THE CRIMINAL LAW

SUPPLEMENTAL READINGS

Class 10

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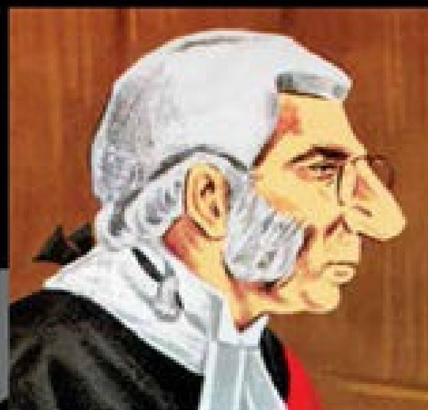

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Criminal Law

Eighth Edition

Steven L. Emanuel

CRIMINAL LAW

EIGHTH EDITION

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The *Emanuel® Law Outlines* Series

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Preface

Thank you for buying this book.

We think the special features that are part of this edition will help you a lot. These include:

- ***Capsule Summary*** — We've boiled the black-letter law of Criminal Law down to 108 pages. We've designed this Capsule Summary to be read in the last week or so (maybe even the last night) before your exam. If you want to know more about a topic, cross-references in the Capsule point you to the pages in the main text that cover the topic more thoroughly.
- ***Casebook Correlation Chart*** — This chart shows you, for the five leading Criminal Law casebooks, where in the *Emanuel* any topic from your casebook is covered.
- ***Exam Tips*** — We've compiled these by reviewing dozens of actual past essay questions, and 100s of multiple-choice questions, asked in past law-school and bar exams. The *Exam Tips* are at the end of each chapter.
- ***Quiz Yourself*** questions — We've adapted these short-answer questions from the *Law in a Flash* flash-card deck on Criminal Law. (We've re-written most answers, to better mesh with the outline's approach.) You'll find these distributed within each chapter, usually at the end of a roman-numeraled section. Each "pod" of Quiz Yourself questions can easily be located by using the Table of Contents.

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:[1]

1. During the semester, use the book in preparing each night for the next day's class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* at the front of the outline to get an idea of what part of

the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.

2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.

3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you all or part of two days.

4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. When you do these questions: (1) record your short "answer" in the book after the question, but also: (2) try to write out a "mini essay" on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.

5. Some time in the week before your exam, do the 26 *Multiple-Choice* questions near the back of the book. Unlike the *Quiz Yourself* questions, these are not marked by chapter or subject matter, so they'll be a better test of whether you can recognize the issues being tested.

6. A couple of days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with steps (4) and/or (5), so that you use the *Tips* to help you spot the issues in the questions. You'll also probably want to follow up from many of the *Tips* to the main outline's discussion of the topic.

7. Some time during the week or so before the exam, do some or all of the full-scale essay exams at the back of the book. Write out a full essay answer under exam-like conditions (e.g., closed-book if your exam will be closed book). If you can, exchange papers with a classmate and critique each other's answer.

8. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your writing juices flowing; and (2) re-read the various *Exam Tips* sections (you should be able to do this in 1-2 hours).

My deepest thanks go to my colleagues at Wolters Kluwer, Barbara Lasoff and Barbara Roth, who have helped greatly to assure the reliability and readability of this and my other books.

Good luck in your Criminal Law course. If you'd like any other Wolters Kluwer publication, you can find it at your bookstore or at **www.wklegaledu.com**. If you'd like to contact me, you can email me at **semanuel@westnet.com**.

Steve Emanuel

Larchmont NY

March 2015

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1. The suggestions below relate only to this book. I don't talk here about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn't mean I don't think these other steps are important — it's just that on this one page I've chosen to focus on how I think you can use this outline.

CASEBOOK CORRELATION CHART

(**Note:** general sections of the outline are omitted from this chart. **NC** = not directly covered by this casebook.)

Emanuel's Criminal Law Outline *(by chapter and section heading)*	Kadish, Schulhoffer, Steiker & Barkow **Criminal Law and Its Processes** (9th Ed. 2012)	Dripps, Boyce & Perkins **Criminal Law and Procedure: Cases and Materials** (12th Ed. 2013)	LaFave **Modern Criminal Law: Cases, Comments & Questions** (5th Ed. 2011)	Dressler & Garvey **Cases and Materials on Criminal Law** (6th Ed. 2012)	Kaplan, Weisberg & Binder **Criminal Law: Cases and Materials** (7th Ed. 2012)
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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed. The order of topics is occasionally somewhat different from that in the main outline.

CHAPTER 1
SOME BASIC ISSUES IN CRIMINAL LAW

I. A BRIEF INTRODUCTION TO CRIMINAL LAW

A. Felonies vs. misdemeanors: Modern criminal statutes typically divide crimes into two broad C categories: ***felonies*** and ***misdemeanors.*** [1] A good general rule, at least for state as opposed to federal crimes, is that:

- □ a ***felony*** is a ***serious*** crime that is punishable by ***at least one year in a state prison;*** and
- □ a ***misdemeanor*** is a ***lesser*** crime for which the maximum penalty is either: (a) incarceration for less than a year, typically in a city or county jail rather than in a state prison; or (b) E a fine or (c) both.

B. Theories of punishment: There are two main philosophies about what the purpose of criminal law should be, often labeled ***"utilitarianism"*** and ***"retributivism."*** [2]

1. Utilitarianism: The basic concept of ***utilitarianism*** is that society should try to ***maximize the net happiness of people*** — "the greatest good for the greatest number." Utilitarians cite the following as the narrow objectives that a system of criminal law and punishment should try to achieve:

- □ Most importantly, the utilitarians stress ***"general deterrence."*** That is, if D commits a crime, we should punish D mainly in order to convince the ***general community*** to avoid criminal conduct in the future.
- □ Next, the utilitarians seek ***"specific deterrence"*** (sometimes called ***"individual*** deterrence"). That is, if D commits a crime, we should punish D to deter her from committing additional

crimes in the future.

- □ Lastly, the utilitarians stress ***"rehabilitation."*** That is, the criminal justice system should try to prevent D from committing further crimes not by causing him to fear the pain of further punishment in the future but by educating him or otherwise ***"reforming"*** him.

2. Retributivism: ***Retributivists,*** on the other hand, believe that the principal — maybe even the sole — purpose of the criminal law should be to ***punish the morally culpable.***

a. Deterrence not principal focus: Retributivists, because of their focus on moral blameworthiness, do ***not*** regard either general or specific ***deterrence*** as being very important objectives to be served by the criminal law.

i. Rehabilitation: For similar reasons, retributivists do not think the criminal law should be spending much effort towards ***rehabilitation*** of offenders.

C. Types of punishment: There are three main ***types*** of punishments in criminal law: (1) ***imprisonment;*** (2) the ***death penalty;*** and (3) the imposition of ***monetary fines.*** With respect to (1) and (3), the states and federal governments have ***wide latitude*** to choose how long a prison sentence, and how great a fine, to impose for any particular crime. [3]

1. "Shaming" punishments: Courts occasionally impose a fourth type of punishment, by trying to publicly ***"shame"*** the defendant, usually by requiring him to make some sort of ***public apology or confession*** as a condition of his probation.

a. Courts split: Appellate courts have been ***split*** about whether and when to reverse shaming punishments. By and large, as long as the punishment is ***reasonably proportional*** to the offense and not likely to inflict major permanent psychological damage, appellate courts seem mostly to ***uphold*** them.

Example: After D is convicted of mail theft, the judge requires him to wear a sign outside A a post office saying "I stole mail; this is my punishment." *Held,* on appeal, the judge was attempting to rehabilitate D, not humiliate him, so the punishment is lawful under federal sentencing procedures. *[U.S. v. Gementera* (2004)] [3]

II. CONSTITUTIONAL LIMITS ON PUNISHMENT

A. The U.S. Constitution generally: The ***U.S. Constitution*** imposes important limits on punishments that may be imposed by federal and state legislatures. [4]

1. Bill of Rights: The Bill of Rights (the first 10 amendments to the Constitution) imposes several limits on the criminal process. By its terms, the Bill of Rights applies only to the federal government, not the states (but see below for how the Bill of Rights affects the states). Some of the more important Bill of Rights guarantees that limit what conduct may be criminalized, or limit how that conduct can be prosecuted, are these:

- The ***First*** Amendment orders Congress to "make no law ... abridging the ***freedom of speech."*** This provision limits, for instance, Congress' right to criminalize expressive conduct (e.g., flag burning).
- The ***Fourth*** Amendment bars the government from making ***"unreasonable searches and seizures."*** Evidence gathered by the police in violation of this amendment must generally be excluded from the defendant's criminal trial.
- The ***Fifth*** Amendment bars the government from trying a person twice for the same charge (the ***"Double Jeopardy"*** clause).
- The ***Fifth*** Amendment also bars the government from depriving a person of "life, liberty, or property, without ***due process of law."*** This Due Process clause guarantees criminal defendants a certain amount of procedural fairness. For instance, if Congress were to pass a criminal statute that was unreasonably vague, so that reasonable people could not tell what conduct was forbidden and what was not, a prosecution under that statute would likely violate the Due Process clause.
- The ***Eighth*** Amendment prohibits Congress from imposing ***"cruel and unusual punishments."*** For instance, the death penalty for any crime other than murder has effectively been found to be cruel and unusual under the Eighth Amendment.

2. Extension of Bill of Rights to the states: The Bill of Rights applies by its terms only to the federal government, but the ***Fourteenth***

Amendment, enacted after the Civil War, imposes limits on what ***state*** governments can do. One clause of the Fourteenth Amendment prohibits states from depriving any person of "life, liberty, or property, without due process of law[.]" In the criminal law context, the effect of this Fourteenth Amendment Due Process clause is to ***make nearly all of the Bill of Rights guarantees applicable to the states.*** [4]

Example: If a state were to impose the death penalty for petty theft, this would violate the Eighth Amendment ban on cruel and unusual punishments, as made applicable to the states via the Fourteenth Amendment's Due Process clause.

B. The "legality" principle: One important limit on the criminal law that has Constitutional underpinnings is the principle of ***"legality."*** Under this principle, a person may not be punished unless his conduct was ***defined as criminal before he acted.*** So the legality principle is essentially a rule against ***"retroactive punishment."*** [4-7]

1. Constitutional underpinnings: The legality principle is not expressly stated anywhere in the Constitution. But several clauses of the Constitution are inspired by the legality principle, i.e., by the idea that retroactive punishment is unfair: [5]

- □ Art. I, § 9, prohibits Congress from passing any ***"bill of attainder,"*** and Art. I, § 10 prohibits the states from doing so. A bill of attainder is legislation that ***singles out for punishment*** a particular ***individual or easily-identified group.***
- □ Art. I, § 9, also prohibits Congress from passing any ***"ex post facto"*** law, and Art. I, § 10, prohibits the states from doing so. An *ex post facto* law is a law that either ***makes conduct criminal*** that was ***not criminal at the time committed,*** increases the ***degree of criminality*** of conduct beyond what it was at the time it was committed, or increases the ***maximum permissible punishment*** for conduct beyond what it was at the time of commission. *[Calder v. Bull* (1798)]
- □ The Due Process clauses of the Fifth and Fourteenth Amendments prohibit most legislatures and courts from behaving in a way that would criminalize conduct without giving ordinary people ***fair warning*** of what is being prohibited. As we'll see immediately below, a statute that is unduly vague, or

that gives the police undue discretion in when to make an arrest, is likely to be found to violate due process.

2. The problem of vagueness: The legality principle means that criminal laws that are ***unreasonably vague*** may not be enforced. Typically, the Constitutional ground for declining to enforce an unreasonably vague criminal statute is that enforcement would violate the ***due process*** rights of the person charged. [5]

a. Rationale: There are actually two distinct but related reasons why unreasonably vague statutes are held to violate the due process rights of persons charged under them:

- First, if a statute is unreasonably vague, it does not provide ***fair warning*** of what is prohibited. *[Grayned v. City of Rockford* (1972)]
- Second, an unreasonably vague statute gives ***too much discretion to law enforcement personnel,*** raising danger of ***"arbitrary and discriminatory enforcement."*** *(City of Chicago v. Morales* discussed immediately *infra).* The Supreme Court has therefore held that a criminal statute must "establish ***minimal guidelines*** to govern law enforcement" *(Kolender v. Lawson* (1983)).

b. Loitering laws: Laws against ***"loitering"*** or ***"vagrancy"*** pose these twin dangers of lack-of-fair-warning and selective-enforcement especially vividly. [5]

Example: Chicago, to combat gang violence, enacts an ordinance that says that if a police officer reasonably believes that at least one of two or more people in a public place is a "criminal gang member," and the people are "loitering" (defined as "remaining in any one place with no apparent purpose"), the officer can and must order them to "disperse" from "the area." A person who disobeys the order can be punished by imprisonment. (It doesn't matter whether the person turns out to be a gang member or not.)

Held, the ordinance is unconstitutionally vague. A majority of the Court believes that it fails to ***"establish minimal guidelines to govern law enforcement."*** For instance, the ordinance is not limited to people whom the police suspect of being gang members (as long as one member of the group is reasonably suspected of being such), nor to persons whom the police suspect of having a *harmful* purpose (since it applies to anyone whose purpose is not apparent to the observing officer). Also, a plurality of the Court believes that the ordinance fails to give fair notice of what conduct is forbidden, because of the vagueness of the concept of "no apparent purpose." *[City of*

Chicago v. Morales (1999)] [5]

C. The principle of proportionality: As a general principle, theories of punishment agree that the punishment for a given crime should be roughly ***proportional*** to that crime's seriousness. This is the principle of ***"proportionality."*** [7]

1. The Eighth Amendment: The ***Eighth Amendment*** to the U.S. Constitution prohibits the federal government from imposing ***"cruel and unusual punishment"*** on those convicted of crimes. The Amendment is indirectly applicable to the states as well, by operation of the Fourteenth Amendment's Due Process clause.

a. Effect on proportionality principle: The extent to which the Eighth Amendment imposes the proportionality principle on federal and state governments is unclear — Supreme Court precedents are somewhat inconsistent, especially as to punishments other than death.

b. Our treatment: To match the Supreme Court's treatment of the subject, we divide our discussion of the Eighth Amendment's limits on criminal punishments into three categories: (1) the death penalty (Par. D below); (2) life without parole (Par. E); and (3) all prison sentences short of life without parole (Par F).

D. Capital punishment (the death penalty): In the case of ***capital punishment,*** the proportionality principle as reflected in the Eighth Amendment imposes ***real limits*** on the circumstances in which government may impose that penalty. Because this penalty is so severe and irrevocable, the Court has held that it is "reserved for a ***narrow category*** of crimes and offenders," including only the ***worst offenders.*** *Roper v. Simmons* (2005). In brief, the Court has held that the death penalty may be imposed in ***"ordinary" murder*** cases, but ***not*** in any of the following situations:

[1] cases ***not involving homicide;***

[2] ***homicide*** cases where the defendant is ***mentally retarded;*** and

[3] ***homicide*** cases where the ***defendant was a juvenile*** at the time of the killing.

1. **“Ordinary” murder cases:** In “ordinary” murder cases — that is, cases involving ***non- mentally-retarded*** defendants who were ***adults*** at the time of the killing — the death penalty does not necessary violate the Eighth Amendment, though it may do so if certain procedures are used. (For instance, the Amendment will be violated if the jury is given ***unbridled discretion*** about whether to impose death or, conversely, death is made mandatory in some class of cases.) Capital punishment in this “ordinary murder” situation is discussed further *infra*, p. C-83.

2. **Non-homicide cases against victims who are individuals:** Where the crime is against an individual and ***does not lead to death,*** the Court has held that capital punishment ***violates the Eighth Amendment.*** So ***rape,*** even of a child, ***may not be punished by death.*** See *Kennedy v. Louisiana* (2008). [8]

   a. **Crimes against state:** On the other hand, there is so far no Eighth Amendment problem with imposing death for serious crimes that are not committed against an *individual* but are instead directed against the ***state,*** such as ***treason, espionage*** and ***terrorism***, even though no death resulted. *Id.*

3. **Execution of the mentally retarded in murder cases:** Even if the defendant *has* committed murder, the Court has held that if he is ***mentally retarded,*** executing him ***violates the Eighth Amendment. Atkins v. Virginia*** (2002). [8]

   a. **Test for “mentally retarded”:** Furthermore, a 2014 case shows that the states are ***not*** free to ***define*** “mental retardation” in what the Supreme Court considers an unduly narrow way. In ***Hall v. Florida*** (2014), Florida took the position that no defendant who scored ***higher than 70*** on an IQ test would be deemed to be mentally retarded. But the Supreme Court, by a 5-4 vote, held that this bright-line rule was ***too inflexible*** to meet the requirements of the Eighth Amendment. [8]

      i. **The new rule:** Under *Hall*, even a defendant with an IQ tested consistently above 70 must be given the opportunity to show that he has ***such large deficits in “adaptive functioning”*** that his practical intellectual capacity is comparable to that of

many people with sub-70 IQ scores. So, for instance, the defendant must be permitted to show that before adulthood, he acquired various ***life skills*** at a much slower-than-usual rate, leaving him with major intellectual deficits, and thus entitling him to be spared the death penalty.

4. Execution of juveniles: Just as the Court has held that the mentally retarded (even if they commit murder) may not be executed, so the Court has held, by 5-4, that the Eighth Amendment prevents the execution of persons who were ***juveniles*** at the time they committed murder. ***Roper v. Simmons*** (2005). [9]

a. Rationale: The *Roper* majority said that juveniles are "categorically ***less culpable*** than the average criminal," because of their ***lack of maturity,*** their lesser ***sense of responsibility,*** their greater vulnerability to ***peer pressure,*** and their *more-****transitory*** character traits.

E. Life Without Parole ("LWOP"): The Supreme Court has similarly held that the punishment of ***"life without parole" ("LWOP")*** is constitutionally suspect, at least where it is imposed on persons who were ***juveniles*** at the time of the crime.

1. Non-homicide cases *(Graham v. Florida):* First, consider LWOP in cases where a juvenile commits a ***non-homicide*** offense. Here, the Court issued a ***categorical rule:*** when a person under the age of 18 commits a crime without taking a life, ***states are absolutely forbidden to impose an LWOP sentence. Graham v. Florida*** (2010). [10]

a. What the decision requires: *Graham* does ***not*** say that a juvenile convicted of a non-homicide crime must ultimately ***be released*** from prison. But it holds that the states must give such persons ***"some meaningful opportunity to obtain release*** based on ***demonstrated maturity and rehabilitation."***

2. Murder cases *(Miller):* Now, consider LWOP sentences for juvenile offenders even where the offender *has* committed a murder. Here, the Court has ***not*** imposed a categorical rule, i.e., a rule entirely eliminating a particular punishment for a particular type of case. Instead the Court has said merely that the legislature may not impose

mandatory LWOP even upon a juvenile offender found guilty of murder — the sentencing judge must be given the ability to ***consider the individual details*** of the case and of the offender's character and life circumstances. ***Miller v. Alabama*** (2012). [11]

   a. **Consequence:** *Miller* means that the judge or jury must be given "the ***opportunity to consider mitigating circumstances"*** before imposing LWOP on a juvenile.

3. **Extremely long terms of years still allowed:** At least as of this writing (early 2015), no constitutional principle seems to prevent a state from merely giving lip service to the anti-LWOP rulings in *Graham* and *Miller*, by imposing extremely long sentences, such as a term of years longer than the young defendant's ***life expectancy.***

F. **Prison sentences short of LWOP:** Outside of the special areas of death and life without parole (LWOP), the role of the Eighth Amendment as a limit on the length of prison sentences is much ***weaker,*** even in non-homicide cases.

1. **General rule:** It is at best ***extremely difficult*** for a criminal defendant, even in a non-homicide case, to succeed with the argument that his non-LWOP prison sentence is so long compared with the severity of his offense as to constitute a violation of the Eighth Amendment. [11]

2. **Three-strikes case:** The most recent case on the subject is ***Ewing v. California*** (2003), in which the Court concluded that the Eighth Amendment was ***not violated*** where California's ***"three strikes"*** law was used to produce a 25-years-to-life sentence for a repeat offender who on the present occasion stole $1200 of merchandise. [11-12]

   a. **Facts:** D had four prior felony convictions regarded as "serious" by California, one for first-degree robbery and three for burglary. Soon after he served an almost-10-year prison sentence, he was convicted of shoplifting three golf clubs, with a total retail value of $1200. The trial court was required to (and did) sentence D to 25-years-to-life, because he had two or more "serious" or "violent" felony convictions. D argued that this sentence was unreasonably disproportionate and thus violated the Eighth Amendment.

b. **Not a violation:** By a 5-4 vote, the Court disagreed with D, and ***affirmed*** his sentence. Three members of the Court believed that the Eighth Amendment contained merely a ***"narrow proportionality principle"*** in non-capital cases, which they said was not violated by the sentence here. Another two members believed that the Eighth Amendment contains ***no proportionality principle at all.*** These two groups created the five votes to strike down D's Eighth Amendment claim.

III. SOURCES OF CRIMINAL LAW

A. Common law in England: Our criminal law derives from English law. Originally, criminal law in England was "common law," i.e., judge-made law. When modern courts (and this outline) refer to the "common-law definition" of a crime, they are referring to the definition of the crime as worked out by English judges in decisions, mostly from before 1900. [12]

B. Rise of statutes: In the last couple of centuries, both in England and the U.S., common-law crimes have largely been ***replaced by statutes.*** [13]

1. **U.S. today:** In the United States today, in nearly every state ***statutes enacted by legislatures*** form either the ***sole or the overwhelmingly-principal source of criminal laws.***

C. The Model Penal Code: The ***Model Penal Code (M.P.C.)*** is an important source of substantive-law principles. The M.P.C. was published in 1962 by the American Law Institute, a private non-profit group. [13]

1. **Not directly binding:** The M.P.C. is not directly enforceable in any state. But over half the states have enacted criminal statutes that draw heavily on M.P.C. wording or concepts.

D. Statutory construction: Criminal statutes, like any other statutes, must be interpreted by courts. Here are two important principles of criminal statutory interpretation, followed by many (but not all) courts:

1. **Common-law term:** When a statute uses a ***term*** that has a tightly-defined ***meaning at common law,*** and the statute does not define the term as tightly, the court will typically ***give the term its common-law meaning,*** especially if there is no evidence that the legislature

intended to impose a different meaning. [13]

2. The "rule" of lenity: Many courts apply — or at least say that they apply — the ***"lenity"*** doctrine. The lenity doctrine is a rule that criminal statutes must be ***"strictly construed"*** against the prosecution: if a statute has two reasonable interpretations, the one that is more favorable to the defendant must be applied. [14]

a. Often not strictly applied: But many courts do not in practice apply the lenity doctrine. Courts declining to give full application to the doctrine fear that doing so will cause people who ought to be punished to escape that punishment.

i. Supreme Court view: The Supreme Court, when it is construing federal criminal statutes, takes this extremely narrow view of the lenity doctrine: the doctrine applies "only if, after seizing everything from which aid can be derived, we can make ***no more than a guess*** as to what [the legislature] intended." *Reno v. Koray* (1995).

ii. Tie-breaker: In other words, in the view of courts (like the U.S. Supreme Court) that do not favor the lenity doctrine, the doctrine merely ***serves as a tie-breaker (in favor of the defendant) if the court can't decide what the statute means after considering all available clues.***

CHAPTER 2
ACTUS REUS AND *MENS REA*

I. GENERAL

A. Four elements: All crimes have several basic common elements: (1) a ***voluntary act*** *("actus reus");* (2) a ***culpable intent*** ("*mens* rea"); (3) ***"concurrence"*** between the *mens rea* and the *actus reus;* and (4) ***causation*** of harm. [15]

II. *ACTUS REUS*

A. Significance of concept: The defendant must have committed a ***voluntary act,*** or ***"actus reus."*** Look for an *actus reus* problem anytime you have one of the following situations: (1) D has not committed

physical acts, but has "guilty" ***thoughts, words,*** states of ***possession*** or ***status;*** (2) D does an ***involuntary act;*** and (3) D has an ***omission,*** or failure to act. [15]

B. Thoughts, words, possession and status: ***Mere thoughts*** are never punishable as crimes. *(Example:* D writes in his diary, "I intend to kill V." This statement alone is not enough to constitute any crime, even attempted murder.) [15]

1. **Possession as criminal act:** However, mere ***possession*** of an object may sometimes constitute the necessary criminal act. *(Example:* Possession of narcotics frequently constitutes a crime in itself.) [15-16]

   a. **Knowledge:** When mere possession is made a crime, the act of "possession" is almost always construed so as to include only ***conscious*** possession. *(Example:* If the prosecution fails to prove that D knew he had narcotics on his person, there can be no conviction.) [8]

C. Act must be voluntary: An act cannot satisfy the *actus reus* requirement unless it is ***voluntary.*** M [16-18]

1. **Reflex or convulsion:** An act consisting of a ***reflex*** or ***convulsion*** does not give rise to criminal liability. [17]

   Example: D, while walking down the street, is striken by epileptic convulsions. His arm jerks back, and he strikes X in the face. The striking of X is not a voluntary act, so D cannot be held criminally liable. But if D had known beforehand that he was subject to such seizures, and unreasonably put himself in a position where he was likely to harm others — for instance, by driving a car — this initial act might subject him to criminal liability.

2. **Unconsciousness:** An act performed during a state of ***"unconsiousness"*** does not meet the *actus reus* requirement. But D will be found to have acted "unconsciously" only in rare situations. [17-18]

   Example: If D can show that at the time of the crime he was on "automatic pilot," and was completely unconscious of what he was doing, his act will be involuntary. (But the mere fact that D has ***amnesia*** concerning the period of the crime will ***not*** be a defense.)

3. **Hypnosis:** Courts are split about whether acts performed under ***hypnosis*** are sufficiently "involuntary" that they do not give rise to

liability. The Model Penal Code (M.P.C.) treats conduct under hypnosis as being involuntary. [18]

4. **Self-induced state:** In all cases involving allegedly involuntary acts, D's ***earlier voluntary*** act may deprive D of the "involuntary" defense. [18]

   a. **Tendency to get seizures:** For instance, if a driver who knows that he is subject to ***epileptic seizures*** nonetheless drives, and causes a fatal accident while having one, he might well be convicted of negligent homicide.

D. Omissions: The *actus reus* requirement means that in most situations, there is no criminal liability for an ***omission*** to act (as distinguished from an affirmative act). [18-21]

> **Example:** D sees V, a stranger, drowning in front of him. D could easily rescue V. D will normally not be criminally liable for failing to attempt to rescue V, because there is no general liability for omissions as distinguished from affirmative acts.

1. **Existence of legal duty:** But there are some "special situations" where courts deem D to have a ***special legal duty to act.*** Where this occurs, D's omission may be punished under a statute that speaks in terms of positive acts. [20-21]

   a. **Special relationship:** Where D and V have a ***special relationship*** — most notably a ***close blood relationship*** — D will be criminally liable for a failure to act. *(Example:* Parent fails to give food or water to Child, and Child dies. Even if there is no general statute dealing with child abuse, Parent can be held liable for murder or manslaughter, because the close relationship is construed to impose on Parent an affirmative duty to furnish necessities and thereby prevent death.) [20]

      i. **Permitting child abuse:** Some courts have applied this theory to hold one parent liable for child abuse for ***failing to intervene*** to stop affirmative abuse by the other parent.

   b. **Contract:** Similarly, a legal duty may arise out of a ***contract.*** *(Example:* Lifeguard is hired by City to guard a beach. Lifeguard intentionally fails to save Victim from drowning, even though he could easily do so. Lifeguard will probably be criminally liable

despite the fact that his conduct was an omission rather than an act; his contract with City imposed a duty to take affirmative action.) [20]

c. **D caused danger:** If the ***danger was caused*** (even innocently) by ***D himself,*** D generally has an affirmative duty to then save V. [21]

Example: D digs a hole in the sidewalk in front of his house, acting legally under a building permit. D sees V about to step into the hole, but says nothing. V falls in and dies. D can be held criminally liable for manslaughter, because he created the condition — even though he did so innocently — and thus had an affirmative duty to protect those he knew to be in danger.

d. **Undertaking:** Finally, D may come under a duty to render assistance if he ***undertakes*** to give assistance. This is especially true where D leaves V ***worse off*** than he was before, or effectively dissuades other rescuers who believe that D is taking care of the problem. [21]

Example: V is drowning, while D and three others are on shore. D says, "I'll swim out to save V." The others agree, and leave, thinking that D is taking care of the situation. Now, D will be criminally liable if he does not make reasonable efforts to save V.

III. *MENS REA*

A. **Meaning:** The term ***"mens rea"*** symbolizes the requirement that there be a ***"culpable state of mind."*** [23]

1. **Not necessarily state of mind:** Most crimes require a true *"mens rea,"* that is, a state of mind that is truly guilty. But other crimes are defined to require merely "negligence" or "recklessness," which is not really a state of mind at all. Nonetheless, the term *"mens rea"* is sometimes used for these crimes as well: thus one can say that "for manslaughter, the *mens rea* is recklessness." There are also a few crimes defined so as to require no *mens rea* at all, the so called "strict liability" crimes. [23]

B. **General vs. specific intent:** Court traditionally classify the *mens rea* requirements of various crimes into three groups: (1) crimes requiring merely ***"general intent";*** (2) crimes requiring ***"specific intent";*** and (3) crimes requiring merely ***recklessness*** or ***negligence.*** (Strict liability crimes form a fourth category, as to which there is no culpable mental

state required at all.) [24-25]

1. **"General intent":** A crime requiring merely ***"general intent"*** is a crime for which it must merely be shown that D ***desired to commit the act which served as the actus reus.*** [24]

2. **"Specific intent":** Where a crime requires ***"specific intent"*** or "special intent," this means that D, in addition to desiring to bring about the *actus reus*, must have desired to do ***something further.*** [24]

   Example of general intent crime: Battery is usually a "general intent" crime. The *actus reus* is a physical injury to or offensive touching of another. So long as D intends to touch another in an offensive way, he has the "general intent" that is all that is needed for battery. (Thus if D touches V with a knife, intending merely to graze his skin and frighten him, this will be all the (general) intent needed for battery, since D intended the touching, and no other intent (such as the intent to cause injury) is required.

   Example of specific intent crime: For common-law burglary, on the other hand, it must be shown that D not only intended to break and enter the dwelling of another, but that he also intended to commit a felony once inside the dwelling. This latter intent is a "specific intent" — it is an intent other than the one associated with the *actus reus* (the breaking and entering).

3. **Significance:** The general/specific intent distinction usually matters in two situations: (1) where D is ***intoxicated;*** and (2) where D makes a ***mistake*** of law or fact. [25]

   a. **Intoxication:** ***Intoxication*** rarely negates a crime of general intent, but may sometimes negate the specific intent for a particular crime. *(Example:* D breaks and enters, but is too drunk to have any intent to commit larceny or any other felony inside; D probably is not guilty of burglary.) [25]

   b. **Mistake:** Similarly, a ***mistake*** of fact is more likely to be enough to negate the required specific intent. [25]

      Example: D breaks and enters, in an attempt to carry away something which he mistakenly thinks belongs to him. D will probably be aquitted of burglary, where mistake will generally not negate a general intent (e.g., the intent to commit the breaking and entering by itself).

4. **Abandonment of distinction:** However, many modern codes, and the Model Penal Code, have ***abandoned*** the general/specific distinction, and instead set forth the precise mental state required for each element of each crime. [25]

C. "Purposely" as mental state: Many crimes are defined to be committed only where a person acts ***"purposely"*** with respect to a particular element of a crime. Other crimes are defined to require the similar, but not identical, mental state of ***"intentionally."*** [26-29]

1. Definition of "purposely": A person acts "purposely" with respect to a particular element if it his ***"conscious object"*** to engage in the particular conduct in question, or to cause the particular result in question. [26-27]

2. Not the same as "knowingly": In modern statutes, "purposely" is not the same as "knowingly." If D does not desire a particular result, but is ***aware*** that the conduct or result is ***certain to follow,*** this is ***not*** "purposely." [29]

Example: D consciously desires to kill A, and does so by putting a bomb on board a plane that contains both A and B. Although D knew B's death was certain, a modern court would probably not hold that D "purposely" killed B, (although D might nonetheless be guilty of murder on the grounds that he acted with a "depraved heart").

3. Conditional intent: Suppose D intends to commit act X only if a ***particular condition*** should be satisfied. Does D "intend" to commit act X? Usually, the answer will be ***"yes."***

a. M.P.C. view: Thus the M. P. C. holds that the existence of the condition ***doesn't*** prevent the U intent from existing "unless the condition ***negatives the harm or evil*** sought to be prevented by the law defining the offense." [27]

Example: D breaks into a house, intending to steal something only if no one is home. Under the M.P.C., the condition (steal only if no one's home) won't block D from having the intent to steal (and thus the intent for burglary, i.e., intent to commit a felony within), because the evil sought to be prevented by laws against burglary (breaking and entering) is present despite the condition.

b. D requires V to comply with condition: Sometimes the condition is one with which D requires V to comply: "I'll do [something bad] to you unless you do [something I don't have the right to make you do]." Here, the modern approach — exemplified by a Supreme Court decision, *Holloway v. U.S.* (1999) — is that the condition ***doesn't negative*** the intent. [28]

Example: D points a gun at V and says, "Give me your car keys." D intends to use

the gun against V if and only if V doesn't give the keys. V gives the keys. Is D guilty of "carjacking" if the crime is defined as "taking a car with intent to cause death or serious bodily injury? *Held*, (by the U.S. Supreme Court), D is guilty, because despite the condition D acted with intent to cause serious bodily injury. "A defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose." *[Holloway v. U.S.* (1999)]

4. Motive: D's ***motive*** will usually be ***irrelevant*** in determining whether he acted "purposely" or "intentionally." [28]

Example: D, in an act of euthanasia, kills V, his wife, who has terminal cancer. D will be held to have "purposely" or "intentionally" killed V, even though he did it for ostensibly "good" motives.

a. Relevant to defenses: Special motives may, however, be relevant to the existence of a ***defense*** (e.g., the defense of self-defense or necessity).

D. "Knowingly": Modern statutes, and the Model Penal Code, define some crimes to require that D ***"knowingly"*** take an act or produce a result. The biggest distinction between "purposely" and "knowingly" relates to D's awareness of the ***consequences*** of his act: if the crime is defined with respect to a certain result of D's conduct, D has acted knowingly (but not "purposely") if he was "aware that it is ***practically certain*** that his conduct will cause that result." [29-30]

Example: On the facts of our earlier "bomb on the airplane" example, D will have "knowingly" killed B, but not "purposely" killed B, because he was aware that it was practically certain that his conduct would cause B's death.

1. Presumption of knowledge: A statutory or judge-made ***presumption*** may be used to help prove that D acted "knowingly." *(Example:* In many statutes governing receipt of stolen property, D's unexplained possession of property which is in fact stolen gives rise to a presumption that D knew the property was stolen.) [30]

2. Knowledge of attendant circumstances: Where a statute specifies that D must act "knowingly," and the statute then specifies various ***attendant circumstances*** which the definition of the crime makes important, usually the requirement of knowledge is held applicable to ***all these attendant circumstances.*** [30]

Example: The federal crime of "aggravated identity theft" applies where the defendant, in connection with the commission of some other crime, "knowingly

transfers, possesses, or uses, without lawful authority, a means of identification *of another person."* D, a Mexican citizen, presents his U.S. employer with a counterfeit Social Security card. The card contains an SS number that happens to be assigned to someone else. D claims that the prosecution has to prove that the statute's use of the word "knowingly" applies to the phrase "identification of another person."

Held, for D — the government must prove that D knew that the Social Security number on the card he was using belonged to someone else. In the case of a criminal statute, "courts ordinarily read a phrase ... that introduces the elements of a crime with the word 'knowingly' as *applying that word to each element."* There is no reason to believe that Congress, in enacting the present statute, intended to depart from this general understanding. *[Flores-Figueroa v. U.S.* (2009)] [30-31]

3. **D need not know of illegality:** On the other hand, a statute that forbids "knowingly" doing X does ***not*** require the prosecution to prove that D knew ***that doing X was illegal.*** In other words, the use of the word "knowingly" does not change the traditional rule that "ignorance of the law is no excuse," i.e., that ignorance of the fact that the law forbids a particular type of conduct is no defense. (See *infra,* p. C-15.)

E. "Recklessly": A person acts ***"recklessly"*** if he ***"consciously disregards a substantial and unjustifiable risk...."*** M.P.C. §2.02(2). The idea is that D has behaved in a way that represents a ***gross deviation*** from the conduct of a law-abiding person. [31-32]

1. **Must be aware of risk:** Most courts, and the Model Penal Code, hold that D is reckless only if he was ***aware*** of the high risk of harm stemming from his conduct. This is a "subjective" standard for recklessness. But a substantial minority of courts and statutes hold that D can be reckless if he behaves extremely unreasonably even though he was unaware of the risk. [31]

Example: D runs a nightclub with inadequate fire exits. A fire breaks out, killing hundreds. Under the majority "subjective" standard for recklessness, D was reckless only if he actually knew of the high risk of harm posed by inadequate fire exits. Under the minority "objective" standard, it would be enough that D was extremely careless and that a reasonable person would have known of the great danger, even though D did not.

F. "Negligently": Some statutes make it a crime to behave ***"negligently"*** if certain results follow. For instance, the crime of "vehicular homicide" is sometimes defined to require a *mens rea* of "criminal negligence." [32]

1. **Awareness not required:** Most modern statutes, and the Model Penal

Code, allow a finding of criminal negligence even if D was ***not aware*** of the risk imposed by his conduct (as in the above night-club fire example). [32]

2. **"Gross" negligence required:** Usually, criminal negligence is ***"gross"*** negligence. That is, the deviation from ordinary care must be greater than that which would be required for civil negligence. [33]

G. Strict liability: Some offenses are ***"strict liability."*** That is, no culpable mental state at all must be shown — it is enough that D performed the act in question, regardless of his mental state. [33-36]

Examples of strict liability crimes: The following are often defined as strict liability offenses: Statutory rape (D is generally guilty if he has intercourse with a girl below the prescribed age, regardless of whether he knew or should have known her true age); mislabelling of drugs; polluting of water or air; concealment of a dangerous weapon while boarding an aircraft.

1. **Constitutionality:** Generally there is no constitutional problem with punishing a defendant without regard to his mental state. [33]

2. **Interpretation:** The mere fact that the statute does not specify a mental state does not mean that the crime is a strict liability one — judges must determine whether a particular mental state was intended by the legislature. [34-35]

   a. **Factors:** Here are some ***factors*** that would make a court ***more likely*** to conclude that the legislature ***intended strict liability:***

      [1] the violation is in the nature of ***neglect*** or ***inaction,*** rather than positive aggression;

      [2] the statute has a ***regulatory*** flavor;

      [3] there is no necessary ***direct injury*** to any person or property, but simply a ***danger*** of such, and it is this danger that the statute seeks to curtail;

      [4] the ***penalty*** prescribed is ***small;***

      [5] conviction does not do grave damage to the defendant's ***reputation;*** and

      [6] it was relatively easy for the defendant to ***find out the true facts*** before she acted, making it not unfair to punish her without

regard to fault.

[Morisette v. U.S. (1952)]

b. M.P.C.: Under the M.P.C., the only offenses that are strict liability are ones called ***"violations."*** These are minor offenses that do not constitute a "crime" and that may be punished only by fine or forfeiture. [35]

H. Vicarious liability: Statutes sometimes impose upon one person liability for the ***act of another;*** this is commonly called ***"vicarious liability."*** In essence, the requirement of an act *(actus reus)* has been dispensed with, not the requirement of the wrongful intent. [36-38]

Example: Statutes frequently make an ***automobile owner*** liable for certain acts committed by those to whom he lends his car, even without a showing of culpable mental state on the part of the owner.

1. Constitutionality: Generally, the imposition of vicarious liability does ***not*** violate D's due process rights. However, there are exceptions: [36]

a. D has no control over offender: If D did not have any ***ability to control*** the person who performed the actual *actus reus,* his conviction is probably unconstitutional. [37]

Example: X steals D's car, and exceeds the speed limit. It is probably unconstitutional for the state to impose criminal sanctions upon D, since he had no ability to control X's conduct.

b. Imprisonment: If D has been sentenced to ***imprisonment*** (or even if he is convicted of a crime for which imprisonment is authorized), some courts hold that his due process rights are violated unless he is shown to have at least ***known*** of the violation. [37]

Example: D is a tavern owner whose employee served a minor. If D did not know of this act, or in any way acquiesce in its commission, some courts would hold that D may not constitutionally be imprisoned for it.

I. Mistake: Defendants raise the defense of *mistake* when they have been mistaken either about the facts or the law. Do not think of "mistake" as being a separate "doctrine." Instead, look at the effect of the particular mistake on D's *mental state,* and examine whether he was thereby prevented from having the mental state required for

the crime. [38-43]

Example: Assume that the requisite mental intent for larceny is the intent to take property which one knows or believes to belong to another. D takes V's umbrella from a restaurant, thinking that it is his own. D's factual mistake — his belief about who owns the umbrella — is a defense to the theft charge, because it negates the requisite mental state (intent to take the property which one knows or believes belongs to another).

1. **Crimes of "general intent":** D's mistake is ***least likely*** to assist him where the crime is a ***"general intent"*** crime (i.e., one for which the most general kind of culpable intent will suffice). [38]

Example: Murder is often thought of as a "general intent" crime in the sense that it will be enough that D either intends to kill, intends to commit grievous bodily injury, is recklessly indifferent to the value of human life or intends to commit any of certain non-homicide felonies. Suppose D shoots a gun at V, intending to hit V in the arm and thus create a painful but not serious flesh wound. D mistakenly believes that V is in ordinary health, when in fact he is a hemopheliac. D's mistake will not help him, because even had the facts been as D supposed them to be, D would have had a requisite mental state, the intent to commit grievous bodily injury.

2. **"Lesser crime" theory:** D's mistake will almost never help him if, had the facts been as D mistakenly supposed them to be, his acts would still have been a crime, though a lesser one. This is the ***"lesser crime"*** theory. [40]

Example: D steals a necklace from a costume jewelry store. The necklace is made of diamonds, and is worth $10,000, but D mistakenly believes it to be costume jewelry worth less than $500. In the jurisdiction, theft of something worth less than $500 is a misdemeanor, and theft of something worth more than that is a felony. D is guilty of a crime — a felony in most states — because even had the facts been as he supposed them to be, he still would have been guilty of some crime. (But some states, and the Model Penal Code, would scale his crime back to the crime that he would have committed had the facts been as he supposed, in this case, a misdemeanor.)

   a. **Moral wrong:** Older decisions extend this principle to deny D of the defense of mistake if, under the facts as D believed them to be, his conduct and intent would have been ***"immoral."*** But modern statutes reject this view. [39]

3. **Mistake need not be "reasonable":** Older cases often impose the rule that a mistake cannot be a defense unless it was ***"reasonable."*** But the modern view, and the view of the M.P.C., is that ***even an unreasonable mistake*** will block conviction if the mistake prevented D from ***having the requisite intent or knowledge.*** [39]

Example: D checks his attache case at a restaurant, then gets drunk. D then sees V leave the restaurant carrying an attache case that D believes is D's. D wrestles the attache case away from V, takes it home, then (when sober) realizes that the case really was V's all along.

Assume that D's mistake was an unreasonable one, and was due to D's being drunk. Under the modern (and M.P.C.) view, D is not guilty of larceny. Although his mistake about the ownership of the case was unreasonable, that mistake prevented D from having the requisite intent for larceny (intent to take the property of another).

4. **Mistake of law:** It is especially hard for D to prevail with a defense based on ***"mistake of law."*** [39]

   a. **Generally no defense:** As a general rule, ***"mistake of law is no defense."*** More precisely, this means that ***the fact that D mistakenly believes that no statute makes his conduct a crime does not furnish a defense.*** [39]

   Example: D, who is retarded, does not realize that unconsented-to intercourse is a crime. D has unconsented-to intercourse with V. D's ignorance that unconsented-to intercourse is a crime will not be a defense; so long as D intended the act of intercourse while knowing that V did not consent, he is guilty.

      i. **Reasonable mistake:** In this core "D mistakenly believes that no statute makes his conduct a crime" situation, even a ***reasonable mistake*** about the meaning of the statute will usually ***not*** protect D. In other words, so long as the crime is not itself defined in a way that makes D's guilty knowledge a prerequisite, there is usually no "reasonable mistake" exception to the core "mistake of law is no defense" rule.

   b. **Mistake of law as to collateral fact:** It is important to remember that the oft-stated "rule," "ignorance of the law is no excuse," really only means ***"ignorance that a statute makes one's conduct a crime is no excuse."*** A mistake of law as to some ***collateral fact*** may negative the required mental state, just as a mistake of fact may do so. [40]

   Example 1: D's car has been repossessed by Finance Co. D finds the car, breaks in, and takes it back. D's belief that the car is still legally his *will* absolve him, because it prevents him from having the requisite mental state for theft (intent to take property which one knows or believes to belong to another). (But if D had taken his neighbor's car, his ignorance that there is a statute making it a crime to take one's neighbor's property would not be a defense.)

Example 2: D reasonably believes that he has been divorced from W, his first wife, but in fact the "divorce" is an invalid foreign decree, which is not recognized under local law. D then marries V. D's "mistake of law" about the enforceability of the prior divorce *will* negative the intent needed for bigamy (intent to have two spouses at once).

c. **Mistake of law defense built in:** Of course, it's always possible for the legislature to write a statute in such a way that a mistake of law *will* constitute a defense (or so that awareness of the criminality of the conduct is an element of the offense). For instance, the legislature might do this by defining the crime to consist of a ***"willful*** violation" — the use of the word "willful" would probably be interpreted to require knowledge by the defendant that his act was prohibited by law. [43]

IV. CONCURRENCE

A. **Two types of concurrence required:** There are two ways in which there must be ***"concur- rence"*** involving the *mens rea:* (1) there must be concurrence between D's ***mental state*** and the **act;** and (2) there must be concurrence between D's ***mental state*** and the ***harmful result,*** if the crime is one defined in terms of bad results. [45]

B. **Concurrence between mind and act:** There must be concurrence between the ***mental state*** and the **act.** [46-47]

1. **Same time:** This requirement is not met if, ***at the time of the act,*** the required mental state does not exist. [46-47]

Example: Common-law larceny is defined as the taking of another's property with intent to deprive him of it. D takes V's umbrella from a restaurant, thinking that it is his own. Five minutes later, he realizes that it belongs to V, and decides to keep it. D has not committed larceny, because at the time he committed the act (the taking), he did not have the requisite mental intent (the intent to deprive another of his property). The fact that D later acquired the requisite intent is irrelevant.

a. **Concurrence with act, not with later result:** On the other hand, the concurrence principle requires merely that there be temporal concurrence between the *mens rea* and the *actus reus,* ***not*** concurrence between *mens rea* and the ***bad result*** (in the case of a crime defined in terms of bad result).

i. **Change of mind:** This means that if D does an act with an intent to achieve a ***certain result,*** the fact that he later ***changes***

his mind and doesn't desire that result will not nullify the crime, if the result occurs due to his act and the crime is defined in terms of intentionally causing that result. [46]

Example: D puts a bomb in V's car, which is set to blow up when the car is started. D later changes his mind, but can't warn V in time. V starts the car, and is blown to bits. The requisite concurrence between act and intent existed (since the act was the placing of the bomb, which D did with intent to kill). The fact that there was no concurrence between mental state and result (V's death) is irrelevant, and D is guilty of intent-to-kill murder.

2. Mental state must cause act: Also, the mental state must ***cause*** the act. [46]

Example: D intends to kill V. While driving to the store to buy a gun to carry out his intent, D accidentally runs over V and kills him. D is not guilty of murder, even though the intent to kill V existed at the time the act (driving the car over V) took place. This is because D's intent to kill did not "cause" the act (driving the car over V).

a. Any action that is legal cause of harm: Most crimes are defined in terms of harmful results (e.g., homicide is the wrongful taking of a life). Where D takes ***several acts*** which together lead to the harmful result, the concurrence requirement is met if the mental state concurs with ***any act that suffices as a legal cause*** of the harm. [47]

i. Destruction or concealment of a "body": Because of this rule, D will be guilty if he attempts to kill his victim, believes the victim to be dead, and then destroys or conceals the "body," killing the victim for real. *(Example:* D strikes V over the head, and thinking V is dead, pushes him over a cliff to destroy the body. The autopsy shows that the blows did not kill V and probably would not have killed him. V really died from the fall off the cliff. Most courts would find D guilty, probably on the theory that the blows to the head were a cause of harm, and the guilty intent (to kill V) caused the blows. *[Thabo Meli v. Regina])*

3. Omission to act: Cases involving D's ***omission to act*** can also pose a concurrence issue. Where D has failed to act in circumstances imposing a duty on her to act, the concurrence-of-timing requirement is ***met*** as long as D had the required mental state at ***any single***

moment when D had a duty to act and failed to act. [48]

Example: At dinner one night, Wife accidentally drops a knife that lands on Husband's thigh, making a small gash. Because Husband is a hemophiliac (as Wife knows), Husband bleeds a lot, and quickly goes into shock and unconsciousness. Wife does not call 911 (which she could have easily done), and Husband bleeds to death. Had Wife called promptly, Husband would have been saved. Wife declined to call because she decided (with an intent formed only after the knife-dropping accident) that she would be better off with Husband dead.

Wife is guilty of murder. Since there was at least one moment in which Wife both (1) actively desired Husband's death and (2) simultaneously had the obligation to render Husband assistance (since she brought about the danger, however innocently) but didn't, the required concurrence between mental state (intent to bring about death) and *actus reus* (here, failure to act while having a duty to act) is satisfied. The fact that Wife didn't have the "desire to kill" intent at the moment she dropped the knife doesn't matter.

C. Concurrence between mind and result: There must also be a correlation between the mental state and the ***harmful result,*** if the crime is one defined in terms of bad results (such as homicide, rape, larceny, etc.) In the case of crimes that require intent, this aspect of concurrence means that the intended result must match up reasonably well with the actual result. So if what actually occurred is ***too far removed*** from what was intended, there will be no concurrence and thus no liability. [48-51]

1. Different crime: Thus if the harm which actually occurs is of a completely different ***type*** from what D intended, D will generally not be guilty of the other crime. In other words, the intent for one crime may not usually be linked with a result associated with a different crime.

Example: D attempts to shoot V to death while V is leaving his house. The shot misses and ruptures V's stove, causing V's house to burn down. Assuming that arson is defined so as to require an intent to burn, D will not be guilty of arson, because the intent for one crime (murder) cannot be matched with the result for another crime (burning) to produce guilt for the latter crime.

2. Recklessly-or negligently-caused result: The same rule applies where D has ***negligently*** or ***recklessly*** acted with respect to the risk of a particular result, and a very different result occurs. [49]

Example: D recklessly takes target practice with his rifle in a crowded area; what makes his conduct reckless is the high risk that D will injure or kill a person. One of D's shots hits a gas tank, and causes a large fire. Assuming that the danger of causing a fire was not large, D will not be convicted of arson (even if arson is defined to include reckless burning), since his conduct was reckless only with respect to the risk of bodily harm, not

the risk of burning.

3. **Felony-murder and misdemeanor-manslaughter rules:** But this general principle that there is no liability for a resulting harm which is substantially different from that intended or risked by D is subject to two very important ***exceptions,*** both relating to ***homicide:*** [49]

   a. **Felony-murder:** First, if D is engaged in the commission of certain ***dangerous felonies,*** he will be liable for certain deaths which occur, even if he did not intend the deaths. This is the ***"felony-murder" rule.*** [49]

   b. **Misdemeanor-manslaughter:** Second, if D was engaged in a *malum in se* misdemeanor (a misdemeanor that is immoral, not just regulatory), and a death occurs, D may be liable for involuntary manslaughter, even though his conduct imposed very little risk of that death and the death was a freak accident. This is the ***"misdemeanor-manslaughter" rule.***[49]

4. **Same harm but different degree:** If the harm which results is of the ***same general type*** as D intended, but of a ***more or less serious degree,*** D gets the benefit of the rules on concurrence. [50]

   a. **Actual result more serious than intended:** Thus if the actual harm is ***greater,*** and related to, the intended result, D is generally ***not liable*** for the greater harm. [50]

   Example: Assume simple battery is defined as the intentional causing of minor bodily harm, and aggravated battery is defined as the intentional causing of grievous bodily harm. D gets into a minor scuffle with V, intending merely to hit him lightly on the chin. But V turns out to have a "glass jaw," which is fractured by the blow. D will not be held guilty of aggravated battery, just simple battery, since his intent was only to produce that lesser degree of injury required for simple battery.

      i. **Exceptions in homicide cases:** But again, we have two exceptions to this rule when death results. First, under the misdemeanor-manslaughter rule, if D's minor attack on V unexpectedly causes V to die, D is guilty of manslaughter (as he would be on the facts of the above example if V unexpectedly bled to death). Second, if D intended to ***seriously injure*** V but not kill him, in most states he will be guilty of murder if V dies from the attack, because most states

have a form of murder as to which the mental state is intent-to-grievously-injure.

Example: D intends to beat V to a pulp, but not to kill him; V dies unexpectedly. In a state defining murder to include a mental state of intent-to-grievously-injure, D is liable for murder.

CHAPTER 3
CAUSATION

I. INTRODUCTION

A. Two aspects of causation: "Causation" in criminal law relates to the link between the ***act*** and the ***harmful result.*** The prosecution must show that the defendant's *actus reus* "caused" the harmful result, in ***two different senses:*** (1) that the act was the ***"cause in fact"*** of the harm; and (2) that the act was the ***"proximate"*** cause (or the "legal" cause) of the harm. [55]

II. CAUSE IN FACT

A. Two ways: There are two ways in which an act can be the "cause in fact" of harm: (1) by being the ***"but for"*** cause of the harm; and (2) by being a ***"substantial factor"*** in creating the harm. These categories overlap, but not completely. [55]

B. The "but for" rule: Most often, the act will be the "cause in fact" of the harm by being the ***"but for"*** cause of that harm. To put the idea negatively, if the result ***would have happened anyway,*** even had the act not occurred, the act is ***not a cause in fact*** of that result. [55]

Example: D shoots at V, but only grazes him, leaving V with a slightly bleeding flesh wound. X, who has always wanted to kill V, finds V (in the same place V would have been in had D not shot at V), and shoots V through the heart, killing him instantly. D's act is not a "cause in fact" of V's death, under the "but for" test — since V would have died, in just the manner and at the same time he did, even if D had not shot him, D's act was not the "but for" cause of V's death. Unless D's act is found to have been a "substantial factor" in V's death (the other test for causation in fact), which it probably would not, D's act is not the "cause in fact" of V's death, and D therefore cannot be punished for that death.

C. "Substantial factor" test: D's act will be found to be the cause in fact of harm, even if the act is not the "but for" cause, if the act was a ***"substantial factor"*** in bringing about the result. [55]

Example: At a time of widespread riots, D sets fire to a house at 99 Main Street, and X simultaneously sets fire to one at 103 Main Street. A house at 101 Main Street is consumed by the blaze from the two fires. D is charged with arson. He shows that even had he not torched 99, the flames from 103 would have been enough to burn down 101 at the same time it actually did burn. (Thus D's act was not the "but for" cause of the burning of 101.) However, since D's conduct was a (though not the sole) "substantial factor" in burning down 101, he was a "cause in fact" of the fire and will therefore be liable for arson.

1. **D's act shortened V's life:** In a homicide case, if D's act ***shortened the victim's life,*** this will strongly suggest that D's conduct was a "substantial factor" in producing the victim's death. [56]

Example: X poisons D, in such a way that despite all medical efforts, V will definitely die within one day. One hour after V drinks the poison, D shoots V, killing him instantly. Since V would have died shortly anyway, it can be argued that D's shooting was not the "but for" cause of V's death. But since D shortened V's life, a court would certainly find that D was a "substantial factor" in causing V's death, and would find him guilty of murder.

2. **Conspiracy:** The above discussion of the "substantial factor" rule assumes that the two concurring acts occurred ***independently*** of each other. If the two occured as part of a ***joint enterprise,*** such as a ***conspiracy,*** the act of each person will be attributed to the other, and there will be no need to determine whether each act was a substantial factor in leading to the harm. [56]

Example: X and D each shoot V, as part of a successful conspiracy to kill V. Even if D's shot only caused a small flesh wound and did not really contribute to V's death, D is guilty of murder, because his co-conspirator's fatal shot will be attributable to D under the law of conspiracy.

III. PROXIMATE CAUSE GENERALLY

A. Definition of "proximate cause": It is not enough that D's act was a "cause in fact" of the harm. The prosecution must also show that the act and harm are sufficiently closely related that the act is a ***"proximate"*** or "legal" cause of that harm. This is a ***policy*** question: ***Is the connection between the act and the harm so stretched that it is unfair to hold D liable for that harm?*** [57]

1. **No precise definition:** There is no precise or mechanical definition of proximate cause — each case gets decided on its own facts. [57]

2. **Model Penal Code formulation:** Under the M.P.C., in most cases

D’s act will be the proximate cause of the harmful result if the result is “not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.” M.P.C. 2.03(2)(b). [57]

B. Year-and-a-day rule in homicide: One common-law rule that expresses the proximate-cause idea is the ***“year and a day”*** rule in homicide cases: D cannot be convicted if the victim did not die until a year and a day following D’s act. Many states continue to impose this rule. [57]

C. Misdemeanor-manslaughter rule: Proximate cause issues often arise in situations that seem to involve the ***misdemeanor-manslaughter rule*** (*infra*, p. C-89), under which the commission of a misdemeanor can establish criminal negligence, which when combined with the fact of V’s death establishes the elements of involuntary manslaughter. If what makes D’s act a misdemeanor ***is not causally related*** to the bringing about of V’s death, then the proximate cause requirement will ***not*** be satisfied, and D will be acquitted. [58]

1. Licensing requirements: This will often happen in the case of a ***licensing*** requirement: If the jurisdiction requires a license to pursue some activity, but D would be entitled to the license as a matter of right, his conducting of the activity without a license, coupled with a harm (e.g., a death) stemming from the activity, won’t trigger the misdemeanor-manslaughter rule because the failure to get a license is not deemed to be the proximate cause of the harm. [58]

Example: After D’s driver’s license expires, D fails to renew it, and continues driving. Driving without a currently-valid license is a misdemeanor in the jurisdiction. While D is driving non-negligently, D’s car collides with V, a pedestrian, who is jay-walking. V dies. D is not guilty of misdemeanor-manslaughter because his misdemeanor of driving without a currently-valid license was not the proximate cause of the accident.

D. Types of problems raised: There are two main types of proximate cause problems: [58]

[1] situations where the type of harm intended occurred, and occurred in roughly the manner intended, but the ***victim was not the intended one;*** and

[2] cases where the general type of harm intended did occur and

occurred to the intended victim, but occurred in an ***unintended manner.***

We consider each of these in a separate section below (IV and V, respectively).

IV. PROXIMATE CAUSE — UNINTENDED VICTIMS

A. Transferred intent: It will not generally be a defense that the actual victim of D's act was ***not the intended victim.*** Instead, courts apply the doctrine of ***"transferred intent,"*** under which D's intent is "transferred" from the actual to the intended victim. [59]

Example: D, intending to kill X, shoots at X. Because of D's bad aim, D hits and kills V instead. D is guilty of the murder of V, because his intent is said to be "transferred" from X to V.

1. Danger to actual V unforeseeable: In most courts, the "unintended victim" rule probably applies even where the danger to the actual victim was ***completely unforeseeable.*** (Example: While D and X are out on the desert, D shoots at X, thinking the two are completely alone. sleeping behind some sagebrush, is hit by the errant bullet. Probably D may be convicted of murdering V.) [59]

B. Same defense: In general, D in an "unintended victim" case may raise the ***same defenses*** that he would have been able to raise had the intended victim been the one harmed. *(Example:* D shoots at X in legitimate self-defense. The bullet strikes V, a bystander. D may claim self-defense, just as he could if the bullet had struck the intended victim.) [60]

C. Mistaken ID: The fact that D is mistaken about the victim's ***identity*** will not be a defense. [60]

Example: D shoots at V, mistakenly thinking that V is really X, D's enemy. D will be guilty of the murder of V, just as if he had been shooting at the person who was actually X, and had mistakenly hit V. The crime of murder requires an intent to kill, but does not require a correct belief as to the victim's identity.

D. Crimes of recklessness or negligence: The "unforeseen victim" problem also arises in crimes where the mental state is ***recklessness*** or ***negligence,*** rather than intent. But in these situations, a ***tighter link*** between D's act and V's injury is probably required than where the crime is intentional. [60]

V. PROXIMATE CAUSE — UNINTENDED MANNER OF HARM

A. Generally: If D's intended victim is harmed, but the harm occurs in an ***unexpected manner*** (though it is the same general type of harm intended), the unexpected manner of harm may or may not be enough to absolve D. In general, D will not be liable where the harm occurs through a ***completely bizarre, unforeseeable chain of events.*** [61]

> **Example:** D gets into a street fight with V, and tries to seriously injure him. As the result of the fight, V is knocked unconscious, recovers a few minutes later, drives away, and is hit by the 8:02 train at a crossing. D's act is certainly a "but for" cause of the harm to V, since had V not been knocked out, he would have continued on his way and crossed earlier than 8:02. And the general type of harm to V — severe bodily injury — is the same as that intended by D. Yet all courts would agree that the chain of events here was so unforeseeable from D's perspective that he should not be held liable for V's death.

1. **"Direct" causation vs. "intervening" events:** Courts often distinguish cases in which D's act was a ***"direct"*** cause of the harm from those in which there was an ***"intervening"*** cause between D's act and the harm. But the direct/intervening distinction is only one factor — D has a somewhat better chance, on average, of escaping liability where there was intervening cause than where there was not. [62]

B. Direct causation: We say that D's act was a ***"direct"*** of V's harm if the harm followed D's act without the presence of any clearly-defined act or event by an outside person or thing. In direct causation situations, D is rarely able to convince the court that the chain of events was so bizarre that D should be absolved. [62-64]

1. **Small differences in type of injury:** If the same general ***type of injury*** (e.g., serious bodily harm, death, burning) occurs as was intended by D, the fact that the harm deviates in some small manner from that intended is irrelevant. [62]

2. **Slightly different mechanism:** Similarly, if the general type of harm intended actually occurs, D will not be absolved because the harm occurred in a slightly different ***way*** than intended. [62]

> **Example:** D attempts to poison her husband, V, by putting strychnine in a glass of milk she serves him for breakfast. V drinks it, and becomes so dizzy from its effect that he falls while getting up from his chair, hitting his head on the table. He dies from the blow to the head, and the autopsy shows that the poison would not have been enough to kill

him directly. Nearly all courts would hold that D is guilty of murder, because her act directly caused V's death, and there was nothing terribly bizarre about the chain of events leading to that death.

3. **Pre-existing weakness:** If V has a ***pre-existing condition,*** unknown to D, that makes him much more ***susceptible to injury or death*** than a normal person would be, D ***"takes his victim as he finds him."*** Thus D may not argue that his own act was not the proximate cause of the unusually severe result. [62]

   Example: D beats V up, with intent to kill him. V runs away before many blows have fallen, and a person in ordinary health would not have been severely hurt by the blows that did fall. Unknown to D, however, V is a hemopheliac, who bleeds to death from one slight wound. D is guilty of murder, even though from D's viewpoint V's death from the slight wounds was unforeseeable.

   Note: When you are looking at a proximate cause problem, don't forget to also apply the rules of concurrence and to insist on the *correct mental state.* For instance, suppose D in the above example had only been trying to commit a minor battery on V, instead of trying to kill him. If V died as a result of his hemophelia, D would not be liable for common-law intent-to-kill murder, because he did not have the requisite mental state, the intent to kill. (But he would probably be liable for *manslaughter* under the misdemeanor-manslaughter rule.)

4. **Fright or stress:** Where V's death results even ***without physical impact,*** as the result of a ***fright*** or ***stress*** caused by D, D's conduct can nonetheless be a proximate cause of the death. [63]

   Example: During a holdup by D, V, a storekeeper, has a fatal heart attack from the stress. In most courts, V's death will be held to be the proximate result of D's act of robbery; coupled with the felony-murder doctrine, this will be enough for D to be guilty of murder, even if there was no way he could have known of V's heart condition. *[People v. Stamp* (1969)]

C. **Intervening acts:** D's odds of escaping liability are better where an ***"intervening act"*** or intervening ***event*** contributes to the result than where D has "directly" caused the harmful result. [64-70]

1. **Dependent vs. independent intervening acts:** Courts usually divide intervening acts into two categories:

   [1] ***"dependent"*** acts, which are ones which would not have occurred except for D's act (e.g., medical treatment for a wound caused by D); and

   [2] ***"independent"*** acts, which would have occurred even if D had

not acted, but which combined with D's act produced the harmful result. [64]

Example of dependent act: D wounds V in a fight. X, a doctor, negligently treats V's wound, and V dies.

Example of independent act or event: D poisons V, weakening his immune system. D is then in a car accident which he would have been in even had the poisoning not taken place. V dies from the combined result of the accident and his pre-accident weakened condition.

a. Significance: D's odds of escaping responsibility are somewhat better where the intervening act is ***"independent":***

- □ An independent intervention will break the chain of events if it was ***"unforeseeable"***for one in D's position.
- □ A dependent intervening cause will break the chain only if it was both unforeseeable and ***"abnormal."***An act is less likely to be considered "abnormal" than it is to be considered merely "unforeseeable," so D typically does better in the independent case. [64]

2. Intervening acts by third persons: [65-67]

a. Medical treatment: The most common intervening act is ***medical treatment*** performed by a doctor or nurse upon V, where this treatment is necessitated by injuries inflicted by D. Here, the treatment is obviously in response to D's act, and therefore is a "dependent" intervening act, so it will only supersede if the treatment is ***"abnormal."*** [65-66]

i. Negligent treatment: The fact that the treatment is ***negligently performed*** will ***not,*** by itself, usually be enough to make it so "abnormal" that it is a superceding event. But if the treatment is performed in a ***reckless*** or ***grossly negligent*** manner, the treatment ***will*** usually be found to be "abnormal" and thus superseding.

b. Failure to act never supersedes: A third party's ***failure to act*** will almost ***never*** be a superseding cause. [67]

Example: D shoots V. There is a doctor, X, standing by who could, with 100% certainty, prevent V from dying. X refuses to render assistance because he hates V and wants V to die. D will still be the proximate cause of death — a third party's

failure to act will never supersede.

3. Act by V: Sometimes the ***victim herself*** will take an action that is possibly a superseding intervening cause. Acts by victims are generally taken in direct response to D's act, so they will not be superseding unless they are "abnormal" (not merely "unforeseeable"). [67-69]

a. Victim refuses medical aid: If the victim refuses to receive ***medical assistance*** which might prevent the severe harm imposed by D, the victim's refusal usually will ***not*** be superseding. [68]

Example: D stabs V repeatedly. V refuses a blood transfusion because she is a Jehovah's Witness. *Held,* V's refusal to allow the transfusion is not a superseding cause. *[Regina v. Blaue* (1975)]

b. Victim tries to avoid danger: If the victim attempts to ***avoid the danger*** posed by D, and this attempted escape results in additional injury, the attempt will be a superseding cause only if it is an "abnormal" reaction. [68]

Example: D kidnaps V by locking her in a room. V tries to escape by knotting bed sheets together, and falls to her death while climbing down. V's escape would probably be found not to be "abnormal" even if it is was "unforeseeable," so it will not be a superseding cause, and D will be the proximate cause of death. The felony-murder rule will then make D guilty of V's death, even though D did not have any of the mental states for ordinary murder.

c. V subjects self to danger: Suppose D urges or encourages V to ***expose himself to danger.*** V's voluntary participation will ***not*** generally supersede, and D will be held to be a proximate cause of the result. [69]

Examples: D persuades V to play Russian Roulette, or to engage in a drag race — many courts will hold D to be the proximate cause of the injury when V shoots himself or crashes.

CHAPTER 4
RESPONSIBILITY

I. THE INSANITY DEFENSE

A. General purpose: If D can show he was ***insane*** at the time he committed a criminal act, he may be entitled to the verdict "not guilty by

reason of insanity." [77]

1. **Mandatory commitment:** If D succeeds with the insanity defense, he does not walk out of the courtroom free. In virtually every state, any D who succeeds with the insanity defense will be involuntarily ***committed*** to a mental institution. [77]

2. **Not constitutionally required:** Virtually every state recognizes some form of the insanity defense. However, the federal constitution probably does ***not require*** the states to recognize insanity as a complete defense. [77]

3. **Limits use of mental disease:** In many states, the insanity defense is coupled with a rule that ***no evidence relating to mental disease or defect*** may be introduced ***except*** as part of an insanity defense. *(Example:* D is charged with knifing his wife to death. In many states, D will not be permitted to show that his mental disease prevented him from forming an intent to kill her. In these states, D's sole method for showing the relevance of his mental disease is via the insanity defense.) [77]

    a. **State may constitutionally curtail expert evidence:** Other states let the defendant prove that his mental disease or defect prevented him from having the required specific intent, but forbid him from using ***expert psychiatric testimony*** to make that proof. It is ***not*** a violation of the defendant's ***due process rights*** for the state to prohibit the defendant from using expert testimony in this way. *[Clark v. Arizona* (2006)] [90]

B. **Tests for insanity:** The principal tests for whether D was insane — each used in some jurisdictions — are as follows: [78-83]

1. ***M'Naghten*** "right from wrong" rule: At least half the states apply the so-called *M'Naghten* rule: D must show: [78-79]

    a. **Mental disease or defect:** That he suffered a ***mental disease*** causing a ***defect*** in his reasoning powers [78]; and

    b. **Result:** That as a result, either: (1) he did not understand the ***"nature and quality"*** of his act; or (2) he did not know that his act was ***wrong.*** [79]

Example 1: D strangles V, his wife, believing that he is squeezing a lemon. Even under the relatively strict *M'Naghten* test, D would probably be ruled insane, on the grounds that he did not understand the "nature and quality" of his act.

Example 2: D is attracted to bright objects, and therefore shoplifts jewelry constantly, though intellectually he knows that this is morally wrong and also illegal. D is not insane under the *M'Naghten* test, because he understood the nature and quality of his act, and knew that his act was wrong. The fact that he may have acted under an "irresistible impulse" is irrelevant under the *M'Naghten* rule.

2. **"Irresistible impulse" test:** Many states, including about half of those states that follow *M'Naghten,* have added a ***second standard*** by which D can establish his insanity: that D was ***unable to control his conduct.*** This is sometimes loosely called the ***"irresistible impulse"*** defense. *(Example:* On the facts of Example 2 above, D would be acquitted, because although he understood that it was wrong to shoplift shiny things, he was unable to control his conduct.) [79]

3. **Model Penal Code standard:** The Model Penal Code (§4.01(1)) allows D to be acquitted if "as a result of mental disease or defect he lacks substantial capacity either to ***appreciate the criminality*** of his conduct or ***to conform his conduct*** to the requirements of the law." Thus D wins if he can show ***either*** that he didn't know his conduct was wrong, or that he couldn't control his conduct. Essentially, D wins if he satisfies either the *M'Naghten* test or the irresistible impulse test, under the M.P.C. approach. [80-82]

4. **The federal standard:** The modern ***federal*** standard (in force since 1984) sets a very stringent standard for federal prosecutions. D wins only if "as a result of a severe mental disease or defect, [he] was unable to appreciate the ***nature and quality*** or the ***wrongfulness*** of his acts...." This is essentially the *M'Naghten* standard. The fact that D was unable to conform his conduct to the requirements of the law is ***irrelevant*** — in other words, in federal suits, there is no "irresistible impulse" defense. [82]

C. Raising and establishing the defense: [83-85]

1. **Who raises defense:** In nearly all states, the insanity defense is an ***affirmative defense.*** That is, D is required to ***come forward with evidence*** showing that he is insane — only then does D's sanity enter the case. [83]

2. **Burden of persuasion:** After D bears his burden of production by showing some evidence of insanity, courts are ***split*** about who bears the "burden of persuasion," i.e., the burden of convincing the fact-finder on the insanity issue. In half the states, the prosecution must prove beyond a reasonable doubt that D is not insane. In the remaining states, D bears the burden of proving his insanity, but only by a "preponderance of the evidence." In the federal system, the rule is even tougher on D: D must prove insanity by "clear and convincing evidence." [83]

3. **Judge/jury allocation:** If the case is tried before a jury, it is the jury that will have the task of deciding the merits of D's insanity defense, based on instructions from the judge. [84-85]

   a. **Decision left to jury:** Courts try hard to ensure that the ultimate decision is in fact made by the jury, ***not by the psychiatric expert witnesses.*** The jury is always free to disregard or disbelieve the expert witness' evaluation of D's condition. In fact, in federal trials, the federal insanity statute ***prevents*** either side's expert from even ***testifying*** as to the ultimate issue of D's sanity. See FRE 704(b). [84]

D. XYY chromosome defense: Some states allow D to buttress his insanity defense by showing that he has a certain chromosomal abnormality, the so-called "XYY chromosome defense," since XYY men are much more likely to commit certain kinds of crimes than men with normal chromosomes. [85]

E. Commitment following insanity acquittal: In nearly every state, if D is acquitted by reason of insanity, he will end up being ***committed*** to a mental institution. In some states (and in the federal system) the judge is ***required by law*** to commit D to a mental institution, without even a hearing as to present sanity. [86] (Such a mandatory commitment procedure does not violate the constitution. *[Jones v. U.S.* (1983)]) In other states, the judge or the jury conducts a ***hearing*** to decide whether D is still insane and in need of commitment. [86-87]

1. **Release:** Once D has been committed to an institution and petitions for release, the release decision typically depends on: (1) whether D continues to be ***insane;*** and (2) whether D continues to be ***dangerous.***

[86-87]

a. Constitutional requirements: The Due Process clause of the federal Constitution places limits on the conditions under which an insantiy acquitee may be kept in an institution. The state may automatically commit an insanity acquitee without a hearing, as noted above. But the state must then periodically offer D the opportunity to be released. The state must release D if he bears the burden of proving that he is ***either no longer insane*** or ***no longer dangerous.*** (Probably the state may not impose on D any burden more difficult than the "preponderance of the evidence" standard for establishing either that he is no longer insane or that he is no longer dangerous.) [86]

F. Fitness to stand trial: The insanity defense can also be asserted as a grounds for ***not trying D*** on the grounds that he is ***incompetent to stand trial.*** In general, D will be held to be incompetent to stand trial if he is unable to do ***both*** of the following: (1) ***understand*** the proceedings against him; and (2) ***assist counsel*** in his defense. [87]

1. Burden of proof: Many jurisdictions place the ***burden of proof*** as toincompetence upon the ***defendant.*** The U.S. Supreme Court has held that it is ***not unconstitutional*** for the state to place upon D the burden of proving by a preponderance of the evidence that he is incompetent to stand trial. *[Medina v. California* (1992)] [87]

G. Insanity at time set for execution: If the defendant is insane ***at the time set for his execution,*** he may ***not*** be executed. Execution of a prisoner who is currently insane violates the Eighth Amendment's ban on cruel and unusual punishment. *[Ford v. Wainwright* (1986)] [87]

II. DIMINISHED RESPONSIBILITY

A. Where and how used: Under the defense of ***"diminished responsibility,"*** a non-insane D argues that he suffers such a mental impairment that he is ***unable to formulate the requisite intent.*** [89-91]

1. Homicide cases: The defense is allowed most often in ***homicide*** cases, usually ones where D is charged with first-degree murder and attempts to reduce it to second-degree by showing that he was incapable of the requisite premeditation. [91]

B. Insanity supersedes: More than half of the states ***reject*** the doctrine of diminished responsibility. Usually, they do so by holding that ***no evidence*** that D suffers from a mental disease or defect may be introduced, except pursuant to a formal insanity defense. [90]

III. AUTOMATISM

A. Defense generally: Under the ***"automatism"*** defense, D tries to show that a mental or physical condition prevented his act from being ***voluntary.*** [91]

> **Example:** While D is in bed with his wife, V, he strangles her. D shows that the strangling occurred while he was in the throes of an epileptic seizure, and that he was not conscious of what he was doing. If the fact-finder believes this story, D will be acquitted, because the strangling was not a voluntary act.

B. Generally allowed: Most courts allow the automatism defense as a distinct defense from the insanity defense. [92]

1. Model Penal Code allows: Thus the Model Penal Code effectively recognizes the defense: D is not liable if he does not commit a "voluntary act," and a "voluntary act" is defined so as to A exclude a "reflex or convulsion" or movement during "unconsiousness." M.P.C. §2.01(1) and R (2). [92]

2. Other variants: Apart from the common instance of epileptic seizures, the automatism defense might be used where: (1) D lapsed into unconsciousness because of low blood sugar; (2) D was unable to control her actions because of Premenstrual Syndrome; or (3) D was unable to control his conduct because of Post Traumatic Stress Disorder (PTSD) suffered as the result of wartime experiences. [92]

IV. INTOXICATION

A. Voluntary intoxication: ***Voluntary self-induced intoxication*** does ***not "excuse"*** criminal conduct, in general. [93-97]

> **Example:** D decides to rob a bank. Normally, he would be too timid to do so. However, he takes several drinks to increase his courage, and goes out and does the robbery. The fact that D was legally intoxicated when he committed the robbery will be completely irrelevant.

1. Effect on mental state: Although voluntary intoxication is not an "excuse," it may ***prevent D from having the required mental state.*** If

so, D will not be guilty. [94]

a. **General/specific intent distinction:** Traditionally, courts have distinguished between crimes of ***"general intent"*** and ***"specific intent."*** In a crime of "general intent," intoxication would *never* be a defense. In a crime requiring "specific intent" (i.e., intent to do an act other than the *actus reus,* such as the intent to commit a felony as required for burglary), D *would* be allowed to show that intoxication prevented him from having the requisite specific intent. [94]

Example: D gets into a car accident in a National Park, and is arrested by two federal Park Rangers. D resists the arrest, attacks the Rangers, and threatens to shoot them sometime in the future. D is charged with (1) a violation of 18 U.S.C. § 111 (making it a crime to attack or resist a federal employee who is performing his duties, essentially a form of simple assault); and (2) a violation of 18 U.S.C. § 115 (threatening to assault a U.S. employee for the purpose of impeding the employee's performance of his duties). The trial judge prevents D from putting on a defense of voluntary intoxication to either charge, and he is convicted on both.

Held, D was improperly convicted on the § 115 charge, but not the § 111 charge. The § 111 charge was for a general-intent crime: the only intent by D that the prosecution was required to prove was that D intended to assault or intimidate someone who was in fact a U.S. employee. Therefore, voluntary intoxication would not have been a valid defense to the § 111 charge. But the § 115 charge was for a *specific-intent* crime: for this charge the prosecution was required to prove that D made a threat for the specific purpose of interfering with the Rangers' performance of their official duties. D was entitled to show that even though his intoxication was voluntary, he was too drunk to form the requisite specific intent to interfere. *[U.S. v. Veach* (2006)] [94]

2. **Modern trend:** But many modern courts don't distinguish between general and specific intent. Instead, these courts generally allow D to show that his intoxication, even involuntary, ***prevented him from having the requisite mental state.*** See M.P.C. §2.08(1) (self-induced intoxication "is not a defense unless it negatives an element of the offense"). [94-95]

3. **State may opt out of allowing this type of evidence:** States are free (constitutionally speaking) to legislate that D's intoxication ***shall not be admitted as evidence*** negating the required mental state. *[Montana v. Egelhoff* (1996)] [94]

4. **Pre-intoxication intent:** Remember that it is not necessary for D to have the required intent ***at the time of the actus reus.*** Therefore, the

fact that D’s drunkenness prevented him from having the requisite intent at the time of the *actus reus* will not necessarily get him off the hook if he had the intent earlier.

Example: D, sober, decides to place a bomb under V’s car, in the hopes that V will be blown up. D prepares the bomb. D then gets drunk. In his drunken stupor, he places the bomb under X’s car; he is so drunk that he forgets why he is doing this, and at the moment the bomb is placed (and the moment a little while later when it goes off), D has no intent to harm anyone. D’s drunkenness will not get him off the hook, because he had the requisite intent to kill at the moment he first prepared the bomb.

5. **Doesn’t negate recklessness:** The most important single fact to remember about intoxication is that in most courts, intoxication ***will not negate the element of recklessness.*** In other words, if a particular element of a crime can be satisfied by a mental state of recklessness, D’s intoxication will be irrelevant. [95]

   a. **Voluntary manslaughter:** For instance, D will generally not be allowed to introduce evidence of his intoxication in an attempt to get a murder charge reduced to ***voluntary manslaughter.*** This reduction is available where D, acting in the heat of passion, acts under provocation that would have been enough to cause an ordinary person to lose control. But the assumption is that the ordinary person is sober, so D’s drunkenness does not help him. [96]

   Example: D, after getting drunk in a bar, believes that V is attacking him with a deadly weapon. An ordinary sober man would have realized that V was merely holding his car keys. D shoots V in an honest attempt to save his own life, and now seeks a reduction from murder to voluntary manslaughter. Because the defense of self-defense is not available when D’s belief in the need for that defense is reckless, D’s drunkenness will not help him — the act of voluntarily getting drunk itself constitutes recklessness.

6. **Murder:** For garden-variety ***murder,*** D’s intoxication will ***rarely*** negate an element, because murder is a crime that can be supported by a ***variety of mental states,*** and some of these are unlikely to be negated by intoxication. Thus if D, despite his drunknenness, either: (1) acted with reckless indifference to the possibility of V’s death (“depraved-heart” murder; see *infra*, p. C-79); or (2) desired to cause V serious bodily injury (see *infra*, p. C-78), the fact that the drunkenness prevented D from desiring V’s death won’t negate his

guilt of murder.

Example: D has enough drinks to raise his blood-alcohol level to twice the legal limit. He then drives his car through Times Square at rush hour, knowing that his coordination is badly impaired. He runs over V, killing him. A trier of fact could quite plausibly conclude that D has displayed reckless indifference to the value of human life (by drinking and then driving in a crowded area), notwithstanding his lack of intent to kill. If so, D's voluntary intoxication would not prevent his guilt of the reckless-indifference form of murder.

B. Involuntary intoxication: In the rare case where D can show that his intoxication was ***"involuntary,"*** D is much more likely to have a valid defense. [97]

1. **Mistake as to nature of substance:** For instance, if D intentionally ingests a substance, but A ***mistakenly believes that it is not intoxicating,*** he may have two related defenses: (1) a sort of "temporary insanity" defense, due to his temporary lack of mental capacity; and (2) a defense that the intoxication negated an element of the offense, even if the element was one for which recklessness will suffice. [97]

Example: D becomes intoxicated when his friend gives him non-alcoholic punch that D does not know is laced with LSD. Under hallucinations, D falsely believes that V is attacking him, and defends by stabbing V to death. D will probably win with his self-defense claims, since he did not act recklessly in becoming impaired, and a reasonable person in his unintentionally-impaired situation might have made the same mistake.

C. Alcoholism and narcotics addiction: Defendants who are ***chronic alcoholics*** or ***narcotics addicts*** sometimes try to use their condition as a defense. [97]

1. **Rejected:** But courts almost always ***reject*** any defense based upon these diseases. For instance, D might argue that because he was an alcoholic, his intoxication was "involuntary," and he should therefore be subject to the more liberal standards for "involuntary" as opposed to "voluntary" self-intoxication described above. But almost all courts would reject the "involuntary" defense for alcoholics and addicts. [97]

2. **Crimes to gain funds:** Similarly, many Ds commit crimes to ***gain funds*** to support their addictions. Arguments by such Ds that they lack free will or self-control, and should thus be acquitted, are even more certain to be rejected by the courts. [98]

CHAPTER 5
JUSTIFICATION AND EXCUSE

I. GENERAL PRINCIPLES

A. Justification and excuse generally: The twin doctrines of ***"justification"*** and ***"excuse"*** allow D to escape conviction even if the prosecution proves all elements of the case. There is no important distinction between those defenses referred to as "justification" and those referred to as "excuses." Here is a list of the main justifications/excuses: [105]

1. ***Duress;***

2. ***Necessity;***

3. ***Self-defense;***

4. ***Defense of others;***

5. ***Defense of property;***

6. ***Law enforcement*** (arrest, prevention of crime and of escape);

7. ***Consent;***

8. ***Maintenance of domestic authority;***

9. ***Entrapment.***

B. Effect of mistake: The effect of a ***mistake of fact*** by D on these defenses has changed over time: [105-106]

1. Traditional view: The traditional rule has generally been that D's ***reasonable*** mistake will not negate the privilege, but that an ***unreasonable*** mistake by D will negate the defense. [105]

2. Modern view: But the modern trend, as exemplified by the M.P.C., is to hold that so long as D genuinely believes (even if ***unreasonably)*** that the facts are such that the defense is merited, the defense will stand. (There is an exception if D is charged with an act that may be committed "recklessly" or "negligently" — here, he loses the defense if the mistake was "reckless" or "negligent.") [106]

II. DURESS

A. General nature: D is said to have committed a crime under ***"duress"*** if he performed the crime because of a ***threat of,*** or ***use of, force*** by a third person sufficiently strong that D's will was ***overborne.*** The term applies to force placed upon D's ***mind,*** not his body. [106]

Example: X forces D to rob Y, by threatening D with immediate death if he does not. D will be able to raise the defense of duress.

B. Elements: D must establish the following elements for duress: [107]

1. Threat: A ***threat*** by a third person, [107]

2. Fear: Which produces a ***reasonable fear*** in D, [107]

3. Imminent danger: That he will suffer ***immediate*** or ***imminent,*** [107]

4. Bodily harm: ***Death*** or ***serious bodily injury.*** [107]

C. Model Penal Code test: Under the M.P.C., the defense is available where the threat to D was sufficiently great that "a person of ***reasonable firmness*** in [D's] situation would have been ***unable to resist."*** M.P.C. §2.09(1). [107]

D. Not available for homicide: Traditionally, the defense of duress is not available if D is charged with ***homicide,*** i.e., the intentional killing of another. [107-108]

Example: D is a member of a gang run by X. X and the other gang members tell D that if D does not kill V, an innocent witness to one of the group's crimes, they will kill D immediately. D reasonably and honestly believes this threat. D kills V. Few if any courts will allow D to assert the defense of duress on these facts, because he is charged with the intentional killing of another. (The result probably would not change even if D had originally been coerced into joining the gang.)

1. Reduction of crime: A few states allow duress to ***reduce the severity*** of an intentional homicide (e.g., from first-degree premeditated murder to second-degree spur-of-the-moment murder).

2. Felony-murder: Also, duress is accepted as a defense to a charge of ***felony-murder.*** *(Exam- ple:* D is coerced into driving X to a robbery site. During the robbery, X intentionally kills V, a witness, to stop V from calling the police. Although in most states D would ordinarily be liable for felony-murder, most states would allow him to raise the defense of duress here.) [108]

E. Imminence of threatened harm: D must be threatened with ***imminent*** or ***immediate*** harm, in most courts. Thus the threat of ***future harm*** is not sufficient. But modern courts are more willing U to relax this requirement. [109]

Example: D witnesses X kill V. X phones D to say that if D testifies against X at X's murder trial, X will kill D after the trial. D lies on the stand to avoid implicating X. D is then charged with perjury. Traditionally, most courts would not allow D to raise the defense of duress, since the threatened harm was not imminent. But a modern court, and the Model Penal Code, might not impose this requirement of immediacy.

F. Threat directed at person other than defendant: Traditionally, most courts have required that the threatened harm be directed ***at the defendant.*** [109]

1. Modern view: But modern courts, and the M.P.C., are more liberal. Many courts now recognize the defense where the threat is made against a member of D's ***family.*** The M.P.C. imposes no requirement at all about who must be threatened (but remember that under the M.P.C. the test is whether a person of "reasonable firmness" would be coerced, and this may be hard to prove if D is coerced by the threat of harm to a complete stranger). [109]

G. Defendant subjects self to danger: Nearly all courts deny the defense to a D who has ***voluntarily placed himself in a situation*** where there is a substantial probability that he will be subjected to duress.

Example: D voluntarily joins an organized crime group known to have the policy of *omerta*, or death to anyone who informs on the gang. D is called to the witness stand, and lies to protect other gang members. D will not be able to raise the defense of duress, since he voluntarily or at least recklessly placed himself in a position where he was likely to be subjected to duress. [110]

H. Guilt of coercer: Even though the person subjected to duress may have a valid defense on that ground, this will not absolve the person who did the coercing. [110]

Example: A forces B to rob V, by threatening to kill B if he does not. Even though B probably has a duress defense to a robbery charge, A will be guilty of robbery, on an accomplice theory.

III. NECESSITY

A. Generally: The defense of ***"necessity"*** may be raised when D has been

compelled to commit a criminal act, not by coercion from another human being, but by ***non-human events.*** The essence of the defense is that D has chosen the ***lesser of two evils.*** [111-114]

> **Example:** D needs to get his seriously ill wife to the hospital. He therefore violates the speed limit. Assuming that there is no available alternative, such as an ambulance, D may claim the defense of necessity, since the traffic violations were a lesser evil than letting his wife get sicker or die.

B. Requirements for defense: The principal requirements which D must meet for the necessity defense are: [111]

1. **Greater harm:** The harm sought to be avoided is ***greater*** than the harm committed; [111]
2. **No alternative:** There is no third ***alternative*** that would also avoid the harm, yet would be non-criminal or a less serious crime; [111]
3. **Imminence:** The harm is ***imminent,*** not merely future; and [112]
4. **Situation not caused by D:** The situation was not brought about by D's carelessly or recklessly ***putting himself in a position*** where the emergency would arise. [112]

> **Note:** In contrast to the case of duress, the harm D is seeking to avoid need not be serious bodily harm, but may be non-serious bodily harm or even ***property damage.***

C. Homicide: Courts have traditionally been very reluctant to permit the necessity defense where D Y is charged with an ***intentional killing.*** [112-113]

1. **Model Penal Code view:** The M.P.C. does not rule out the necessity defense even in intentional homicide cases. But under the M.P.C., one may not sacrifice one life to save another, since the Code requires the choice of the lesser of two evils, not merely the equal of two evils, and all lives are presumed to be of equal value. But if a life can be sacrificed to save two or more lives, the Code would allow the defense. *(Example:* D, a mountain climber, is roped to V, who has fallen over a cliff. If the only alternative is that both climbers will die, D may cut the rope even if this will inevitably cause V's death.) [113]

D. Economic necessity not sufficient: The harm that confronts D may be of a non-bodily nature, such as damage to his property. But courts do not

accept the defense of ***"economic necessity."*** *(Example:* D, an unemployed worker, may not steal food and then claim the defense of necessity. But if he is actually about to starve to death, then the defense may be allowed.) [114]

E. Civil disobedience: The necessity defense is almost always rejected in cases of ***"civil disobedience."*** [114]

> **Example:** To protest U.S. military assistance to El Salvador, the Ds trespass in their local IRS office, splash blood on the walls, and do other criminal acts to draw attention to why U.S. policy is bad. *Held,* the Ds' necessity defense is invalid, because there were lawful ways of attempting to bring about changed government policies. *[U.S. v. Schoon* (1991)]

IV. SELF-DEFENSE

A. Self-defense generally: There is a general right to ***defend oneself*** against the use of ***unlawful force.*** When successfully asserted, the defense is a complete one, leading to acquittal. [115]

B. Requirements: The following requirements must generally be met: [115]

1. **Resist unlawful force:** D must have been resisting the ***present or imminent use*** of ***unlawful force;*** [115]

2. **Force must not be excessive:** The degree of force used by D must not have been ***more than was reasonably necessary*** to defend against the threatened harm; [115]

3. **Deadly force:** The force used by D may not have been ***deadly*** (i.e., intended or likely to cause death or serious bodily injury) unless the danger being resisted was also deadly force; [115]

4. **Aggressor:** D must not have been the ***aggressor,*** unless: (1) he was a ***non-deadly aggressor*** confronted with the unexpected use of deadly force; or (2) he ***withdrew*** after his initial aggression, and the other party continued to attack; and [115]

5. **Retreat:** (In some states) D must not have been in a position from which he could ***retreat*** with complete safety, unless: (1) the attack took place in D's dwelling; or (2) D used only non-deadly force. [115]

C. Requirement of "unlawful force": Self-defense applies only where D

is resisting force that is ***unlawful.*** [115-116]

1. Other party commits tort or crime: Generally, this means that the other party must be committing a ***crime or tort.*** [115]

a. Other party has privilege: Thus if the other party, even though he is using force, is ***entitled*** to do so, the force is not unlawful, and D may not use force to defend against it. For instance, a property owner who is using non-deadly force to defend his property against attempted theft is not using "unlawful" force. [115]

Example: D tries to pick V's pocket. V, not a trained or dangerous fistfighter, hits D lightly with his fist. V has a privilege to use reasonable non-deadly force to defend his property, so V is not using "unlawful" force, and D therefore has no right to use any force in self-defense.

b. Other party uses excessive force: However, if the other party is entitled to use some degree of force, but uses ***more than is lawfully allowed,*** the excess will probably be treated as unlawful, and D may resist it by using force himself. [115]

Example: On the facts of the above example, suppose that V pulls out a gun and aims it at D and starts to pull the trigger, even though V realizes that D is unarmed and not dangerous. D may probably tackle V and knock away the gun, because V has gone beyond the scope of the privilege to use reasonable force to defend property.

c. Reasonable mistake by D: If D makes a ***reasonable mistake*** about the unlawful status of the force being used against her, she will nonetheless be protected. (In general, the defense of self-defense is not voided by a reasonable mistake.) But in most states, D will lose the defense if her mistaken belief that the opposing force was unlawful was unreasonble. See the further discussion of mistake in self-defense below. [115-118]

D. Degree of force: D may not use more force than is ***reasonably necessary*** to protect himself. [116]

1. Use of non-deadly force: D may use ***non-deadly force*** to resist virtually any kind of unlawful force (assuming that the level of non-deadly force D uses is not more than is necessary to meet the threat). [118]

a. No need to retreat: D may use non-deadly force without

retreating even if retreat could be safely done. [116]

b. Prevention of theft: D may use non-deadly force to resist the other person's attempted theft of ***property.*** [116]

2. Deadly force: D may defend himself with ***deadly force*** only if the attack threatens D with ***serious bodily harm.*** [118]

a. Definition of "deadly force": Remember that "deadly force" is usually defined as force that is ***intended or likely*** to cause ***death or serious bodily harm.*** [116]

i. Verbal threats: D's verbal ***threat*** to use deadly force does ***not*** itself constitute use of deadly force, provided that D ***does not intend to carry out the threat.*** (M.P.C. §3.11(2))

ii. Kidnapping and rape: When the victim's conduct is being analyzed, most courts expand the concept of "serious bodily harm" to cover ***kidnapping*** and forcible ***rape —*** so if V threatens D with kidnapping or forcible rape, D may use deadly force to resist if lesser force would not suffice.

iii. Firing firearm: Generally, if D purposely ***fires a gun*** in the direction of another person, this will be considered use of deadly force. See M.P.C. §3.11(2).

iv. Slap (no serious threat): A ***"slap"*** of D by V normally does ***not*** pose the risk of present serious bodily harm to D (or foreshadow serious bodily harm in the imminent future), so D may ***not*** respond with deadly force.

v. Result irrelevant: The ***actual result*** of the deadly force is ***irrelevant,*** either way.

Example 1: D shoots at V with a gun, and misses him entirely. D has used deadly force, and will be liable for assault and/or battery if deadly force was not permissible.

Example 2: D, not a particularly capable fistfighter, swings his fist at V's stomach, intending to immobilize V. V unexpectedly suffers a ruptured spleen, and dies. D will not be deemed to have used deadly force, since the force was neither intended nor likely to cause death or serious bodily harm.

b. Effect of mistake: As with other sorts of mistakes, if D is

reasonably mistaken in the belief that he is threatened with serious bodily harm, he will not lose the right to reply with deadly force. [118]

3. **No more force than reasonably necessary (the "proportionality" rule):** Whether D uses deadly or non-deadly force, D ***may not use more force than seems reasonably necessary in the circumstances.*** This is the so-called ***"proportionality" rule.*** Thus even if V uses deadly force against D, D may still not use deadly force in return if the use of non-deadly force would seem sufficient to one in D's position. [117]

Example: V takes out a knife and approaches D menacingly, with an intent to kill D. D is a martial arts specialist, and knows that he could easily take the knife away from D. Instead, D takes out his own knife and stabs V in the stomach, intending to put him in the hospital to teach him a lesson. V bleeds to death.

D cannot claim self-defense — he used more force than a person in his position would conclude was reasonably necessary to deal with the threat. Therefore, D is guilty of "intent to do serious bodily harm" murder.

E. Imminence of harm: The harm being defended against must be reasonably ***imminent.*** [118]

1. **M.P.C. liberal view:** The M.P.C. construes this requirement somewhat liberally — D may use force to protect himself against unlawful force that will be used ***"on the present occasion."*** [118]

Example 1: V tells D on the telephone, "I will kill you tomorrow." D goes to V's house and shoots V. D may not claim self-defense, because V's threat was not for imminent force.

Example 2: D is stranded in his broken-down car in the middle of a neighborhood he does not U know well. V sees D defenseless, and says, "I'm gonna go get my friends and we're gonna L come back and strip the tires off your car." Under the M.P.C., D may use non-violent force to E prevent V from getting his friends, because the threat is that unlawful force will be used "on the present occasion," even though the force is not completely imminent.

2. **Withdrawal by aggressor:** One consequence of the requirement that the danger be imminent is that if the ***aggressor withdraws*** from the conflict, the victim ***loses his right to use force,*** at least where the withdrawal should reasonably be interpreted as indicating that the danger is over. (But if the assailant seems to be getting

reinforcements, that's not a "withdrawal," and the victim can keep using force.)

Example: V and D are friends. They get into a verbal dispute, and V takes a swing at D. D starts to swing back. V stops swinging and says, "Wait a minute, we've always been friends, let's stop fighting." D (who has no reason to believe that V's offer to stop the fight is phony) continues to beat V up. D will not be able to use the defense of self-defense if he is charged with battery occurring after V's offer to stop — once V withdrew from the conflict, the occasion requiring self-defense was over.

F. Aggressor may not claim self-defense: If D is the ***initial aggressor*** — that is, one who strikes the first blow or otherwise precipitates the conflict — he may ordinarily ***not claim self-defense.***[118-120]

Example: D starts a fight in a bar with V, by brandishing a knife at V. V, using his own knife, tries to cut D's knife-wielding hand. D hits V in the face with his other hand, injuring him. D cannot claim self-defense, because he precipitated the conflict by brandishing the knife.

1. Aggression without actual force: D can be treated as an aggressor, and thus lose the right of self-defense, even if D did not actually strike the first blow. It is enough if D did an ***unlawful*** (i.e., tortious or criminal) act which ***"provoked"*** the physical conflict. [119]

Example: The above example illustrates this principle — D has merely brandished the knife, not used it, yet he is deemed the aggressor.

2. "Aggressor" is narrowly defined: But in deciding whether D was an aggressor and thus forfeited his right of self-defense, the term "aggressor" is relatively ***narrowly defined:*** only if D ***intentionally provoked the violent encounter*** will he be deemed the aggressor. [119] Here are some scenarios in which D is *not* an aggressor:

a. Trespass: The mere fact that D ***trespassed*** will generally not be enough to make D an aggressor, and D will therefore be permitted to use force to repel an attack by the owner.

b. Larceny: The mere fact that D was committing ***larceny,*** assuming he did it in a way that did not pose a danger of physical harm to anyone, typically won't make D an aggressor.

Example: D, shopping at Store, picks up a small item and puts it in her pocket, intending to shoplift it. V, a store detective, sees D do this, grabs D, and starts to put a dangerous chokehold on her. D, to avoid the chokehold, kicks V hard in the shin, causing V to fall and break his leg. D is prosecuted for assault, and claims self-

defense.

The fact that D committed larceny did not make D the aggressor. Therefore, D was entitled to use self-defense against V's unlawful use of force (the chokehold). [119]

c. Verbal provocation: Similarly, the fact that D acts in a ***verbally provocative way*** towards V (while not threatening physical harm) won't make D an aggressor.

Example: D and V get into a verbal altercation in a bar, while each is a bit tipsy. D shouts at V, "You are a drunk and a thief, and you're too yellow-bellied to even try to stop me from saying it." V, enraged, starting hitting D in the face. D, a far better fist-fighter, hits back, breaking V's jaw.

D was not the aggressor, because verbal taunts not amounting to threats of imminent harm won't be considered aggression for self-defense purposes. Therefore, D had the right to use reasonable force in self-defense once V attacked him.

3. Exceptions: There are two major ***exceptions*** to the rule that the one who is the aggressor may not claim self-defense: [120]

a. Non-deadly force met with deadly force: First, if D provokes the exchange but uses no actual force or only ***non-deadly force,*** and the other party ***responds with deadly force,*** D may then defend himself (even with deadly force, if necessary). [120]

Example: D attacks V with his fists. V defends by knocking D down, then starting to smash D's head against the wall, so that D is in danger of being killed or badly hurt. D manages to pull a knife, and kills X. Probably D is entitled to a claim of self-defense. V, by meeting non-deadly force with deadly force, was acting unlawfully, and D will be permitted to save his life. (All of this assumes that D did not have the duty and opportunity to retreat, a duty which he might have in some states under some circumstances.)

b. Withdrawal: Second, if D ***withdraws from the conflict,*** and the other party (V) initiates a ***second conflict,*** D may use non-deadly force (and even deadly force if he is threatened with death or serious bodily harm). This is true even if D started the initial conflict with the use of deadly force. All of this is so because once D (the initial aggressor) withdraws, the conflict is over, so V's use of force becomes unlawful force that D can defend against. [120]

Example: In a bar, D attacks V with his fists, hits him several times, and knocks him down. D leaves the bar and gets into his car, intending to drive away. V, after getting up, follows D outside, and attacks D with his fists, just as D is getting to the car. D

swings back, hitting and injuring V. D will be entitled to claim self-defense, because he withdrew from the conflict, and V was in effect starting a new conflict in which V was really the aggressor.

G. Retreat: Some states (but not a majority) require that if D could ***safely retreat,*** he must do so ***rather than use deadly force.*** [121-122]

1. No retreat before non-deadly force: No states require retreat before the use of ***non-deadly force.*** [121]

Example: V attacks D with non-deadly force. D could withdraw from the encounter with complete safety, by getting into his car and driving away. D instead stands his ground and fights back with his fists, with which he is not especially proficient. In all states, even those with a general "duty to retreat," D is privileged, because no reatreat is ever required before the use of non-deadly force.

2. Retreat only required where it can be safely done: The retreat rule, in states requiring it, only applies where D could retreat with ***complete safety*** to himself and others. Also, if D reasonably but mistakenly believes that retreat cannot be safely done, he will be protected. [121]

3. Retreat in D's dwelling: Those states requiring retreat do not generally require it where the attack takes place in ***D's dwelling.*** [122]

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Example: D invites V to D's house, and the two parties get into a dispute. V attacks D with a knife. D could easily go into a bedroom which can be locked from the inside; while there, he could readily call the police. Instead, D grabs a knife — the only reasonably available means of combatting V, given D's inferior martial arts skills — and seriously wounds V. Even in states imposing a general duty of retreat, D is exempt from the duty here, since the attack is taking place in his own dwelling.

a. Not applicable if D was aggressor: But this exception for a dwelling does not apply if D was the ***aggressor.*** [122]

b. Assailant also resident: Also, some courts hold that the dwelling exception to the retreat requirement does not apply where the ***assailant is also a resident*** of the dwelling. But other courts, probably representing the more modern view, do not remove the exception in this situation. [122]

Example: H and W are married. H attacks W at home. W could easily retreat to a lockable bedroom, but instead uses deadly force (though no more than reasonably necessary) to rebut the attack. Of the states requiring a duty to retreat, most would give W an exemption because she is in her dwelling, but a few would impose the duty

of retreat even here because H is also a resident of the dwelling.

H. Effect of mistake: The effect of a ***mistake*** by D concerning the need for self-defense will depend largely on whether the mistake is ***"reasonable."*** Observe that there are various kinds of mistakes that D might make concerning the need for self-defense: (1) a mistaken belief that he is about to be attacked; (2) a mistake in belief that the force used against him is unlawful; (3) a mistaken belief that only deadly force will suffice to repel the threat; or (4) a mistaken belief that retreat could not be accomplished safely. [122-124]

1. Reasonable: As long as D's mistaken belief as to any of these points is ***reasonable,*** all courts will allow him to claim self-defense. [122]

Example: While D is walking down the street one evening, V says, "Your money or your life," and points what appears to be a gun at D. In fact, the "gun" is merely V's finger poking through V's jacket. A reasonable person in D's position would be likely to believe that there was a real gun. D also reasonably believes that V may shoot D even if D gives up the property, because this has happened in the neighborhood on several recent occasions. D pulls his own gun and shoots V to death. Later evidence shows that V, a career mugger, would never have dreamt of actually doing physical harm to a victim. Because D's mistakes (about the existence of a gun, and about whether it would be used against him) were "reasonable," D is entitled to claim self-defense despite the mistakes.

2. Unreasonable mistake: But if D's mistake is ***unreasonable,*** most states hold that he ***loses*** the right to claim self-defense. [122-124]

Example: D travels on a New York City subway while carrying an unlicensed loaded pistol. Four youths approach him, and one states, "Give me $5." D pulls out the gun and shoots at each of the four, one of whom is sitting on a bench and apparently posing no imminent threat to D at the time. D later admits that he did not think the youths had a gun, but that he had a fear, based on prior times when he was mugged, that he might be maimed as a result of this encounter.

Held, D's claim of self-defense is valid only if he "reasonably believed" that one of the victims was about to use deadly physical force or about to commit one of certain violent crimes upon him. This imposes an objective standard, by which D's conduct must be that of a reasonable person in D's situation. *[People v. Goetz* (1986)]

a. M.P.C./minority view: A minority of courts, and the Model Penal Code, hold that even an ***unreasonable*** (but genuine) mistake as to the need for self-defense will protect D. This is, in a sense, the more "modern" view. (But if the crime is one that can be committed by a "reckless" or "negligent" state of mind, even under

the M.P.C. D's reckless or negligent mistake as to the need for self-defense will not absolve him.) [124]

b. Not totally subjective: Even in courts following the majority "objective" standard for reasonableness of mistake, the standard is not completely objective.

i. D's physical disadvantages: Courts generally take D's ***physical disadvantages*** into account in determining the reasonableness of his mistake. [123]

Example: If D is a small woman, and V is a large man, obviously it is reasonable for D to fear harm more readily than if the roles were reversed.

ii. D's past experiences and knowledge: Similarly, courts generally hold that D's ***past experiences*** and knowledge are to be taken into account in determining whether D's mistake was a "reasonable" one. [123]

Example: In *People v. Goetz, supra,* D was allowed to put on evidence that he was previously mugged, thus contributing to his belief that danger to him was likely in the present encounter.

c. Intoxication: If the cause of D's unreasonable mistake as to the need for self-defense is his ***intoxication,*** all courts agree that the intoxication does not excuse the mistake, and D will not be entitled to a claim of self-defense. [124]

Example: D gets drunk in a bar. He mistakenly believes that V is about to shoot him. He instead draws first, and shoots V to death. Had D been sober, he would have realized that V was not about to attack him. All courts agree that because D's mistake was caused by his intoxication, he loses the claim of self-defense.

I. Battered women and self-defense: Where a woman ***kills her spouse*** because she believes this is the only way she can protect herself against ongoing ***battering*** by him, courts normally do not change the generally-applicable rules of self-defense. [124-127]

1. Standard for "reasonableness": In a battered-woman case, the courts try not to allow too much subjectivity into the determination of whether the woman has acted reasonably. Most courts make the test, What would a reasonable woman do in the defendant's situation, taking into account the prior history of abuse, but not taking into

account the particular psychology of the woman herself (e.g., that she is unusually depressed, or aggressive, or otherwise different)? [125]

2. **Imminence of danger:** Nearly all courts continue to require in battered-woman cases, as in other cases, that self-defense be used only where the danger is ***imminent.*** For instance, courts have not modified the traditional requirement of imminent danger to cover situations where the woman's counter-strike ***does not come during a physical confrontation.*** Thus D would probably be convicted of murder for killing her abusing husband, V, in any of the following situations:

   - □ V, after abusing D, has ***gone to sleep,*** and D shoots him in the head while he sleeps;
   - □ D ***waits*** for V to return home, and kills him immediately, before any kind of argument has arisen; and
   - □ D ***arranges with someone else*** (at the most extreme, a hired killer) to kill V.

   (But if the absense of confrontation is merely a ***momentary lull*** in the attack — e.g., V's back is temporarily turned, but D reasonably believes that the attack will resume any moment — then the requirement of imminence is typically found to be satisfied.) [126-127]

3. **Battered child:** Essentially the same rules apply where a ***battered child*** kills the abusive parent or step-parent, typically the father. Thus many courts allow psychologists to testify about a "battered child's syndrome." But courts apply the imminence requirement in the case of killings by children, just as in the case of killings by the wife. [127]

J. Resisting arrest: A person's right to use force to ***resist an unlawful arrest*** is much more limited than his right to use force to resist other kinds of unlawful attack. [127]

1. **Deadly force:** Virtually no state allows a suspect to use ***deadly force*** to resist an unlawful arrest. [127]

2. **Non-deadly force:** A substantial minority of states now bar even the use of ***non-deadly force*** against an unlawful arrest. The M.P.C., for instance, refuses to allow the use of force to resist an unlawful arrest, if D knows that the person doing the arresting is a police officer. M.P.C. §3.04(2)(a)(i). [127]

Example: Officer comes to D's house to arrest D for a felony committed a long time ago, as to which the police have long suspected D. Officer does not have a warrant. D knows that Officer is a police officer, but D also knows that constitutionally, a warrant is required for entering a suspect's house to arrest him unless there are exigent circumstances. Although D thus knows that the arrest is unlawful, D may not use even non-deadly force — such as punching or kicking the officer — to resist arrest, under minority/M.P.C. view.

a. **Traditional view:** But the traditional view, probably still followed by a bare majority of states, is that a suspect *may* use ***non-deadly*** force to resist an unlawful arrest. [127]

3. **Excessive force:** Nearly all states allow the use of non-deadly force to resist an arrest made with ***excessive force,*** or in any situation where D reasonably believes that he will be ***injured.*** (But even here, deadly force may not be used.) [127]

Example: In a Rodney King-like scenario, D is arrested properly, then kicked and beaten with truncheons for several minutes, while he does not resist. Nearly all states would allow D to punch or kick the arresting officer and to run away, in order to escape the blows. But D could not pull out a knife and stab the arresting officer, even in this extreme situation.

K. Injury to third persons: If while D is using force to protect himself, he ***injures a bystander,*** his criminal liability with respect to this injury will be measured by the same standards as if it was the assailant who was injured. [128]

1. **D not reckless or negligent:** Thus if D's conduct was not reckless or negligent with respect to the bystander, he will not be liable, assuming that self-defense as to the assailant was proper. [128]

2. **Recklessness or negligence:** Conversely, if D *is* reckless or negligent with respect to the risk of injuring a bystander, D may not claim self-defense if the charge is one that requires only recklessness or negligence (as the case may be). [128]

Example: X, wielding a knife, attacks D in a crowded bar. D pulls out what he knows to be a very powerful gun, and shoots at X. The bullet misses X and kills Y, a bystander. Even if, as seems likely, D had a general right to use deadly force in his own defense in this situation, a jury could find that D was reckless as to the risk of killing a bystander. If the jury so concluded, D would then be guilty of voluntary manslaughter, because his mental state with respect to Y — recklessness — suffices for manslaughter.

L. "Imperfect" self-defense: D may be entitled to a claim of ***"imperfect"***

self-defense, sufficient to reduce his crime from murder to ***voluntary manslaughter,*** if D killed in self-defense but failed to satisfy one of the requirements for acquittal by reason of self-defense. [128]

1. **Unreasonable mistake:** Thus if D makes an ***unreasonable mistake*** as to the need for force, or as to the unlawfulness of the other party's force, most states give him the claim of imperfect self-defense. [128]

2. **Initial aggressor:** Similarly, if D was the ***initial aggressor,*** and thus lost the right to claim true self-defense, he can still use imperfect self-defense to get his crime reduced to manslaughter. [128]

   Example: X insults D. D pulls a knife and advances towards X. X pulls a gun and is about to shoot D. With his spare hand, D pulls a gun and shoots X to death. Because D was the aggressor — and he was the first to use physical violence rather than mere words — he does not have a "full" claim of self-defense. However, he met all the requirements for use of deadly force except that he not have been the aggressor, so he'll probably be entitled to have the charge reduced from murder to voluntary manslaughter.

3. **Model Penal Code view:** The M.P.C. similarly says that an unreasonable belief in the need for deadly force will give rise to manslaughter if D was reckless in his mistake. (If D's unreasonable belief was merely negligent, under the M.P.C. he cannot be charged with anything higher than criminally negligent homicide.) [128]

M. Burden of proof: Nearly all states make a claim of self-defense an ***affirmative defense,*** i.e., one which must be raised, in the first instance, by D. Many states also place the ***burden of persuasion*** on D, requiring him to prove by a ***preponderance of the evidence*** that all the requirements for the defense are met. It is constitutional for a state to put this burden of persuasion upon the defendant. *[Martin v. Ohio* (1987)] [129]

V. DEFENSE OF OTHERS

A. Right to defend others in general: A person may use force to ***defend another*** in roughly the same circumstances in which he would be justified in using force in his own defense. [129]

B. Relation between defendant and aided person: At common law, a person was permitted to defend only his ***relatives.*** [129]

1. **Modern rule:** Today, however, most courts and statutes permit one to

use force to defend anyone, even a ***total stranger,*** from threat of harm from another. [129]

C. Requirements: D must generally meet the following requirements in order to have a claim of defense of others: [129]

1. **Danger to other:** He reasonably believes that the other person is in ***imminent danger*** of ***unlawful bodily harm;*** [129]
2. **Degree of force:** The ***degree of force*** used by D is no greater than that which seems reasonably ***necessary*** to prevent the harm; and [129]
3. **Belief in the other person's right to use force:** D reasonably believes that the party being assisted would have the right to use in his ***own defense*** the force that D proposes to use in assistance. [129]

D. Retreat: Most courts hold that D may not use deadly force if he has reason to believe that the person being aided could ***retreat with safety.*** Thus the M.P.C. requires that D at least "try to cause" the person being aided to retreat if retreat with safety is possible (although D may then use deadly force if his attempt at causing retreat fails). [129]

1. **Home of either party:** Probably retreat is not necessary if the place where the encounter takes place is the ***dwelling*** or ***place of business*** of either the defendant or the party assisted.

   [130]

E. Mistake as to who is aggressor: Courts are split about the effect of D's mistake concerning ***who was really the aggressor.*** [130]

1. **Traditional view:** The traditional view, called the ***"alter ego"*** rule, is that D "stands in the shoes" of the person he aids. Under this view, if the person aided would not have had the right to use that degree of force in his own defense, D's claim fails. [130]

   Example: D observes two middle-aged men beating and struggling with an 18-year-old youth; D reasonably concludes that these two are unlawfully attacking the youth. D hits X, one of the older men, in an attempt to get him off the youth; he breaks X's jaw. It turns out that X and the other older man were plainclothes police officers trying to make a lawful arrest of the youth for an attempted mugging. Under the traditional "alter ego" view, since the youth did not have the privilege to hit back to prevent a lawful arrest, D did not have that privilege to do so for the youth's benefit.

2. **Modern view:** But the modern view is that so long as D's belief that

unlawful force is being used against the aidee is ***reasonable,*** D may assert a claim of defense of others even if his evaluation turns out to have been wrong. Thus the M.P.C. gives the right based on "the circumstances as the actor believes them to be...." *(Example:* On the facts of the above example, the modern/M.P.C. view would permit D to use the claim of defense of others.) [130]

VI. DEFENSE OF PROPERTY, INCLUDING HABITATION

A. Generally: A person has a limited right to use force to ***defend his or her property*** against a wrongful taking. [131]

1. **Non-deadly force:** ***Non-deadly force*** may be used to prevent a ***wrongful entry on one's real property,*** and the ***wrongful taking of one's personal property.*** [131]

2. **Reasonable degree:** The degree of force used must not be ***more than appears reasonably necessary*** to prevent the taking. For instance, if one in D's position should believe that a ***request to desist*** would be sufficient, force may not be used. [131]

   Example of proper use of non-deadly force: D sees X attempting to break into D's car, parked on the street. At least if D has no reason to believe that words alone will dissuade X, D may punch X, spray mace at him, or otherwise use non-deadly force to stop the break-in.

3. **Subsequent use of deadly force:** If D begins by using a reasonable degree of non-deadly force, and the wrongdoer responds with a personal attack, then the rules governing self-defense come into play. It may then become permissible for D to use deadly force to protect himself. [131]

B. Deadly force: In general, one may ***not use deadly force*** to defend personal property or real estate. [131-132]

1. **Dwelling:** However, in limited circumstances, one may be able to use deadly force to defend ***one's dwelling.*** [131-132]

   a. **Modern view requires violent felony:** Under the modern view, deadly force may be used ***only where the intrusion appears to pose a danger of a violent felony.***

   Example: Under the modern view, a homeowner may ***not*** shoot a ***suspected burglar,*** unless the owner believes the burglar either to be ***armed,*** or to pose a threat of ***serious***

bodily harm to the inhabitants. [131]

C. Mechanical devices: A property owner may ordinarily use ***mechanical devices*** to protect his property. [132-133]

1. Non-deadly devices: A device that is ***non-deadly*** (i.e., one that is not likely or intended to cause death or serious bodily harm) may be used whenever it is ***reasonable*** to do so. Thus a property owner may put ***barbed wire*** or a ***spiked fence*** (but not an electrical fence) around his property. (Under the M.P.C., the owner must give a ***warning*** to intruders about the device unless it is one that is "customarily used for such a purpose.") [132]

2. Deadly force: Courts are much less likely to allow a mechanical device that constitutes ***deadly force.*** [132]

a. Traditional view: Traditionally, D could use a mechanical deadly device if the situation were one in which D himself could use deadly force. [132]

Example: D, a homeowner, sets up a spring gun attached to the door. The gun shoots X, who turns out to be an armed and dangerous burglar. Under the traditional view, D would not be guilty of anything, since he would have had the right to use deadly force against the burglar personally.

b. Modern view prohibits: But the ***modern*** view ***prohibits*** the use of such devices altogether, even if they happen to go off in a situation where the owner himself would have been justified in using deadly force. [132]

Example: Under the modern/M.P.C. view, on the facts of the above example, D would be guilty of murder if the gun went off and shot to death even an armed and dangerous burglar.

D. Recapture of chattel and re-entry on land: A person has a privilege to use reasonable force to ***re-take*** his personal or real property. [133]

1. Personal property: Where personal property has been taken, all courts agree that D may use reasonable non-deadly force to ***recapture*** it, provided that he does so ***immediately*** following the taking. [133]

VII. LAW ENFORCEMENT (ARREST; PREVENTION OF ESCAPE AND CRIME)

A. General privilege: A person engaged in ***lawenforcement*** has a general privilege to violate the law when it is reasonable to do so. [133]

Example: D, a police officer, is chasing a fleeing convict. D may drive his car through a stop light, or 20 m.p.h. above the speed limit, provided that a reasonable officer in D's position would believe that this was necessary to recapture the escapee.

1. **Use of force:** The main question that arises is whether an officer's ***use of force*** was lawful. See below. [133]

B. Arrest: A law enforcement officer is privileged to use reasonable force in ***effecting an arrest.*** However, this privilege exists only where the arrest being made is a ***lawful one.*** [134-136]

1. **Summary of arrest rules:** The rules for determining whether an arrest is lawful depend in part on whether the arrest is for a felony or a misdemeanor: [134]

   a. **Felony:** At common law, a police officer may make an arrest for a ***felony*** if: (1) it was commited in the officer's presence; or (2) it was committed outside the officer's presence, but the officer has reasonable cause to believe that it was committed, and by the person to be arrested. [134]

      i. **Warrant not required:** In these situations, the arresting officer is ***not required*** to have a ***warrant.***

   b. **Misdemeanor:** An officer may also arrest for a ***misdemeanor.*** [134]

      i. **Warrant:** If the misdemeanor occurred in the officer's presence, no warrant is required. But at common law, if the misdemeanor occurred outside of the officer's presence, then a warrant ***is*** required (though this rule has often been changed by statute).

2. **Arrest resisted:** If an officer who is attempting to make a lawful arrest meets resistance, he may use reasonable force to protect himself. In general, the rules applicable to self-defense apply here. [134]

   a. **No retreat:** There is one important difference: even in those states requiring one to retreat before using deadly force where it is safe to

do so, an officer is ***not required to retreat*** rather than make the arrest. [134]

3. **Fleeing suspect:** An officer may use ***non-deadly force*** wherever it is reasonably necessary to arrest a ***fleeing*** suspect. But there are important limits on the use of ***deadly*** force where the suspect is fleeing: [134-136]

   a. **Misdemeanor:** If the suspect is fleeing from an arrest for a ***misdemeanor,*** deadly force may ***not*** be used against him. [134]

   Example: If the police are chasing a garden-variety speeder, they may not shoot at him or at his car. If they shoot at the tires and cause a fatal crash, they will be liable for manslaughter, since shooting a gun in the direction of a person, even without intent to hit him, is generally considered to be the use of deadly force.

   b. **Non-dangerous felony:** Where the suspect is fleeing an arrest for a ***non-dangerous*** felony, the modern, and Supreme Court, view is that the police may ***not*** use deadly force to catch the suspect. [135-136]

   Example: Where an officer is chasing an escaping burglar whom the officer has no reason to believe is armed, the officer may not shoot the burglar in the back. This is true even if the burglar ignores a command to stop and raise his hands. *[Tennessee v. Garner* (1985)]

   c. **Dangerous felony:** If the felony or the felon is a ***"dangerous"*** one, the arresting officer may use deadly force if that is the only way that the arrest can be made. The issue is whether the suspect poses a threat of ***serious physical harm,*** either to the officer or to others. [136]

   Example: The typical car thief or burglar is not "dangerous," and thus cannot be stopped with deadly force. But the typical armed bank robbery suspect, and perhaps the typical rapist, is probably "dangerous" and thus may be stopped with deadly force.

4. **Arrest by private citizen:** A ***private citizen*** who is attempting to make a "citizen's arrest" may use reasonable non-deadly force. The private citizen may also use deadly force, but only in extremely limited circumstances: the citizen takes the ***full risk of a mistake.*** [136]

   Example: If it turns out that no dangerous felony was actually committed, or that the suspect was not the one who committed it, the citizen will be criminally liable for death

or injury to the suspect.

a. **More extreme view:** Some states, and the M.P.C., go further: they do not allow private citizens to use deadly force *at all* to make a citizen's arrest, even if the suspect really *has* committed a dangerous felony.

b. **Escape of non-deadly felon:** Virtually all courts agree that a private citizen, like a police officer, may not use deadly force to stop a fleeing felon if the felon poses ***no immediate threat*** to the citizen or to others. That is, the rationale of *Tennessee v. Garner* (see *supra)* presumably applies to attempted arrests by private citizens just as to attempted arrests by police officers. (Of course, this rule would be invoked only where the court rejects — as most courts do — the M.P.C.'s blanket rule that the arresting citizen may *never* use deadly force, even to arrest a felon who *is* dangerous.) [137]

C. **Prevention of escape:** An officer may use reasonable force to ***prevent the escape*** of a suspect who has already been arrested. The above rules apply in this situation as well. [137]

D. **Crime prevention:** Similarly, officers may use force to ***prevent a crime*** from taking place, or from being completed. [137]

1. **Reasonable non-deadly force:** Both law enforcement officers and private citizens may use reasonable ***non-deadly force*** to prevent the commission of a felony, or of a misdemeanor amounting to a breach of the peace. [137]

2. **Deadly force:** Deadly force may be used to prevent only ***dangerous felonies.*** [137]

VIII. MAINTAINING AUTHORITY

A. **Right to maintain authority generally:** ***Parents*** of minor children, ***school teachers,*** and other persons who have a duty of supervision, have a limited right to use force to discharge their duties. [137]

B. **Parents of minor:** Parents of a minor child may use a ***reasonable degree of force*** to guard the child's welfare. [138]

Example: A parent who hits or spanks his child will not be guilty of battery, provided

that the purpose is to promote the welfare of the child, including preventing or punishing misconduct. However, the parent loses the privilege if the degree of force is unreasonable under the circumstances.

IX. CONSENT

A. Effect of consent by victim: Generally, the fact that the victim of a crime has ***consented*** does not bar criminal liability. [138]

Example: Suppose V, who is terminally ill, consents to have D perform a mercy killing on V. This consent does not protect D from murder charges.

However, there are two major exceptions to this rule that consent does not bar criminal liability:

1. Consent as element of crime: First, some crimes are defined in such a way that lack of consent is an ***element of the crime.*** [139]

Example: Common-law rape is defined to include the element of lack of consent. Therefore, if V consents, there is automatically no crime, no matter how culpable D's mental state.

2. Consent as negating of harm: Second, for some crimes, in some courts, the fact that V has consented prevents D's conduct from constituting the ***harm*** from arising that the law is trying to prevent. [139]

a. Athletic contest: Thus if the crime involves threatened or actual ***bodily harm,*** consent is a defense if the bodily harm is ***not serious*** or is part of a lawful ***athletic contest*** or ***competitive sport.*** [139]

Example: D and V agree to a lawfully-sanctioned boxing match. D strikes V repeatedly, trying to injure V, knowing that V is already hurt. D will not be liable for battery, attempted murder, murder, or any other crime. See M.P.C. §2.11(1).

B. Incapacity to consent: Even where the crime is one as to which consent can be a defense, consent will not be found where V is too ***young,*** mentally defective, intoxicated, or for other reasons unable to give a meaningful assent. [139]

1. Fraud: Similarly, if the consent was obtained by ***fraud,*** it will generally not be valid. However, the fraud will negate the consent only where it goes to the ***essence*** of the harmful activity. [139]

C. Contributory negligence of V: The fact that V may have been ***contributorily negligent*** will not, by itself, be a defense to any crime.

[139]

> **Example:** D and V agree to drag race. D's car slams into V's, killing him. If D is prosectuted for criminally negligent homicide or voluntary manslaughter, V's consent will not be a defense, though it might give D a chance to show that V's negligence, not his own, was the sole proximate cause of the accident.

D. Guilt of V: The fact that V is himself engaged in the same or a different illegal activity will not generally prevent the person who takes advantage of him from being criminally liable. *(Example:* D and V agree to an illegal boxing match, during which V is killed. V's equal culpability will not be a defense for D.) [139]

E. Forgiveness or settlement: The fact that V forgives the injury, is unwilling to prosecute, or ***set- tles a civil suit*** against D, will ***not*** absolve D from liability. The crime is considered to be against the people, not against V as an individual. [140]

X. ENTRAPMENT

A. Entrapment generally: The defense of ***entrapment*** exists where a ***law enforcement official,*** or someone cooperating with him, has ***induced*** D to commit the crime. [140-141]

B. Two tests for entrapment: There are two distinct tests used by courts for whether there has been Y entrapment: [140-141]

1. "Predisposition" test: The majority test, and the one used in the federal system, is that entrapment exists where: (1) the government ***originates*** the crime and ***induces*** its commission; and (2) D is an ***innocent person,*** i.e., one who is ***not predisposed*** to committing this sort of crime. This is the so-called ***"predisposition"*** test. [140-141]

> **Example:** X, an undercover narcotics operative, offers to sell V heroin for V's own use. If the offer originated entirely with X, and V had never used or sought heroin, V would have a good chance at an entrapment defense, on the theory that he was an "innocent" person who was not predisposed to committing this sort of crime. But if the evidence showed that V had frequently purchased heroin from other sources, then V would not be entrapped under the "predisposition" test, even if the transaction between X and V was entirely at X's instigation.

2. "Police conduct" rule: A minority of courts apply the ***"police conduct"*** rule. Under this rule, entrapment exists where the government agents originate the crime, and their participation is such

as is likely to induce ***unpredisposed*** persons to commit the crime, regardless of whether D himself is predisposed. This test is usually easier for the defendant to meet. [141]

C. Other aspects of entrapment: [141]

1. **False representations regarding legality:** A separate kind of entrapment exists where the government agent knowingly makes a ***false representation*** that the act in question is ***legal.*** [141]

2. **Violent crimes:** Some courts refuse to allow the entrapment defense where the crime is one involving ***violence.*** [141]

3. **Distinguished from "missing element" cases:** Distinguish entrapment situations from cases where, because of the participation of government agents, an ***element*** of the crime is ***missing.*** [141]

Example: X, a government agent, suspects that D is a confidence man who swindles people out of their property. X pretends to go along with D's scheme, and gives D money which D appropriates. D is not guilty of obtaining money by false pretenses, because one of the elements of that crime is reliance on the part of the victim, and X was not really fooled.

CHAPTER 6
ATTEMPT

I. ATTEMPT — INTRODUCTION

A. Attempt generally: All states, in general, punish certain unsuccessful ***attempts*** to commit crimes. [153-154]

1. **General attempt statutes:** Nearly all prosecutions for attempt occur under ***general attempt statutes.*** That is, the typical criminal code does not specifically make it a crime to attempt murder, to attempt robbery, etc. Instead, a separate statutory section makes it a crime to attempt to commit any of the substantive crimes enumerated elsewhere in the code. [154]

B. Two requirements: For most attempt statutes, there are two principal requirements, corresponding to the *mens rea* and the *actus reus:* [155]

1. **Mental state:** First, D must have had a ***mental state*** which would have been enough to satisfy the *mens rea* requirement of the substantive crime itself. Typically, D will ***intend*** to commit the crime.

But if a mental state less than intent (e.g., recklessness) suffices for the substantive crime, there may be instances where this same less-than-intent mental state will suffice for attempted commission of that crime. This is discussed further below (p. C48).

[154]

2. **Act requirement:** Second, D must be shown to have committed some ***overt act*** in furtherance of his plan of criminality. A leading modern view, that of the M.P.C., is that the act must constitute "a ***substantial step"*** in a course of conduct planned to culminate in the commission of the crime, but only if the substantial step is ***"strongly corroborative"*** of D's criminal purpose. M.P.C. §5.01(1)(c). [154]

C. **Broader liability:** Modern courts impose attempt liability more ***broadly*** than older cases did. Two major illustrations of this broader trend are: [154]

1. **Looser act requirement:** The overt act that D needs to commit can be further away from actual completion of the crime than used to be the case. [154]

2. **Impossibility:** The defense of "legal impossibility" has been dramatically restricted. [154]

II. MENTAL STATE

A. **Intent usually required:** Generally, D will be liable for an attempt only if he ***intended*** to do acts which, if they had been carried out, would have resulted in the commission of that crime. [155-157]

Example: D hits V in the jaw, intending only to slightly injure V. Instead, V suffers serious injuries due to hemophelia, but recovers. D will not be liable for attempted murder, even though he came close to killing V; this is because D is liable for attempted murder only if he had the mental state needed for actual murder (in this case, either an intent to kill or an intent to do serious bodily injury).

1. **Specific crime:** Furthermore, D must have had an attempt to commit an act which would constitute the ***same crime*** as he is charged with attempting. [155]

Example: On the facts of the above example, it is not enough that D attempted a crime, namely battery against V. What must be shown by the prosecution is that D had the mental state needed for the very crime D is charged with attempting — murder.

2. **Knowledge of likely consequences:** Nor is it enough that D knew that certain consequences were ***highly likely*** to result from his act. [155]

   a. **"Substantially certain" results:** But if it is shown that D knew that a certain result was ***"substantially certain"*** to occur, then this may be enough to meet the intent requirement, even though D did not desire that result to occur. [155]

3. **Crimes defined by recklessness, negligence or strict liability:** Ordinarily, there can be no attempt to commit a crime defined in terms of ***recklessness*** or ***negligence*** or ***strict liability.*** [156]

   a. **Bringing about certain result:** This is clearly true as to crimes defined in terms of recklessly or negligently bringing about a ***certain result*** — there can be no attempt liability for these crimes. [156]

   Example: D gets into his car knowing that it has bad brakes, but recklessly decides to take a chance. D almost runs into V because he can't stop in time, but V dives out of the way. D will not be guilty of attempted involuntary manslaughter, because crimes defined in terms of recklessly or negligently bringing about a certain result cannot give rise to attempt liability.

   b. **Strict-liability crimes:** Where a crime is defined as bringing about a certain result regardless of the defendant's mental state — i.e., the crime is a ***strict-liability crime*** — the prevailing view is that D ***won't*** be guilty of attempting that crime unless he ***attempted to bring about the forbidden result.*** [156]

   Example: It's a crime in the jurisdiction to sell "adulterated" (impure) milk even though the seller doesn't know that the milk is adulterated. V selects a bottle of milk from a shelf in D's convenience store and brings it to D at the checkout counter, where D rings it up. But V suspects the milk is bad, and refuses to complete the transaction. The milk is in fact adulterated (something D didn't know).

   D will not be convicted of an attempt to sell adulterated milk, because he did not attempt to bring about the forbidden result (selling milk that was adulterated).

4. **Intent as to surrounding circumstances:** It is probably ***not*** necessary that D's intent encompass all of the ***surrounding circumstances*** that are elements of the crime. [157]

Example: A federal statute makes it a federal crime to kill an FBI agent. Case law demonstrates that for the completed crime, it is enough that the defendant was reckless

or even negligent with respect to the victim's identity. D tries to shoot V (an FBI agent) to death, but his shot misses; D recklessly disregarded the chance that V might be an FBI agent. Probably D may be found guilty of attempted killing of an FBI agent.

III. THE ACT — ATTEMPT VS. "MERE PREPARATION"

A. The problem: All courts agree that D cannot be convicted of attempt merely for thinking evil thoughts, or plotting in his mind to commit a crime. Thus all courts agree that D must have committed some ***"overt act"*** in furtherance of his plan of ciminality. But courts disagree about what sort of act will suffice. In general, modern courts hold that D must come much ***less close to success*** than older courts required. [158]

B. Various approaches: There are two main approaches which courts use to decide whether D's act p was sufficient, the "proximity" approach and the "equivocality" approach. [158-162]

1. The "proximity" approach: Most courts have based their decision on ***how close D came to completing the offense.*** This is the ***"proximity"*** approach. In general, older decisions required L D to come very close to success — thus older decisions frequently require D to achieve a ***"dangerous proximity to success."*** But modern courts tend to require merely that D take a ***"substantial step"*** towards carrying out his criminal plan. [158-160]

2. The "equivocality" approach: Other courts follow a completely different approach, concentrating not on how close D came to success, but on whether D's conduct ***unequivocally manifested his criminal intent.*** Under this ***"equivocality"*** approach, if D's conduct could indicate either a non-criminal intent or a criminal one, it is not sufficient — but if it does unequivocally manifest criminal intent, it suffices even though completion of the plan is many steps away. [160]

a. Confession excluded: Under the "equivocality" test, any ***confession*** by D, made either to police or to other persons, is usually ***not to be considered*** in determining whether D's acts were unequivocally criminal in intent. [160]

3. M.P.C.'s "substantial step" test: The M.P.C. incorporates aspects of both the "proximity" test and the "equivocality" test. But the incorporated aspects of each test are relatively unstringent in the

M.P.C. approach, so that almost any conduct meeting any of the variations of ***either*** of these tests would be sufficient under the Code. Under the M.P.C., conduct meets the act requirement if, under the circumstances as D believes them to be: (1) there occurs "an act or omission constituting a ***substantial step*** in a course of conduct planned to culminate in [D's] commission of the crime"; and (2) the act is ***"strongly corroborative"*** of the actor's criminal purpose. [160-162]

a. Illustrations: Here are some illustrations of conduct that would suffice as overt acts under the M.P.C.'s "substantial step" approach: [161-162]

i. ***Lying in wait, searching*** for or ***following*** the contemplated victim of the crime. [161]

ii. ***Enticing*** or seeking to entice the contemplated victim to ***go to the*** place contemplated for its commission. [161]

iii. ***Reconnoitering*** the place contemplated for commission of the crime. *(Example:* D is caught while hiding in the bushes observing V's residence, while V is away from home. This "casing the joint" will probably suffice.) [162]

iv. Unlawful ***entry*** of a structure, vehicle or enclosure where the crime is to be committed. [162]

v. ***Possession of materials*** to be employed in the commission of the crime, if the materials are ***specially designed*** for such unlawful use or can serve no lawful purpose of D under the circumstances. *(Example:* D is stopped on the street at night and is found to be in possession of lock-picking tools. Probably he can be convicted of attempted burglary.) [162]

b. Followed in many states: The M.P.C.'s "substantial step" test is a popular one. About half the states, and two-thirds of the federal circuits, now use something like this test. [162]

IV. IMPOSSIBILITY

A. Nature of "impossibility" defense: The ***"impossibility"*** defense is raised where D has done everything in his power to accomplish the

result he desires, but, due to external circumstances, no substantive crime has been committed. Most variants of the defense are ***unsuccessful*** today, but it is still important to be able to recognize situations where the defense might plausibly be raised. Here are some examples: [163]

> **Example 1:** D, a would-be pickpocket, reaches into V's pocket, but discovers that it is empty.
>
> **Example 2:** D, a would-be rapist, achieves penetration of V, but discovers that V is a corpse, not a living woman.
>
> **Example 3:** D buys a substance from V, thinking that it is heroin. In fact, the substance is sugar, because V is an undercover narcotics operative.
>
> **Note:** In these three examples, a modern court would almost certainly hold that D is ***liable*** for attempt (to commit the substantive crime of larceny, rape and narcotics possession, respectively).

B. Factual impossibility: A claim of ***factual*** impossibility arises out of D's mistake concerning an issue of fact. D in effect says, "I made a mistake of fact. Had the facts been as I believed them to be, there would have been a crime. But under the true facts, my attempt to commit a crime could not possibly have succeeded." [163-164]

1. Not accepted: The defense of factual impossibility is ***rejected*** by all modern courts. Impossibility is ***no defense*** in those cases where, ***had the facts been as D believed them to be, there would have been a crime.*** Thus D is guilty of an attempt (and his "factual impossibility" defense will fail) in all of the following examples: [163]

> **Example 1:** D points his gun at A, and pulls the trigger. The gun does not fire because, unbeknownst to D, it is not loaded.
>
> **Example 2:** D intends to rape X, but is unable to do so because he is impotent.
>
> **Example 3:** D is a "con man" who tries to get X to entrust money to him, which D intends to steal. Unbeknownst to D, X is a plainclothes police officer who is not fooled.
>
> **Example 4:** D attempts to poison X with a substance D believes is arsenic, but which is in fact harmless.

C. "True legal" impossibility: A different sort of defense arises where D is mistaken about ***how an offense is defined.*** That is, D engages in conduct which he believes is forbidden by a statute, but D has

misunderstood the meaning of the statute. Here, D will be ***acquitted*** — the defense of "true legal" impossibility is a successful one. You can recognize the situation giving rise to the "true legal" impossibility defense by looking for situations where, ***even had the facts been as D supposed them to be,*** no crime would have been committed. [164]

Example 1: D obtains a check for $2.50. He alters the numerals in the upper right hand corner, changing them to "12.50." But D does not change the written-out portion of the check, which remains "two and 50/100 dollars." Because the crime of forgery is defined as the material alteration of an instrument, and the numerals are considered an immaterial part of a check (the amount written out in words controls), D will be acquitted of attempted forgery. *[Wilson v. State* (1905)]

Example 2: D is questioned by X, a police officer, during a criminal investigation. D lies, while believing that lying to the police constitutes perjury. D cannot be convicted of attempted perjury, because the act he was performing (and in fact the act he thought he was performing) is simply not a violation of the perjury statute.

Note: The defense of "true legal impossibility" is the flip side of the rule that "mistake of law g is no excuse." Just as D cannot defend on the grounds that he did not know that his acts were prohibited, so D will be acquitted where he commits an act that he thinks is forbidden but that is not forbidden.

D. Mistake of fact governing legal relationship (the "hybrid" case): There is a third category, involving a ***mistake of fact*** that ***bears upon legal relationships,*** sometimes called the situation of ***"hybrid"*** impossibility. In this situation, D understands what the statute prohibits, but mistakenly believes that the facts bring his situation within the statute. Here, in the vast majority of states D will be ***convicted*** of attempt. This is because ***had the facts been as D supposed them to be, his conduct would have been a crime.*** [164-168]

Example 1: D buys goods which he believes are stolen. In fact, the goods are police "bait," and D has been tricked by the seller, an undercover police officer, into thinking that they are stolen. D is guilty of attempted possession of stolen property.

Example 2: D has intercourse with X, who he believes is in an unconscious drunken stupor. In fact, X is already dead at the time of intercourse. D is guilty of attempted rape, since had the facts been as he supposed them to be, his conduct would have been a crime.

Example 3: D meets V on the Internet, and sends a photo of genitalia to her. D thinks that V is 16, and thus a minor. In fact, D is an adult undercover agent for the police. Most courts would not allow D to claim impossibility to avoid a charge of attempted distribution of obscene material to a minor, since had the facts been as D supposed, V was a minor and the completed crime would have occurred. [Cf. *People v. Thousand* (2001)]

Note: The majority approach to all three categories — "factual" impossibility, "true legal impossibility" and "factual mistake bearing on legal relationship" — can be explained with one principle. Ask, "Would D's conduct have been criminal had the facts been as D supposed them to be?" For the "true legal impossibility" situation, the answer is "no." For the other two situations, the answer is "yes," so D is guilty of attempt in just the latter two situations.

E. "Inherent" impossibility (ineptness and superstition): If D's act is, to a reasonable observer, so ***farfetched*** that it had ***no probability of success,*** D may be able to successfully assert the defense of ***"inherent impossibility."*** [168]

1. Courts split: Courts are ***split*** about whether to recognize a defense of "inherent impossibility." The M.P.C. authorizes a ***conviction*** in such cases, but also allows conviction of a lesser grade or degree, or in extreme circumstances even a dismissal, if the conduct charged "is so inherently unlikely to result or culminate in a commission of a crime that neither such conduct nor the actor presents a public danger...." [168]

Example: D, a Haitian witch doctor, immigrates to the U.S. and continues practicing voodoo. A police officer sees D sticking pins in a doll representing V, in an attempt to kill V. D is charged with attempted murder of V. A court might conclude that D's conduct was so inherently unlikely to kill V (and that D himself was so unlikely to commit the substantive crime of murder or to make a more "serious" attempt to kill V) that D should be acquitted, or convicted of a lesser crime such as attempted battery.

V. RENUNCIATION

A. Defense generally accepted: Where D is charged with an attempted crime, most courts accept the defense of ***renunciation.*** To establish this defense, D must show that he ***voluntarily abandoned*** his attempt before completion of the substantive crime. [169]

Example: D decides to shoot V when V comes out of V's house. D carries a loaded gun, and waits in the bushes outside V's house. Five minutes before he expects V to come out, D decides that he doesn't really want to kill V at all. D returns home, and is arrested and charged with attempted murder. All courts would acquit D in this circumstance, because he voluntarily abandoned his plan before completing it (even though the abandonment came after D took sufficient overt acts that he could have been arrested for an attempt right before the renunciation).

B. Voluntariness: All courts accepting the defense of abandonment require that the abandonment be ***"voluntary."*** [170-171]

1. **Threat of imminent apprehension:** Thus if D, at the last moment, learns facts causing him to believe that he will be ***caught*** if he goes through with his plan, the abandonment will generally not be deemed voluntary. [170]

Example: On the facts of the above example, just before V is scheduled to come out of his house, D spots a police officer on the sidewalk near D. D's abandonment has been motivated by the fear of imminent apprehension, so his abandonment will not be deemed voluntary, and D can be convicted of attempted murder.

2. **Generalized fear:** On the other hand, if D abandons because of a ***generalized*** fear of apprehension, not linked to any ***particular*** threat or event, his abandonment will probably be deemed voluntary. [170]

Example: On the facts of the above two examples, suppose that D's decision to abandon is motivated not by the appearance of a police officer, but by D's sudden thought, "If I get caught, I'll go to prison for life." D's abandonment will probably be treated as voluntary, and will be a bar to his prosecution for attempt.

3. **Other special circumstances:** [170-171]

a. **Postponement:** If D merely ***postpones*** his plan, because the scheduled time proves less advantageous than he thought it would be, this does ***not*** constitute a voluntary abandonment. [170]

b. **Dissuasion by victim:** Similarly, if D's renunciation is the result of ***dissuasion by the victim,*** it will probably be deemed involuntary. [171]

Example: D decides to rob V, a pedestrian, on a secluded street at night. D says, "Your money or your life," and brandishes a knife at V. V pulls out his own switchblade and says, "If you come any closer, I'll carve you up." D turns around and walks away. D's abandonment will almost certainly be found to be involuntary, because it was motivated by the victim's conduct. Therefore, D can be convicted of attempted robbery.

VI. ATTEMPT-LIKE CRIMES

A. Problem generally: Some ***substantive*** crimes punish incompleted or "inchoate" behavior. If D intends to commit acts which, if completed, would constitute one of these inchoate crimes, D may raise the defense that he cannot be convicted of "an attempt to commit a crime which is itself an attempt." [171-172]

1. **Occasionally successful:** Very occasionally, defendants have

succeeded with this defense. [172]

Example: D, who is very weak, throws a rock at V, a police officer, but his arm is not strong enough to get the rock even close to V. One type of "assault" defined by statute in the jurisdiction is "an attempt to commit battery by one having present ability to do so." D is charged with "attempted assault." A court might hold that D should not be convicted, because the crime of assault (of the attempted-battery type) is intended to cover near-battery, and the crime here is effectively near-near-battery. But most courts would probably reject this defense and would convict D on these facts.

VII. MECHANICS OF TRIAL; PUNISHMENT

A. Relation between charge and conviction: Complications arise where D is: (1) charged with a completed substantive crime, but shown at trial to be guilty of at most an attempt; or (2) charged with attempt, but shown at trial to have committed the underlying substantive crime. [172]

1. **Substantive crime charged, attempt proved:** If D is charged with a completed crime but shown to have committed only an attempt, the courts agree that D ***may be convicted of attempt.*** The attempt is said to be a "lesser included offense." [173]

2. **Attempt charged, completed crime proved:** Conversely, if D is charged with an attempt and is shown at trial to have committed the underlying complete crime, D may normally be ***convicted of attempt.*** (But the attempt statute may be drafted so as to make failure an element of attempt; if so, D will escape liability.) [173]

CHAPTER 7
CONSPIRACY

I. INTRODUCTION

A. Definition of "conspiracy": The common-law crime of ***conspiracy*** is defined as ***an agreement between two or more persons to do either an unlawful act or a lawful act by unlawful means.*** At common law, the prosecution must show the following: [181]

1. **Agreement:** An ***agreement*** between two or more persons; [181]

2. **Objective:** To carry out an act which is either ***unlawful*** or which is lawful but to be accomplished by ***unlawful means;*** and [181]

3. ***Mens rea:*** A ***culpable intent*** on the part of the defendant. [181]

B. Procedural advantages: The prosecution gets a number of ***procedural*** advantages in a conspiracy case. [182] The two most important are:

1. **Joint trial:** Joinder laws generally let the prosecution try in a ***single proceeding*** all persons indicted on a single conspiracy charge. [182]

2. **Admission of hearsay:** Statements made by any member of the conspiracy can generally be admitted against all, without constraint from the ***hearsay*** rule. ***Any previous incriminating statement by any member of the conspiracy, if made in furtherance of the conspiracy, may be introduced into evidence against all of the conspirators.*** See FRE 801(d)(2)(E). [182]

   Example: D1, D2 and D3 are charged with conspiracy to rob a bank. D1, the mastermind, tries to recruit X, an arms supplier, into the conspiracy, by telling X that D3 is also part of the conspiracy. X refuses to join the conspiracy. At the Ds' trial for conspiracy, X testifies as to D1's statements about D3's participation. This testimony will be admitted against D3 for the substantive purpose of showing that D3 was part of the conspiracy. This will be true even though the statement by D1 is hearsay as to D3.

   a. **Hearsay considered in determining admissibility:** In the federal system, and in many states, the judge may determine the admissibility of hearsay ***without respect to the rules of evidence.*** This means that the incriminating statement by a member of the alleged conspiracy ***may itself be considered*** in determining whether the conspiracy has been sufficiently documented that the hearsay should be admissible against the defendant. [182]

II. THE AGREEMENT

A. "Meeting of the minds" not required: The essence of a conspiracy is an ***agreement*** for the joint pursuit of unlawful ends. However, no true "meeting of the minds" is necessary — all that is needed is that the parties communicate to each other in some way their intention to pursue a joint objective. [182-183]

1. **Implied agreement:** Thus words are not necessary — each party may, by his ***actions alone,*** make it clear to the other that they will pursue a common objective. [183]

   Example: A is in the process of mugging V on the street, when B comes along. B pins V to the ground, while A takes his wallet. A conspiracy to commit robbery could be found on these facts, even though there was no spoken communication between A and B.

2. **Proof by circumstantial evidence:** The prosecution may prove agreement by mere ***circumstantial evidence.*** That is, the prosecution can show that the parties committed acts in circumstances strongly suggesting that there ***must*** have been a ***common plan.*** [183]

Example: V, a politician, is riding in a motorcade down a crowded city street. A and B both simultaneously shoot at V. The fact that both people shot simultaneously would be strong, and admissible, evidence that A and B had agreed to jointly attempt to kill V, and would thus support prosecution of the two for conspiracy to commit murder.

B. Aiding and abetting: Suppose that A and B conspire to commit a crime (let's call the crime "X"). C then "aids and abets" A and B in the commission of crime X, but never reaches explicit agreement with A and B that he is helping them. It is clear that C will be liable for X if A and B actually commit X. But if A and B never commit X, courts are ***split*** about whether C, as a mere aider and abetter, is also liable for conspiracy to commit X. The M.P.C. holds that a person does ***not*** become a co-conspirator merely by aiding and abetting the conspirators, if he himself does not reach agreement with them. [183]

Example: D knows that A and B plan to kill X. D, without making any agreement with A and B, prevents a telegram of warning from reaching X. If X is thus unable to flee, and A and B kill X, it is clear that D is liable for the substantive crime of murder, since he aided and abetted A and B in carrying out the murder. But if X escapes, so there is no substantive crime of murder to be charged, can D be convicted of conspiracy to commit murder? Courts are split. The M.P.C. would acquit D on these facts, since under the M.P.C. an aider and abetter is not liable for the conspiracy if he did not reach any agreement with the conspirators.

C. Parties don't agree to commit object crime: Although there must be an agreement, it is not necessary that each conspirator agree to commit the ***substantive object crime(s).*** A particular D can be a conspirator even though he agreed to help only in the ***planning stages.*** *(Example:* D1, D2 and D3 work together to commit a bank robbery. D3's only participation is to agree to obtain the getaway car, not to participate in the bank robbery itself. D3 is still guilty of conspiracy to commit bank robbery.) [184]

D. Feigned agreement: Courts disagree about the proper result where one of the parties to a "conspiracy" is merely ***feigning*** his agreement. The problem typically arises where one of the parties is secretly an ***undercover agent.*** [184]

Example: A and B agree that they will rob a bank. B is secretly an undercover agent, and never has any intention of committing the robbery. In fact, B makes sure that the FBI is present at the bank, and A is arrested when he and B show up. Courts disagree about whether the requisite "agreement" between A and B took place, and thus about whether A can be prosecuted for conspiracy to commit bank robbery.

1. **Traditional view that there is no conspiracy:** The traditional, common-law view is that there is ***no agreement,*** and therefore ***no conspiracy.*** Thus on the facts of the above example, A could not be charged with conspiracy to commit bank robbery. This traditional view is sometimes called the ***"bilateral"*** view, in the sense that the agreement must be a bilateral one if either party is to be bound. [184]

2. **Modern view allows conspiracy finding:** But the modern view is that regardless of one party's lack of subjective intent to carry out the object crime, ***the other party may nonetheless be convicted of conspiracy.*** [184]

   a. **Model Penal Code agrees:** The Model Penal Code agrees with the modern view. The Code follows a ***"unilateral"*** approach to conspiracy — a given individual is liable for conspiracy if he "agrees with another person or persons," whether or not the other person is really part of the plan. Thus under the M.P.C., A in the above example has clearly agreed to rob the bank (even though B has not truly agreed), and A can therefore be prosecuted for conspiracy. [185]

III. *MENS REA*

A. Intent to commit object crime:

A. Intent to commit object crime: Normally, the conspirators must be shown to have agreed to commit a crime. It is then universally held that each of the conspirators must be shown to have had ***at least the mental state required for the object crime.*** [185-189]

Example: A and B are caught trying to break into a dwelling at night. The prosecution shows only that A and B agreed to attempt to break and enter the dwelling, and does not show anything about what A and B intended to do once they were inside. A and B cannot be convicted of conspiracy to commit burglary, because there has been no showing that they had the intent necessary for the substantive crime of burglary, i.e., it has not been shown that they had the intent to commit any felony once they got inside.

1. **Must have intent to achieve objective:** Also, where the substantive crime is defined in terms of causing a ***harmful result,*** for conspiracy

to commit that crime the conspirators must be shown to have ***intended to bring about that result.*** This is true even though the intent is not necessary for conviction of the substantive crime. [186]

Example: A and B plan to blow up a building by exploding a bomb. They know there are people in the building who are highly likely to be killed. If the bomb goes off and kills X, A and B are guilty of murder even though they did not intend to kill X (because one form of murder is the "depraved heart" or "reckless indifference to the value of human life" kind). But A and B are ***not*** guilty of conspiracy to murder X, because they did not have an affirmative intent to bring about X's death.

2. **Crime of recklessness or negligence:** It's probably also the case that there can be no conspiracy to commit a crime that is defined in terms of recklessly or negligently causing a particular result. [186]

3. **Attendant circumstances:** But where the substantive crime contains some elements relating to the ***attendant circumstances*** surrounding the crime, and strict liability applies to those attendant circumstances, then two people ***can*** be convicted of conspiracy even though they had no knowledge or intent regarding the surrounding circumstances. [186-187]

   a. **Federal jurisdiction:** Elements relating to ***federal jurisdiction*** illustrate this problem. Even if the Ds are shown not to have been aware that the elements of federal jurisdiction were present, they can still be held liable for conspiracy to commit the underlying federal crime. [186]

   Example: It is a federal crime to assault a federal officer engaged in the performance of his duties. Cases on this crime hold that the defendant need not be shown to have been aware that his victim was a federal officer. D1 and D2 orally agree to attack V, thinking he is a rival drug dealer. In fact, V is a federal officer. D1 and D2 can be convicted of conspiracy to assault a federal officer, because V's status as such was merely an attendant circumstance, as to which intent need not be shown. *[U.S. v. Feola* (1975)]

B. **Supplying of goods and services:** The Ds must be shown to have ***intended*** to further a criminal objective. It is not generally enough that a particular D merely ***knew*** that his acts might tend to enable others to pursue criminal ends. The issue arises most often where D is charged with conspiracy because he ***supplied goods or services*** to others who committed or planned to commit a substantive crime. [187-188]

1. **Mere knowledge not sufficient:** It is ***not*** enough for the prosecution

to show that D supplied goods or services with ***knowledge*** that his supplies might enable others to pursue a criminal objective. Instead, the supplier must be shown to have ***desired*** to further the criminal objective. On the other hand, this desire or intent can be shown by ***circumstantial*** evidence. [187-188]

a. "Stake in venture": For instance, the requisite desire to further the criminal objective can be shown circumstantially by the fact that the supplier in some sense acquired a ***"stake in the venture."*** [187]

Example: D and S agree that if S supplies D with equipment to make an illegal still, D will pay S 10% of the profits S makes from his illegal liquor operations. S will be held to have had such a stake in the venture that the jury may infer that he desired to bring about the illegal act of operating his still.

b. Controlled commodities: The supplier is more likely to be found to be a participant in a conspiracy if the substance he sold was a ***governmentally controlled*** one that could only have been used for illegal purposes. *(Example:* S supplies the Ds with horse-racing information of benefit only to bookmakers, in a state where bookmaking is illegal.) [188]

c. Inflated charges: The fact that the supplier is charging his criminal purchasers an ***inflated price*** compared with the cost of the items if sold for legal purposes, is evidence of **e.**intent. [188]

d. Large proportion of sales: If sales to criminal purchasers represent a ***large portion*** of the supplier's overall sales of the item, the supplier is more likely to be held to have had the requisite intent. [188]

e. Serious crime: The more ***serious*** the crime, the more likely it is that the supplier's participation will be found to be part of the conspiracy. [188]

IV. THE CONSPIRATORIAL OBJECTIVE

A. Non-criminal objective: Traditionally, and in England, the Ds could be convicted of conspiracy upon proof that they intended to commit acts that were ***"immoral"*** or "contrary to the public interest." In other words, the fact that the act or ultimate object was not explicitly criminal was not an automatic defense. [189-190]

1. **Modern American view rejects:** But the modern American tendency is to allow a conspiracy conviction ***only*** if the Ds intended to perform an act that is ***explicitly criminal.*** Thus the M.P.C. allows a conspiracy only where the defendants intend to commit a crime. [190]

   Example: D1 collaborates with various prostitutes, with the intention of publishing a directory of prostitutes. Under the traditional/English view, D1 and the prostitutes can be convicted of conspiracy to "corrupt public morals," even though actual publication of the directory would not itself have been a crime. But under the modern American view, there could be no conspiracy here, since no act was intended which would have been criminal. *[Shaw v. Dir. Pub. Prosec.* (Eng. 1961)]

B. **The "overt act" requirement:** At common law, the crime of conspiracy is ***complete as soon as the agreement has been made.*** But about half the states have statutes requiring, in addition, that some ***overt act*** in furtherance of the conspiracy must also be committed. [190]

1. **M.P.C. limits requirement:** The M.P.C. limits the overt act requirement to ***non-serious crimes.*** Under the M.P.C., a conspiracy to commit a felony of the first or second degree may be proved even without an overt act. [190]

2. **Kind of act required:** The overt act, where required, may be ***any act*** which is taken in furtherance of the conspiracy. It does ***not*** have to be an act that is ***criminal in itself.*** Thus acts of ***mere preparation*** will be sufficient. *(Example:* If the conspiracy is to make moonshine liquor, purchase of sugar from a grocery store would meet the overt act requirement.) [190]

3. **Act of one attributable to all:** Even in states requiring an overt act, it is not necessary that each D charged with the conspiracy be shown to have committed an overt act. Instead, if the overt act requirement applies, the overt act of a ***single person*** will be ***attributable to all.*** [190]

   a. **Alibi for underlying crime irrelevant:** This means that even in a state requiring an overt act, a defendant who has a perfect ***alibi*** (e.g., he's in jail or out of the country) when another conspirator's overt act occurs, ***won't benefit*** — once a given defendant agrees to the conspiratorial objective with some other person, the defendant's liability is complete. [191]

Example: On Friday, D1 and D2 agree to rob the First National Bank of Ames the following Tuesday. Assume the jurisdiction requires an overt act for conspiracy. D1 gets arrested on Saturday, and remains in jail. On Tuesday, D2 robs the bank himself. D1 (and D2) can be convicted of conspiracy to rob the Bank — the fact that only D2 committed any overt act in furtherance of the conspiracy is irrelevant, because D2's overt act will be attributed to D1. (And notice that at *common law* the conspiracy would have been complete the second D1 and D2 reached their agreement, so that no overt act by *either* was required.)

C. Impossibility: The same rules concerning ***"impossibility"*** apply in conspiracy as in attempt. [191] For instance, the defense of ***"factual impossibility"*** is always rejected. *(Example:* D1 and D2 agree to pick the pocket of a certain victim. The pocket turns out to be empty. The Ds are liable for conspiracy to commit larceny.) [191]

D. Substantive liability for crimes of other conspirators: The most frequently-tested aspect of conspiracy law relates to a member's liability for the ***substantive crimes*** committed by other members of the conspiracy. This subject is complicated, and requires close analysis. [191-192]

1. Aiding and abetting: Normally, each conspirator ***"aids and abets"*** the others in furtherance of the aims of the conspiracy. Where this is the case, a D who has aided and abetted one of the others in accomplishing a particular substantive crime will be liable for that substantive crime — this is not a result having anything to do with conspiracy law, but is instead merely a product of the general rules about accomplice liability (discussed *infra*, p. C-63). [191-192]

Example: A and B agree to a scheme whereby A will steal a car, pick B up in it, and wait outside the First National Bank while B goes in and robs the teller. A steals the car, picks up B, and delivers B to the bank. Before B can even rob the teller, A is arrested out on the street. B robs the teller anyway. A is clearly liable for the substantive crime of bank robbery, because he has "aided and abetted" B in carrying out this crime. It is also true that A and B are guilty of conspiracy to commit bank robbery, but this fact is not necessary to a finding that A is liable for B's substantive crime — aiding and abetting is all that is required for A to be liable for bank robbery.

2. Substantive liability without "aiding and abetting": The more difficult question arises where A and B conspire to commit crime X, and B commits ***additional crimes*** "in furtherance" of the conspiracy, but without the direct assistance of A. Does A, by his ***mere membership*** in the conspiracy, become liable for these additional

crimes by B in furtherance of the conspiracy? [191-192]

a. Traditional view: The traditional "common-law" view is that each member of a conspiracy, by virtue of his ***membership alone,*** is likely for reasonably foreseeable crimes committed by the others in ***"furtherance"*** of the conspiracy. [191]

Example: Same basic fact pattern as prior example. Now, however, assume that A knows that B is carrying a gun into the bank, and A also knows that B would rather shoot anyone attempting to stop him than go to prison. However, A has done nothing to help B get the gun, and has not encouraged B to use the gun. B goes into the bank, and shoots V, a guard, while V is trying to capture B. V is seriously wounded. Under the traditional view, if B is liable for assault with a deadly weapon, A will be liable also, merely because he was a p member of a conspiracy, and the crime was committed by another member in furtherance of the aims of the conspiracy (robbery with successful escape).

b. Modern/M.P.C. view: But modern courts, and the M.P.C., are ***less likely to hold that mere membership in the conspiracy,*** without anything more, automatically makes each member liable for substantive crimes committed by any other member in furtherance of the conspiracy. [192]

Example: Same facts as above example. Assuming that A in no way encouraged or helped B to use his gun, a modern court might not hold A substantively liable for the assault on V, despite the fact that it was done in furtherance of the conspiracy.

V. SCOPE: MULTIPLE PARTIES

a

A. Not all parties know each other: When not all parties ***know*** each other, you may have to decide whether there was one large conspiracy or a series of smaller ones. [192]

B. "Wheel" conspiracies: In a ***"wheel"*** or ***"circle"*** conspiracy, a "ring leader" participates with each of the conspirators, but these conspirators deal only with the ring leader, not with each other.

[193]

1. "Community of interest" test: In the "wheel" situation, there can either be a single large conspiracy covering the entire wheel, or a series of smaller conspiracies, each involving the "hub" (the ring leader) and a single spoke (an individual who works with the ring

leader). There will be a single conspiracy only if two requirements are met: (1) each spoke ***knows that the other spokes exist*** (though not necessarily the identity of each other spoke); and (2) the various spokes have, and realize that they have, a ***"community of interest."*** [193]

C. "Chain" conspiracies: In a ***"chain"*** conspiracy, there is a distribution chain of a commodity (usually ***drugs).*** As with "wheel" conspiracies, the main determinant of whether there is a single or multiple conspiracies is whether all the participants have a "community of interest." [194]

> **Example:** A group of smugglers import illegal drugs; they sell the drugs to middlemen, who distribute them to retailers, who sell them to addicts. If all members of the conspiracy knew of each other's existence, and regarded themselves as being engaged in a single distribution venture, then a court might hold that there was a single conspiracy. Otherwise, there might be merely individual conspiracies, one involving smugglers and middlemen, another involving middlemen and retailers, etc.

D. Party who comes late or leaves early: Special problems arise as to a conspirator who ***enters*** the conspiracy ***after*** it has begun, or ***leaves it before*** it is finished. [195]

1. **Party comes late:** One who enters a conspiracy that has ***already committed substantive acts*** will be a conspirator as to those acts only if he is not only told about them, but ***accepts them*** as part of the general scheme in which he is participating. [195]

   Example: D is a fence who buys from A and B, two jewelry thieves. D is clearly conspiring to receive stolen property. But he will normally *not* be a conspirator to the original crime of theft, unless he somehow involved himself in that venture, as by making the request for particular items in advance.

2. **Party who leaves early:** One who ***leaves*** a conspiracy before it is finished is liable for acts that occur later only if those acts are ***fairly within the confines of the conspiracy as it existed*** at the time D was still present. [195]

   Example: D agrees to help A and B rob a bank; D is to procure the transportation, and to deliver it to A. D steals a car and delivers it to A, then leaves the conspiracy. D is guilty of conspiring to rob the bank even though he does nothing further, since the bank robbery is part of the original agreement. But if A and B, totally unbeknownst to D, decided after D left the conspiracy that they wished to use the car to rob a grocery store, D would not be guilty of conspiracy to rob the grocery store.

VI. DURATION OF THE CONSPIRACY

A. Why it matters: You may have to determine the ***ending point*** of a conspiracy. Here are some issues on which the ending point may make a difference: [195]

1. Who has joined: A person can be held to have ***joined*** the conspiracy only if it still existed at the time he got involved in it; [195]

2. Statute of limitations: The ***statute of limitations*** on conspiracy does not start to run until the conspiracy has ended; and [195]

3. Statements by co-defendants: Declarations of co-conspirators may be admissible against each other, despite the hearsay rule, but only if those declarations were made in furtherance of the conspiracy while it was still in progress. [195]

B. Abandonment: A conspiracy will come to an end if it is ***abandoned*** by the participants. [196-198]

1. Abandoned by all: If ***all*** the parties abandon the plan, this will be enough to end the conspiracy (and thus, for instance, to start the statute of limitations running). [196]

a. No defense to conspiracy charge: But abandonment does ***not*** serve as a defense to the ***conspiracy charge itself.*** Under the common-law approach, the conspiracy is ***complete as soon as the agreement is made.*** Therefore, abandonment is irrelevant. [196]

Example: A and B, while in their prison cell, decide to rob the first national bank the Tuesday after they are released. Before they are even released, they decide not to go through with the plan. However, X, to whom they previously confided their plans, turns them into the authorities. A and B are liable for conspiracy to commit bank robbery, even though they abandoned the plan — their crime of conspiracy was complete as soon as they made their agreement, and their subsequent abandonment did not, at common law, change the result.

2. Withdrawal by individual conspirator: A similar rule applies to the ***withdrawal*** by an ***individual conspirator.*** [196]

a. Procedural issues: Thus for ***procedural*** purposes, D's withdrawal ends the conspiracy as to him. So long as D has made an ***affirmative act*** bringing home the fact of his withdrawal to his confederates, the conspiracy is over as to him, for purposes of: (1)

running of the statute of limitations; (2) inadmissibility of declarations by other conspirators after he left; or (3) non-liability for the substantive crimes committed by the others after his departure. (Instead of notifying each of the other conspirators, the person withdrawing can instead notify the police.) [196]

b. As defense to conspiracy charge: But if D tries to show withdrawal as a ***substantive defense*** against the conspiracy charge itself, he will fail: the common-law rule is that ***no act of withdrawal,*** even thwarting the conspiracy by turning others into the police, will be a defense. This comes from the principle that the crime is ***complete*** once the agreement has been made. [197]

i. More liberal Model Penal Code view: But the M.P.C. relaxes the common-law rule E a bit. The M.P.C. allows a limited defense of ***"renunciation of criminal purpose."*** D can avoid liability for the conspiracy itself if: (1) his renunciation was ***voluntary;*** and (2) he ***thwarted*** the conspiracy, typically by ***informing the police.*** (Good faith efforts U by D to thwart the conspiracy, which fail for reasons beyond D's control, such as M police inefficiency, are ***not*** enough, even under the liberal M.P.C. view.) [197] M

VII. PLURALITY

A. Significance of the plurality requirement: A conspiracy necessarily involves ***two or more*** persons. This is called the ***"plurality"*** requirement. [198]

B. Wharton's Rule: Under the common-law ***Wharton's Rule,*** where a substantive offense is defined so as to necessarily require more than one person, a prosecution for the substantive offense must be brought, rather than a conspiracy prosecution. The classic examples are ***adultery, incest, bigamy*** and ***dueling*** crimes. [198-200]

> **Example:** Howard and Wanda are husband and wife. Marsha is a single woman. Howard and Marsha agree to meet later one night at a specified motel, to have sex. They are arrested before the rendezvous can take place. Since the crime of adultery is defined so as to require at least two people, Howard and Marsha cannot be convicted of conspiracy to commit adultery, under the common law Wharton's Rule.

1. More persons than necessary: A key ***exception*** to Wharton's Rule is

that there is no bar to a conspiracy conviction where there were ***more participants*** than were logically necessary to complete the crime. [199]

Example: Same facts as above example. Now, however, assume that Steve, Howard's friend, has urged him to have sex with Marsha, and has reserved the hotel room for them. Despite Wharton's Rule, Howard, Marsha and Steve can all be prosecuted for conspiracy, because there were more persons involved than merely the two necessary direct parties to the substantive crime of adultery.

2. Sometimes only a presumption: Modern courts, including the federal system, frequently hold that Wharton's Rule is not an inflexible rule but merely a ***presumption*** about what the legislature intended. Under courts following this approach, if the legislative history behind the substantive crime is silent about whether the legislature intended to bar conspiracy convictions, a conspiracy charge is allowed. [199]

Example: A federal act makes it a federal crime for five or more persons to conduct a gambling business prohibited by state law. The five Ds are charged with conspiracy to violate this federal act. *Held,* the legislative history behind the federal act shows no congressional intent to merge conspiracy charges into the substantive crime, so a conspiracy charge is valid here. *[Iannelli v. U.S.* (1975)]

3. Model Penal Code rejects Rule: The Model Penal Code almost completely ***rejects*** Wharton's Rule. [200]

a. No conviction for conspiracy and substantive offense: However, the Code does provide that one may not be convicted of ***both*** a substantive crime and a conspiracy to commit that crime. (By contrast, most states ***allow*** this sort of ***"cumulative"*** punishment scheme, as long as the situation is not the classic Wharton's Rule scenario where only the parties logically necessary for the completed crime have been charged.) [200]

C. Statutory purpose not to punish one party: The court will not convict a party of conspiracy where it finds that the legislature intended not to punish such a party for the ***substantive*** crime. Typically, this situation arises where the legislature that defined the substantive crime recognized that two parties were necessarily involved, but chose to punish only one of those parties as being the "more guilty" one. [200]

1. Statutory rape: For instance, all courts agree that where an underage

person has sex with an adult, the ***underaged person cannot be charged*** with ***conspiracy to commit statutory rape*** — since the whole purpose of the statutory rape provision is to protect underage persons, allowing a conspiracy conviction of the protected person would defeat the purpose of the statute.

D. Spouses and corporations: [201]

1. **Spouses:** At common law, a ***husband and wife*** cannot by themselves make up a ***conspiracy.*** But virtually all modern courts have ***rejected*** this common-law rule, so a conspiracy composed solely of husband and wife is punishable. [201]

2. **Corporations:** There must at least be two ***human*** members of any conspiracy. Thus although a corporation can be punished as a conspirator, there can be no conspiracy when only one corporation and one human being (e.g., an officer or stockholder of the corporation) are implicated. [201]

E. Inconsistent disposition: Look out for situations where one or more members of the alleged conspiracy are not convicted — does this prevent the conviction of the others? For now, let's assume that there are only two purported members, A and B. [201]

1. **Acquittal:** Where A and B are tried in the ***same proceeding,*** and A is acquitted, all courts agree that B must also be acquitted. But if the two are tried in ***separate*** proceedings, courts are split. Most courts today hold that A's acquittal does ***not*** require B's release. [201]

   a. **Model Penal Code rejects consistency requirement:** The M.P.C., as the result of its "unilateral" approach, follows the majority rule of not requiring consistency where separate trials occur. [202]

   Example: A and B are the only two alleged conspirators. A is acquitted in his trial. B is then tried. B may be convicted, because under the "unilateral" approach, we look only at whether B conspired with anyone else, not whether "A and B conspired together."

2. **One conspirator not tried:** If A is ***not brought to justice*** at all, this will ***not*** prevent conviction of B (assuming that the prosecution shows, in B's trial, that both A and B participated in the agreement). [202]

VIII. PUNISHMENT

A. Cumulative sentencing: May a member of the conspiracy be convicted of ***both*** conspiracy to commit the crime and the substantive crime itself? [202]

1. Cumulative sentencing usually allowed: Most states allow a ***cumulative sentence,*** i.e., conviction for both conspiracy and the underlying crime. [202]

2. M.P.C. limits: But the Model Penal Code does not follow this majority approach — D may not be convicted simultaneously of crime X, and conspiracy to commit crime X. [202]

a. Some objectives not realized: If, however, the conspiracy has a number of objectives, and less than all are carried out, even under the M.P.C. there can be a conviction of both conspiracy and the carried-out crimes. [203]

CHAPTER 8
ACCOMPLICE LIABILITY AND SOLICITATION

I. PARTIES TO CRIME

A. Modern nomenclature: Modern courts and statutes dispense with common-law designations like "principal in the first degree," "accessory before the fact," "accessory after the fact," etc. Instead, modern courts and statutes usually refer only to two different types of criminal actors: "accomplices" and "principals." [213-214]

1. Accomplice: An ***"accomplice"*** is one who ***assists*** or ***encourages*** the carrying out of a crime, but does not commit the *actus reus.* [214]

2. Principal: A ***"principal,"*** by contrast, is one who ***commits*** the *actus reus* (with or without the assistance of an accomplice). [214]

Example: As part of a bank robbery plan, A steals a car, and drives B to the First National Bank. A remains in the car acting as lookout. B goes inside and demands money, which he receives and leaves the bank with. A drives the getaway car. Since B carried out the physical act of robbery, he is a "principal" to bank robbery. Since A merely assisted B, but did not carry out the physical act of bank robbery, he is an "accomplice" to bank robbery.

3. Significance of distinction: Relatively little turns today on the

distinction between “accomplice” and “principal.” The main significance of the distinction is that generally, the accomplice may not be convicted unless the prosecution also proves that the principal is guilty of the substantive crime in question. The most important rule to remember in dealing with accomplices is that generally, the accomplice is ***guilty of the substantive crimes*** he assisted or encouraged. [214]

II. ACCOMPLICES — THE ACT REQUIREMENT

A. Liability for aiding and abetting: The key principle of accomplice liability is that one who ***aids, abets, encourages*** or ***assists*** another to perform a crime, will himself be ***liable for that crime.*** [214-217]

Example 1: Same facts as the above bank-robbery example. A is guilty of bank robbery, even though he did not himself use any violence, or even set foot inside the bank or touch the money.

Example 2: A and B have a common enemy, V. A and B, in conversation, realize that they would both like V dead. A encourages B to kill V, and supplies B with a rifle with which to do the deed. B kills V with the rifle. A is guilty of murder — he assisted and encouraged another to commit murder, so he is himself guilty of murder.

1. Words alone may be enough: *Words,* by themselves, may be enough to constitute the requisite link between accomplice and principal — if the words constituted ***encouragement*** and ***approval*** of the crime, and thereby assisted commission of the crime, then the speaker is liable even if he did not take any physical acts. [214]

a. Fight scenario: One scenario in which “words alone” may well be ***sufficient*** for accomplice liability is the group ***fight*** scenario. If *A* encourages *B* to commit acts constituting, say, battery or murder, and *B* commits those acts, that’s enough to make *A* an accomplice, and thus to make *A* substantively liable for *B*’s completed crime of battery or murder. [214]

Example: Joe and Jerry are members of the Jets gang, and Steve and Sue are members of the rival Sharks gang. One day, all four happen to gather on the town square without any pre-arrangement. Steve shouts an insult at Jerry. Jerry shouts back, but does not take any other immediate action. Joe whispers in Jerry’s ear, “Kill that [expletive deleted]!” Jerry pulls out a knife he happens to be carrying, and stabs Steve to death. (Assume that Jerry’s conduct constitutes murder rather than voluntary manslaughter.) Joe takes no other action, nor makes any other comment, during the entire episode.

Joe is an accomplice to the killing by Jerry, and is therefore guilty of murder. This is so because Joe rendered assistance or encouragement to Jerry (he "aided and abetted" him) in Jerry's commission of the murder. The fact that Joe's involvement consisted of "words alone" doesn't lessen his accomplice liability. [214]

2. **Presence at crime scene not required:** One can be an accomplice even without ever being ***present*** at the ***crime scene.*** That is, the requisite encouragement, assistance, etc., may all take place before the actual occasion on which the crime takes place. [215]

3. **Presence not sufficient:** Conversely, ***mere presence*** at the scene of the crime is **not,** by itself, sufficient to render one an accomplice. The prosecution must also show that D was at the crime scene for the ***purpose of approving and encouraging*** commission of the offense. [215]

   a. **Presence as evidence:** But D's presence at the crime scene can, of course, be convincing circumstantial ***evidence*** that D encouraged or assisted the crime. [215]

   Example: If the prosecution shows that *A*'s presence at the crime was so that he could serve as a "look out" while *B* carried out the physical acts, *A* is obviously aiding the crime, so he's an accomplice, and is thus guilty of the substantive crime.

4. **Failure to intervene:** Normally, the mere fact that D ***failed to intervene*** to prevent the crime will ***not*** make him an accomplice, even if the intervention could have been accomplished easily. [215]

   Example: On the facts of the above Joe-and-Jerry example, suppose that Joe did not whisper anything in Jerry's ear, or otherwise encourage Jerry to kill or attack Steve. Joe will not have accomplice liability for the stabbing — neither Joe's mere presence at the killing scene, nor his friendship with Joe, nor any enmity he might have had towards Steve, would create accomplice liability for Joe.

   a. **Duty to intervene:** There are a few situations, however, where D has an ***affirmative legal duty*** to intervene. If he fails to exercise this duty, he may be an accomplice. [215]

   Example: Under general legal principles, both parents have an affirmative duty to safeguard the welfare of their child. Mother severely beats Child while Father remains silently E by. Father is probably an accomplice to battery or child abuse, because he had an affirmative duty to protect Child and failed to carry out that duty.

B. **"Crime for hire" scenario:** Accomplice liability will often figure in ***"crime for hire"*** scenarios. Thus where D1 conceives of a crime, and

hires an intermediary, D2, to carry out the crime, D1 is an "accomplice" even though she is the moving force and originator of the crime. If the crime is carried out by D2, D1 will be substantively liable for the crime just as D2 will be. [217] R

Example: Wife desires to have her husband, Hubby, die so that Wife can collect his life insurance. Wife advertises on the Internet for a hired killer. Ken answers the ad. Wife agrees to pay Ken $10,000 if Hubby is killed. Ken shoots Hubby to death. Wife is an "accomplice" to the murder. By virtue of that accomplice status, Wife is guilty of murder.

C. Aid not crucial: Suppose that D gives assistance in furtherance of a crime, but the assistance turns out ***not to have been necessary.*** In this situation, D is generally ***guilty*** — as long as D intended to aid the crime, and took acts or spoke words in furtherance of this goal, the fact that the crime would probably have been carried out anyway will be irrelevant. [216-217]

1. Attempts to aid where no crime occurs: If D attempts to give aid, but the substantive crime never takes place because the principal is ***unsuccessful,*** D may be liable for an ***attempt.*** [216]

Example: *A* gives *B* a gun with which to kill *V,* and encourages *B* to do so. *B* shoots at *V,* but misses. *A* is guilty of attempted murder, just as *B* is.

a. Crime not attempted by the principal: If, on the other hand, the principal does not even ***attempt*** the crime, most courts will ***not*** hold D guilty of even the crime of attempt on an accomplice theory. However, D is probably guilty of the crime of "solicitation," and a minority of courts might hold him guilty of attempt. [217]

Example: *A* tries to persuade *B* to murder *V,* and gives *B* a rifle with which to do so. *B* turns *A* into the police, rather than trying to kill *V.* In most states, *A* is not liable for attempted murder on an accomplice theory (but may be liable for criminal solicitation). A few states, and the M.P.C., would hold *A* liable for attempted murder on these facts.

D. Conspiracy as meeting the act requirement: Some cases, especially older ones, hold that if D is found to have been in a ***conspiracy*** with another, he is automatically liable for any crimes committed by the other in furtherance of the conspiracy. (See *supra,* p. C-64.) [217]

1. Insufficient under modern view: However, the modern view, and

the view of the M.P.C., is that the act of joining a conspiracy is ***not, by itself, enough*** to make one an accomplice to all crimes carried out by any conspirator in furtherance of the conspiracy. But even in courts following this modern view, membership in the conspiracy will be strong *evidence* that D gave the other conspirators the required assistance or encouragement in the commission of the crimes that were the object of the conspiracy. [217]

III. ACCOMPLICES — MENTAL STATE

A. General rule: For D to have accomplice liability for a crime, the prosecution must generally show the following about D's mental state: (1) that D ***intentionally aided or encouraged*** the other to commit the criminal act; and (2) that D had the mental state ***necessary for the crime*** actually committed by the other. [217-223]

1. Must have purpose to further crime: The first requirement listed above means that it is not enough that D intends acts which have the ***effect*** of inducing another person to commit a crime — D must have the ***purpose*** of helping bring that crime about. [218]

Example: D writes to X, "Your wife is sleeping with V." X, enraged, shoots V to death. D does not have the requisite mental state for accomplice liability for murder or manslaughter merely by virtue of intending to write the letter — the prosecution must also show that D intended to encourage X to kill V.

2. Must have *mens rea* for crime actually committed: D must be shown to have the *mens rea* for the ***underlying crime.*** Thus if the person assisted commits a ***different crime*** from that intended by D, D may escape liability. [218-219]

Example: D believes that X will commit a burglary, and wants to help X do so. D procures a weapon for X, and drives X to the crime scene. Unbeknownst to D, X really intends all along to use the weapon to frighten V so that X can rape V; X carries out this scheme. D is not an accomplice to rape, because he did not have the *mens rea* — that is, he did not intend to cause unconsented-to sexual intercourse. The fact that D may have had the *mens rea* for burglary or robbery is irrelevant to the rape charge, though D might be held liable for attempted burglary or attempted robbery on these facts.

3. Police undercover agents: Where a ***police undercover agent*** helps bring about a crime by a suspect, the agent will usually have a valid defense based on his lack of the appropriate mental state.

B. Knowledge, but not intent, as to criminal result: The most important

thing to watch out for regarding the mental state for accomplice is the situation where D ***knows*** that his conduct will encourage or assist another person in committing a crime, but D does not ***intend*** or ***desire*** to bring about that criminal result. [219-220]

1. **Not usually sufficient:** Most courts hold that D is ***not*** an accomplice in this "knowledge but not intent" situation. [219]

   Example: X asks his friend D for a ride to a particular address. X is dressed all in black, and D knows that X has previously committed burglary. D does not desire that X commit a burglary, but figures, "If I don't give X a ride, someone else will, so I might as well stay on his good side." D drives X to the site, and X burgles the site. D is not guilty of burglary on an accomplice theory, because mere knowledge of X's purpose is not enough — D must be shown to have intended or desired to help X commit the crime.

2. **Supplying goods or services:** The "mere knowledge" issue usually arises where D ***supplies goods or services*** with ***knowledge*** that his supplies may enable others to pursue a criminal objective. As with conspiracy (see *supra*, p. C-57), mere knowledge of the criminal objective is not ***not*** enough for accomplice liability. Instead, the supplier must be shown to have ***desired*** to further the criminal objective. [219]

3. **Circumstantial evidence:** D's desire or intent to aid the principal's criminal objective can be shown by ***circumstantial*** evidence, just as in the case of conspiracy. [219]

   a. **"Stake in venture":** For instance, the supplier's desire to further the criminal objective C can be shown circumstantially by the fact that the supplier acquired a ***"stake in the ven- ture"*** (e.g., that the supplier was ***promised a bonus*** expressed as a percentage of the profit from the crime).

   b. **Inflated charges:** Similarly, the fact that the supplier charged his criminal purchasers an ***inflated price*** compared with the cost of the items if sold for legal purposes is evidence of intent to further the criminal objective.

   c. **Serious crime:** The more ***serious*** the underlying crime (as known to the supplier), the more likely it is that the supplier's participation will be found to make him an accomplice to that crime.

C. **Assistance with crime of recklessness or negligence:** If the underlying

crime is not one that requires intent, but merely ***recklessness or negligence, most*** courts hold D liable as an accomplice upon a mere showing that D was reckless or negligent concerning the risk that the principal would commit the crime. [220]

1. **Lending car to drunk driver:** Thus if D ***lends his car to one that he knows to be drunk,*** and the driver kills or wounds a pedestrian or other driver, some courts find D liable as an accomplice to manslaughter or battery. On these facts, D has had the mental state of recklessness (sufficient for involuntary manslaughter or battery), so a court probably will hold that D's lack of intent to bring about the death or injury to another is irrelevant. [220]

   a. **Negligence-manslaughter:** Observe that in the above "lend car to drunk driver" scenario, D may be liable for manslaughter even if accomplice theory is not used — the crime of manslaughter is generally committed when one recklessly brings about the death of another, so D may, by entrusting his car to a known drunk, be guilty of manslaughter as a principal. [220]

2. **"Depraved-indifference" murder:** Similarly, most courts would probably impose accomplice liability on D where X commits a killing with ***depraved indifference*** to human life, and D (acting with the same depraved indifference) encourages X in the conduct leading to the death. [220]

   a. **Drag races and gun battles:** Thus if D and X engage in joint activity of an extremely dangerous sort — such as a ***drag race*** on a city street, or a ***gun battle*** while bystanders are nearby — D may well be held liable as an accomplice to depraved-heart murder if X's act results in a bystander's death. That may be true even if D and X are opposing each other — even trying to kill each other — instead of being allied in a cooperative activity.

   b. **Carrying dangerous weapons:** Another scenario that's likely to involve accomplice liability for depraved-indifference murder is where multiple defendants all ***carry very dangerous weapons into a robbery*** or other crime scene, and then a gunfight breaks out that leads to death. Even in a jurisdiction that does not apply the felony-murder doctrine *(infra,* p. C-80), D1's act of assisting D2 in

carrying out the armed robbery may impose on D1 accomplice liability for the resulting depraved-indifference murder. [221]

Example: D1, D2 and D3 all agree to carry loaded fully-automatic machine guns for a robbery of the First National Bank. To terrify the tellers and customers and make sure that they don't summon the police, D1 shouts, "Nobody move," and then fires a sustained burst of bullets (about 20 in all) at the ceiling. A bullet ricochets off the marble that lines the ceiling, then strikes and kills a teller. D1, D2 and D3 are all charged with murder. Assume that the jurisdiction does not apply felony-murder.

D2 and D3 can be convicted of murder on an accomplice-liability theory. D1 acted with depraved indifference to the value of human life by firing the weapon in circumstances where there was a large risk of just the sort of ricochet that occurred. D2 and D3 aided and abetted D1 in the commission of the underlying robbery, and in the carrying by all Ds of the loaded machine guns. Therefore, D2 and D3 (not just D1) probably had the requisite depraved-indifference mental state. Consequently, D2 and D3 are accomplices to the killing, making them substantively guilty of depraved-indifference murder. [221]

c. **No proof of who was principal:** The majority view that D can be liable as an accomplice M for depraved-indifference murder if he acted with merely a recklessly-indifferent state of M mind can help the prosecution in situations where ***two defendants each behave recklessly*** — such as by firing their weapons at a crowd — but it cannot be proved beyond reasonable doubt ***whose*** conduct directly caused the killing.

Example: D1 and D2 open fire on a group of people, including V, who dies from the wound. The prosecution is unable to prove whether the fatal shot came from D1's gun or D2's, and can't prove that either D intended to kill or seriously wound. Most states would probably hold that either D can be convicted as an accomplice to depraved-indifference murder if he is shown to have fired with reckless indifference, even if it is the other D's gun that fired the fatal shot. [Cf. *Riley v. State* (2002)].

IV. ACCOMPLICES — ADDITIONAL CRIMES BY PRINCIPAL

A. **"Natural and probable" results that are not intended:** A frequently-tested scenario involves a principal who commits not only the offense that the accomplice has assisted or encouraged, but ***other offenses*** as well. The accomplice will be liable for these additional crimes if: (1) the additional offenses are the ***"natural and probable" consequences*** of the conduct that D did intend to assist (even though D did not intend these additional offenses); ***and*** (2) the principal committed the additional crimes ***in furtherance of the original criminal objective*** that D was trying to assist. [223-224]

Example: D1 and D2 agree to commit an armed robbery of a convenience store owned by V. D1 personally abhors violence. However, he knows that D2 is armed, and that D2 has been known to shoot in the course of prior robberies. D1 urges D2 not to shoot no matter what, but D2 refuses to make this promise. During the robbery, V attempts to trip an alarm, and D2 shoots her to death. A court would probably hold that D1 is liable for murder on an accomplice theory, since the shooting was a "natural and probable" consequence of armed robbery, and the shooting was carried out to further the original criminal objective of getting away with robbery.

On the other hand, if D2 forcibly raped V instead of shooting her, and D1 had no reason to expect D2 to do this, Dl would not be liable for rape on an accomplice theory. This is because the rape was not the "natural and probable" consequence of the conduct encouraged by D1, nor was it committed in furtherance of the original objective of robbery.

1. **Unforeseeable:** Thus if D can show that the additional offenses were ***unlikely*** or ***unforeseeable,*** D will not be liable for them. *(Example:* This is why D1 would not be liable for rape on the above hypothetical.)

2. **M.P.C. rejects extended liability:** The Model Penal Code rejects even the basic principle allowing an accomplice to be held liable for "natural and probable" crimes beyond those which he intended to aid or encourage. Under the M.P.C., only those crimes that D ***intended*** to aid or encourage will be laid at his door. [223] § S

3. **Felony-murder and misdemeanor-manslaughter rules:** Wherever the additional offense is a ***death,*** the accomplice may end up being guilty not because of the "natural and probable consequences" rule, but because of the specialized ***felony-murder*** or ***misdemeanor-manslaughter*** rules. For instance, under the felony-murder rule (discussed *infra*, p. C-80), if in the course of certain dangerous felonies the felon kills another, even ***accidentally,*** he is liable for § murder. This can be combined with the general principles of accomplice liability to make the accessory liable for an unintended death. [223-224]

   Example: D1 and D2 agree to commit an armed robbery together, with D2 carrying the only gun. D1 does not desire that anybody be shot. D2 points his gun at V and asks for money; the gun accidentally goes off, killing V. D1 is probably guilty of murder on these facts. However, this is not because V's death was a "natural and probable consequence" of armed robbery.

   Instead, it is because under the felony-murder doctrine, even an accidental death that directly stems from the commission of a dangerous felony such as armed robbery will constitute murder. By felony-murder alone, D2 is thus guilty of murder even though

he did not intend to shoot, let alone kill, V. Then, since D1 was D2's accomplice in the armed robbery, D1 is liable for armed robbery. Since the killing occurred in the furtherance of the robbery *by Dl* (even though he was not the shooter), and since D1 had the mental state required for felony-murder (intent to commit a dangerous felony), D1 is liable for murder without any use of the "natural and probable consequences" rule.

V. GUILT OF THE PRINCIPAL

A. Principal must be guilty: Most courts hold that the accomplice cannot be convicted unless the prosecution shows that the person being aided or encouraged — the principal — is ***in fact guilty*** of the underlying crime. [224-227]

Example: Iago falsely tells Othello that Othello's wife Desdemona is having an affair; Iago hopes that Othello will kill her in a fit of jealousy. Othello does so, without further involvement by Iago. Note that Othello is guilty only of voluntary manslaughter (not murder), assuming that he acted in the heat of passion. Most courts would hold that Iago cannot be convicted of being an accomplie to murder, because Othello, the principal, is guilty only of the lesser offense. [Cf. *People v. McCoy* (2001)]

1. **Principal's conviction not necessary:** But it is not necessary that the principal be ***convicted.***

   Example: A is charged with assisting *B* to commit a robbery. *B* is never arrested or brought to trial. Instead, *B* gets immunity and turns state's evidence against *A. A* can be convicted of being an accomplice to the robbery upon proof that B committed the robbery, and that *A* helped *B* carry it out — the fact that *B* is never charged or convicted is irrelevant. [225]

2. **Inconsistent verdicts:** But if the principal is actually ***acquitted,*** the accomplice must normally be acquitted as well, according to the majority view. This is clearly true if the principal is acquitted in the ***same trial,*** and probably true even if the principal is acquitted in an ***earlier*** trial. *[People v. Taylor* (Cal. 1974)] [225]

3. **Minority abandons rule:** Also, a ***minority*** of courts have ***abandoned*** the requirement that the principal be shown to have had the mental state required for the crime. California has done so, at least for homicide cases. (Cf. *People v. McCoy, supra,* stating that in the above Othello hypo, Iago will be guilty of being of murder as an accomplice.)

4. **Conviction of principal for use of innocent agent:** Keep in mind that in some "guilty accomplice but innocent principal" cases, it may be possible to charge the "accomplice" with being ***himself a***

principal.

a. **Model Penal Code:** For instance, M.P.C. § 2.06(2)(a) makes one person liable for the acts of another when "acting with the kind of culpability that is sufficient for the commission of the offense, he causes an ***innocent or irresponsible*** person to engage in such conduct."

> **Example:** *A* stands in front of a house owned by *V. A* has placed a ladder leading to a second-floor window. *A* stops a 10-year-old boy, B, who's passing by. *A* says to B, "I've stupidly locked myself out of my house. Luckily my house-painters have left this ladder, but I'm scared of heights. Could you climb up, go through the window, and unlock the front door for me?" B, believing A's story, does so. Before *A* can enter, he's arrested.
>
> *A* is guilty of burglary (breaking and entering a dwelling with intent to commit a felony inside) even though he himself never entered — he's used an innocent agent (B) to commit the breaking and entering. By contrast, if *A* were charged as an *accomplice,* he'd be acquitted, assuming the jurisdiction follows the majority rule that an accomplice can't be convicted unless the principal is guilty.

VI. WITHDRAWAL BY THE ACCOMPLICE

A. **Withdrawal as defense:** One who has given aid or encouragement prior to a crime may ***withdraw*** and thus avoid accomplice liability. In other words, withdrawal is generally a ***defense*** to accomplice liability (in contrast to the conspiracy situation, where it is usually not a defense to the conspiracy charge itself, merely to substantive crimes later commited in furtherance of the conspiracy). [228]

1. **Model Penal Code:** Most states follow, at least roughly, the Model Penal Code's approach to accomplice-withdrawal. [228] Under M.P.C. § 2.06(6)(c), a person avoids accomplice liability if he ***stops participating*** before the underlying crime occurs, and then *either:*

[1] wholly ***undoes the effect*** of his prior actions, or else

[2] makes an ***effort to thwart*** the crime, typically by ***warning*** the authorities.

> **Example:** X tells D that X wants to rob a gas station at gun point, and that he needs a gun to do so. D supplies X with a gun for this purpose. D then has second thoughts, and takes the gun back from X, while also telling X, "I don't think this robbery is a good idea." X gets a different gun from someone else, and carries out the same robbery of the same store. D is not guilty of being an accomplice to the robbery, because he withdrew, in a way that undid the effect of his earlier assistance and encouragement.

2. **Verbal withdrawal not always enough:** If D's aid has been only ***verbal,*** he may be able to withdraw merely by stating to the "principal" that he now withdraws and disapproves of the project. But if D's assistance has been more ***tangible,*** he probably has to take ***affirmative action*** to undo his affects. [228]

   Example: On the facts of the prior example, where D supplies a gun to X, it probably would not be enough for D to say, "I think the robbery is a bad idea," while letting X keep the gun — D probably has to get the gun back.

   a. **Warning to authorities:** Alternatively, D can almost always make an effective withdrawal by ***warning the authorities*** prior to commission of the crime. [228]

3. **Change of heart not enough:** It is ***not*** enough that the defendant has a ***subjective change of heart,*** and gives no further assistance prior to the crime. Most states agree with the M.P.C. that the defendant must either ***undo the effect*** of his prior assistance, or make other reasonable efforts, even if not successful, to ***thwart the crime*** (e.g., by warning the authorities). [228]

   Example: *A* agrees to serve as lookout while *B* robs a convenience store. As soon as *B* enters the store, *A* changes his mind and flees, without telling *B. A* has neither undone the effect of his encouragement, nor made reasonable efforts to thwart the crime. Therefore, he's guilty of robbery once *B* completes it.

4. **Not required that crime be thwarted:** Regardless of the means used to withdraw, it is ***not necessary*** that D actually ***thwart*** the crime. [228]

   Example: D encourages X to commit a particular burglary at a specified time and place. X thinks better of it, and leaves a message at the local police station alerting the police to the place and time for the crime. He does not make any effort to talk X out of the crime, however. Due to police inefficiency, the message gets lost, and X carries out the crime. D's notice to the authorities will probably be held to be enough to constitute an effective withdrawal, even though D was not successful in actually thwarting the crime.

VII. VICTIMS AND OTHER EXCEPTIONS TO ACCOMPLICE LIABILITY

A. Exceptions for certain classes:liablilty will be imposed: [229] There are certain ***classes*** of persons as to whom no accomplice liablilty will be imposed: [229]

1. **Victims:** Most obviously, where the legislature regards a certain type of person as being the ***victim*** of the crime, that victim will not be subject to accomplice liability. [229]

   a. **Statutory rape:** Thus a ***female below the age of consent*** will not be liable as an accessory to ***statutory rape*** of herself, even if she gives assistance and encouragement to the male. [229]

   b. **Kidnapping and extortion:** Similarly, a person who meets the demands of an ***extortionist,*** or a person who pays a ransom to ***kidnappers*** to secure the release of a loved one, will not be an accomplice to the extortion or kidnapping. [229]

2. **Crime logically requiring second person:** Where a crime is defined so as to logically require participation by a second person, as to whom ***no direct punishment*** has been authorized by the legislature, that second person will not be liable as an accomplice. [230]

   Examples: Since an abortion cannot be performed without a pregnant woman, the pregnant woman will not be liable as an accomplice to her own abortion, assuming that the legislature has not specifically authorized punishment for the woman in this situation. The same would be true of a customer who patronizes a prostitute, or one who purchases illegal drugs — if the legislature has not specifically punished customers of prostitutes or purchasers of drugs, these will not be liable as accomplices to prostitution/drug sales.

VIII. POST-CRIME ASSISTANCE

A. **Accessory after the fact:** One who knowingly gives assistance to felon, for the purpose of helping him ***avoid apprehension*** following his crime, is an ***accessory after the fact.*** Under modern law, the accessory after the fact is ***not liable*** for the ***felony itself,*** as an accomplice would be. Instead, he has committed a distinct crime based upon obstruction of justice, and his punishment does not depend on the punishment for the underlying felony. [230]

B. **Elements:** Here are the elements for accessory after the fact: [230]

   1. **Commission of a felony:** A ***completed felony*** must have been committed. (It is not enough that D ***mistakenly believed*** that the person he was assisting committed a felony — but the person aided need not have been formally charged, or even caught.) [230]

   2. **Knowledge of felony:** D must be shown to have ***known,*** not merely

suspected, that the felony was committed. [230]

3. Assistance to felon personally: The assistance must have been given to the ***felon personally.*** (Thus it is not enough that D knows that a crime has been committed by some unknown person, and D destroys evidence or otherwise obstructs prosecution.) [231]

4. Affirmative acts: D must be shown to have taken ***affirmative acts*** to hinder the felon's arrest. It is not enough that D ***fails to report the felon,*** or fails to turn in ***evidence*** that he possesses. [231]

C. Misprision of felony: At common law, one who simply fails to report a crime or known felon — without committing any affirmative acts to hinder the felon's arrest — is guilty of the separate crime of ***"misprision of felony."*** However, almost no states recognize this crime today. [231]

IX. SOLICITATION

A. Solicitation defined: The common-law crime of ***solicitation*** occurs when one ***requests or encourages another*** to perform a criminal act, regardless of whether the latter agrees. [231]

1. Utility: The main utility of the crime is that it allows punishment of the solicitor if the person who is requested to commit the crime ***refuses.*** [231]

Example: Wendy is unhappily married to Herbert, and has been having an affair with Bart. Wendy says to Bart, "Won't you please kill Herbert? If you do, we can live happily ever after." Bart does not respond either way, but tells the police what has happened. The police arrest Wendy before Bart takes any action regarding Herbert. On these facts, Wendy is guilty of solicitation — she has requested or encouraged another to perform a criminal act, and it does not matter that the other has refused.

B. No overt act required: The crime of solicitation is never construed so as to require an ***overt act*** — as soon as D makes his request or proposal, the crime is complete (as in the above example).

[231]

C. Communication not received: Courts disagree about whether D can be convicted of solicitation where he attempts to communicate his criminal proposal, but the proposal is never ***received.*** [232]

1. Model Penal Code: The Model Penal Code imposes liability in this

"failed communication" situation. [232]

Example: On the facts of the above example, Wendy sends a letter to Bart asking Bart to kill Herbert. The letter is intercepted by police before Bart can get it. Courts are split as to whether Wendy can be convicted of solicitation; the M.P.C. would impose liability here. (Even courts not following the M.P.C. approach would probably allow a conviction for "attempted solicitation" on these facts.) [232]

D. Renunciation: Some courts allow the defense that the solicitor ***voluntarily renounced*** his crime. Thus the M.P.C. allows the defense of renunciation if D ***prevents*** the commission of the crime, and does so voluntarily. [232]

E. Solicitation as an attempted crime: If all D has done is to request or encourage another to commit a crime ("bare" solicitation), this is ***not*** enough to make D guilty of an ***attempt*** to commit the object crime. However, if D has gone further, by making extensive preparations with or on behalf of the solicitee, or otherwise making overt acts, this may be enough to cause him to be guilty of not only solicitation but an attempt [233] at the crime (even if the solicitee himself refuses to participate).

X. CRIMINAL LIABILITY OF CORPORATIONS

A. Corporations can commit crimes: Most state and federal penal statutes are drafted in a way that makes them applicable not only to humans but also to artificial entities, including ***corporations.*** Therefore, corporations may be — and not infrequently *are* — convicted of crimes. [233]

1. Two main approaches: Most American courts follow one of two main approaches to the issue of what types of human acts may give rise to corporate criminal liability:

[1] a relatively wide-sweeping approach based on the tort concept of ***"respondeat superior,"*** under which actions taken on the corporation's behalf even by relatively ***low-ranking employees*** may give rise to corporate criminal liability; and

[2] a narrower approach adopted by the Model Penal Code, under which in most instances only acts committed or approved by a ***"high managerial agent"*** of the corporation may give rise to corporate liability.

We consider each of these two approaches in turn.

2. **The *"respondeat superior"* approach:** Many courts approach the problem of corporate criminal liability by applying a variant of the tort concept of ***"respondeat superior."*** In courts applying the criminal-law analog to the doctrine, a corporation can be ***guilty of crimes committed by an "agent"*** (typically an employee) acting on behalf of the corporation. [234]

   a. **Three requirements:** Most courts that apply the *respondeat superior* approach to corporate criminal liability impose ***three requirements*** that have to be satisfied before the corporation will be guilty of a crime committed by its human agent (whether the agent is an employee or an independent contractor):

      [1] The agent's ***own conduct*** meets the ***statutory requirements for the crime,*** in terms of ***actus reus*** and ***mens rea;***

      [2] the agent was acting within the ***"scope of employment";*** and

      [3] the agent, in committing the crime, was ***intending to benefit the corporation*** in some way. [234]

   b. **Two requirements are easy to satisfy:** But as the *respondeat superior* doctrine is construed in most courts that apply it, requirements [2] and [3] above are almost meaningless.

      i. **"Within the scope of employment":** First, the ***"within the scope of employment"***requirement is interpreted in a way that is easy to satisfy. As long as the employee was somehow acting ***"in connection with"*** the job, courts tend to deem her conduct as being within the scope of that job even if the conduct was ***specifically forbidden by a corporate policy,*** and even though the corporation made ***good-faith efforts to prevent*** the crime. [234]

      ii. **"Intent to benefit":** Second, courts tend to hold that the employee acted with the requisite ***"intent to benefit the corporation"*** even if the corporation ***ended up receiving no actual benefit.*** [234]

      iii. **Ratification:** Furthermore, even if the "within the scope of

employment" and "intent to benefit the corporation" requirements wouldn't otherwise be met by the employee's action, courts following the *respondeat superior* doctrine often apply the concept of post-crime ***ratification*** by the corporation to satisfy these two requirements after the fact. [234]

Example: Suppose a low-level employee's criminal act results in ***extra dollars being paid*** into the corporation's treasury. The mere fact that the corporation's upper management ***does not voluntarily disgorge the funds*** after discovering the act will likely ***count as ratification,*** in which case the corporation will likely be convicted, if the court follows the *respondeat superior* approach.

c. **Management tries to prevent violation:** In courts following the *respondeat superior* approach, a conviction of the corporation is quite possible ***even where the company's upper management shows that it tried hard to prevent the very conduct in question.***

Example: The federal Sherman Antitrust Act prohibits various acts "in restraint of trade." In Portland, Oregon, many hotel-related businesses join a dues-funded "Association" to attract convention business. The federal government alleges that D (the Hilton Hotels chain) has boycotted suppliers that refused to pay their Association dues; the government says that this boycot by D constitutes a criminal violation of the Act. D defends on the (factually accurate) grounds that the manager of its only Portland hotel expressly instructed the hotel's purchasing agent, X, that he was not to take part in the boycott, instructions that X disobeys. D argues that since X was a low-level employee who was acting against the instructions and policies of the hotel's management, X's unauthorized actions cannot be the basis for a conviction of D.

Held (on appeal), for the government. What matters is whether Congress ***intended*** to impose criminal Sherman Act liability even on businesses whose employees commit acts that are contrary to express upper-management instructions. The answer is yes: Congress intended to make a corporation liable under the Sherman Act for the conduct of its agents taken within the scope of the employment, even if that conduct was directly contrary to the corporation's policies and express instructions. Congress was afraid that otherwise, management would merely give subordinates "generalized directives" to obey the Act, and these directives would likely not be taken seriously by the subordinates. Therefore, it was up to D to enforce its instructions, and the company P will be criminally liable for X's conduct when he ignored the instructions and violated the Act. *U.S. v. Hilton Hotels Corp.* (9th Cir. 1972). [235-236]

3. **The Model Penal Code's "high managerial agent" approach:** The other major approach to corporate criminal liability, that of the ***Model Penal Code,*** reflects the view that the traditional *respondeat superior* approach ***casts too wide a net,*** by unfairly making the corporation

criminally liable for actions by low-level employees even where those acts are contrary to express corporate policies. [236]

a. "High managerial agent": The M.P.C. says that in general, a corporation will be criminally liable *only* if the commission of the offense was ***authorized, requested,*** or ***recklessly*** A ***tolerated*** by either the ***board of directors*** or by a ***"high managerial agent"*** who was "acting [on] behalf of the corporation within the scope of his office or employment." § 2.07(1)(c). [236]

i. Significance: So where a low-level employee commits an action that constitutes an ordinary crime under the M.P.C., if neither the Board of Directors nor any "high managerial agent" knows about or approves the action (or is found to have "recklessly tolerated the action" after the fact), the corporation ***cannot be convicted of that crime.***

ii. **"High managerial agent" defined:** In states adopting the M.P.C. approach, a lot turns on what sort of person is considered a "high managerial agent." The M.P.C. itself defines this term fairly narrowly, to mean "an officer of a corporation ... or any other agent ... having duties of ***such responsibility*** that his conduct may fairly be ***assumed to represent the policy of the corporation."*** § 2.07(4)(c). [236-237]

Example: Had the M.P.C. been in force in the federal court that decided the *Hilton Hotels* case, *supra*, the result would probably have been different. X (the purchasing agent) would probably not be found to have been given such heavy responsibilities that his conduct could "fairly be assumed to represent the policy" of defendant Hilton Hotels Corp., which owned hundreds of hotels around the world. [237]

CHAPTER 9
HOMICIDE AND OTHER CRIMES AGAINST THE PERSON

I. HOMICIDE — INTRODUCTION

A. Different grades of homicide: Any unlawful taking of the life of another falls within the generic class ***"homicide."*** The two principal kinds of homicide are ***murder*** and ***manslaughter.*** [247]

1. **Degrees of murder:** In many jurisdictions, murder is divided into first-degree and seconddegree murder. Generally, first-degree murder consists of murders committed "with premeditation and deliberation," and killings committed during the course of certain felonies. [247]

2. **Two kinds of manslaughter:** Similarly, manslaughter is usually divided into: (1) ***voluntary*** manslaughter (in most cases, a killing occurring the "heat of passion"); and (2) ***involuntary*** manslaughter (an unintentional killing committed recklessly, grossly negligently, or during commission of an unlawful act). [247]

3. **Other statutory forms of homicide:** Additional forms of homicide exist by statute in some states. Many states have created the crime of ***vehicular homicide*** (an unintentional death caused by the driver of a moter vehicle). Similarly, some states, and the M.P.C., have created the crime of "negligent homicide." [247]

II. MURDER — GENERALLY

A. Definition of "murder": There is no simple definition of "murder" that is sufficient to distinguish killings that are murder from killings that are not. At the most general level, murder is defined as the ***unlawful killing*** of ***another person.*** [247]

1. **Four types:** In most states, there are four types of murder, distinguished principally by the defendant's mental state:

   [1] ***intent-to-kill*** murder;

   [2] ***intent-to-commit-grievous-bodily-injury*** murder;

   [3] ***"depraved-heart"*** (a/k/a "reckless indifference to the value of human life") murder; and [4] ***felony-murder,*** i.e., a killing occurring during the course of a dangerous felony.

   Each of these types is discussed in detail below.

B. Taking of life: Murder exists only where a life has been taken. Therefore, be ready to spot situations where there is no murder because either: (1) the victim had not yet been born alive when D acted, and was never born alive; or (2) the victim's life had ended before D's act. [247-249]

1. **Fetus:** A ***fetus*** is not a human being for homicide purposes, in most states. Thus if D commits an act which kills the fetus, this does not fall within the general murder statute in most states. [248]

   Example: D shoots X, a pregnant woman. The bullet goes into X's uterus and instantly kills V, a fetus which has not yet started the birth process. In most states, D has not committed garden-variety murder of V, though he may have committed the separate statutory crime of feticide, defined in many states.

   a. **Fetus born alive:** But if the infant is ***born alive*** and then dies, D is guilty of murdering it even though his acts took place before the birth. *(Example:* Same facts as in the above example. Now, however, assume that the shooting causes X to go into premature labor, V is born alive, and immediately thereafter V dies of the bullet wound. D has murdered V.) [248]

2. **End of life:** Traditionally, ***death*** has been deemed to occur only when the victim's heart has stopped beating. The modern tendancy, however, is to recognize ***"brain death"*** as also being a type of death. [249]

   Example: D, a physician, concludes that V is "brain dead," and thus removes V's heart to use it in an organ transplant. Most courts today would probably hold that D has not murdered V, because V was already dead even though her heart was still beating.

C. **Elements of murder:** Here are the elements which the prosecution must prove to obtain a murder conviction: [249-250]

1. ***Actus reus:*** There must be ***conduct by the defendant*** (an ***"actus reus")*** either an affirmative act by D an omission by D where he had a duty to act. [249]

2. ***Corpus delecti:*** There must be shown to have been a ***death*** of the victim. Death is the *"cor- pus delecti"* ("body of the crime") of murder. But the prosecution does ***not*** have to produce a P ***corpse.*** Like any element of any crime, existence of death may be proved by ***circumstantial evidence.*** [249]

   Example: D and V are known to be getting along badly, and D has a motive — financial gain — for wanting V dead. V is last seen alive while about to visit D's remote mountain cabin. V E is never seen again, and no body is ever found. V's wallet is found in the cabin. Seven years have gone by without a trace of V. A jury could probably reasonably conclude that V is now dead, and that D caused the death by methods unknown.

3. ***Mens rea:*** D must be shown to have had an appropriate ***mental state*** for murder. The required mental state is sometimes called ***"malice aforethought,"*** but this is merely a term of art, which can be satisfied by any of several mental states. In most jurisdictions, any of the four following intents will suffice: [250]

a. An intent to ***kill;*** [250-251]

b. An intent to ***commit grievous bodily injury;*** [251-252]

c. ***Reckless indifference*** to the ***value of human life*** (or a ***"depraved heart,"*** as the concept is sometimes put); [252-256] and

d. An intent to commit any of certain non-homicide ***dangerous felonies.*** [256-266]

4. Proximate cause: There must be a ***causal relationship*** between D's act and V's death. D's conduct must be both the "cause in fact" of the death and also its "proximate cause." [250]

a. Year-and-a-day rule: Most states continue a common-law proximate cause rule that applies only in murder cases: V must die within a ***year and a day*** of D's conduct. [250]

Note on four types of murder: Anytime D can be said to have killed V, you should go through all four types of murder before concluding that no murder has occurred. In other words, examine the possibility that D: (1) intended to kill V; (2) intended to inflict serious bodily harm upon V; (3) knew V or someone else had a substantial chance of dying, but with "reckless indifference" or "depraved heart" ignored this risk; or (4) intended to commit some dangerous felony, not itself a form of homicide (e.g., robbery, rape, kidnapping, etc.) Only if D's intent did not fall within any of these cases can you be confident that V's death does not constitute murder.

D. Intent-to-kill murder: The most common state of mind that suffices for murder is the ***intent to kill.*** [250-251]

1. Desire to kill: This intent exists, of course, when D has the ***desire*** to bring about the death of another. [250]

2. Substantial certainty of death: The requisite intent also exists where D knows that death is ***substantially certain*** to occur, but does not actively desire to bring about V's death. *(Example:* D, a terrorist, puts a bomb onto an airliner. He does not desire the death of any passengers, but knows that at least one death is almost certain to

occur. D has the state of mind needed for “intent to kill” murder.) [250]

3. **Ill-will unnecessary:** The requisite intent to kill may exist even where D does not bear any ***ill will*** towards the victim. *(Example:* D’s wife, V, is suffering from terminal cancer, but still has at least several weeks to live. D feeds her poison without telling her what this is, in order to spare her suffering. As a strictly legal matter, D has the mental state required for “intent to kill” murder, though a jury might well decide to convict only of manslaughter.) [251]

4. **Circumstantial evidence:** Intent to kill may be proved by ***circumstantial evidence.*** *(Example:* If death occurs as the result of a deadly weapon used by D, the jury is usually permitted to infer that D intended to bring about the death.) [251]

5. **Compare with voluntary manslaughter:** It does not automatically follow that because D intended to kill and did kill, that D is guilty of murder. (For instance, most cases of ***voluntary manslaughter*** — generally, a killing occurring in a “heat of passion” — are ones where D intended to kill.) In a prosecution for intent-to-kill murder, the mental state is an intent to kill ***not accompanied by other redeeming or mitigating factors.*** [251]

E. Intent-to-do-serious-bodily-injury murder: In most states, the *mens rea* requirement for murder is satisfied if D intended not to kill, but to do ***serious bodily injury*** to V. [251-252]

Example: D is angry at V for welching on a debt. D beats V with brass knuckles, intending only to break V’s nose and jaw, and to knock out most of his teeth. In most states, D has the mental state required for murder of the “intent to do serious bodily injury” sort. Therefore, if V unexpectedly dies, D is guilty of murder in these states.

1. **Subjective standard:** Most states apply a ***subjective*** standard as to the risk of serious bodily harm — D has the requisite mental state only if he ***actually realized*** that there was a high probability of serious harm (not necessarily death) to V, and the fact that a “reasonable person” would have realized the danger is not sufficient. [252]

2. **“Serious bodily injury” defined:** Some courts hold that only conduct which is likely to be ***“life threatening”*** suffices for “intent to commit serious bodily injury.” Other courts take a broader view of what

constitutes serious bodily harm. However, all courts recognizing this form of murder hold that a mere intent to commit some sort of bodily injury does not suffice. [252]

Example: D punches V in the face, intending merely to knock V down. V strikes his head while falling, and dies. Probably no court would hold that D is liable for "intent to do serious bodily harm" murder on these facts, though he would be liable for manslaughter under the misdemeanor-manslaughter rule.

3. **Model Penal Code rejects:** The Model Penal Code does ***not*** recognize "intent to do serious bodily harm" murder. The M.P.C. regards the "reckless indifference to value of human life" or "depraved-heart" standard, discussed below, as being enough to take care of cases where D wilfully endangers the life or safety of others and death results. [252]

F. **"Reckless indifference to value of human life" or "depraved-heart" murder:** Nearly all states hold D liable if he causes a death, while acting with such great ***recklessness*** that he can be said to have a ***"depraved-heart"*** or an ***"extreme indifference to the value of human life."*** [252-256]

1. **Illustrations:** Here are some illustrations of "depraved-heart" or "extreme indifference" murder: [253]

Example 2: D fires a bullet into a passing passenger train, without any intent to kill any particular person. The bullet happens to strike and kill V, a passenger.

Example 1: D sets fire to a building where he knows people are sleeping; he does not desire their death, but knows that there is a high risk of death. One inhabitant dies in the fire.

Example 3: D, trying to escape from pursuing police, drives his car at 75 mph the wrong way P down a one-way residential street that has a 30 mph speed limit. D hits V, a pedestrian.

Example 4: D, trying to rob a bank, fires an automatic weapon into the bank lobby's marble-covered ceiling while lots of employees are around. He does this to frighten the employees into complying with his demands. A bullet ricochets, killing V, an employee.

2. **Awareness of risk:** Courts are split as to whether D shows the requisite "depravity" where he is ***not aware*** of the risk involved in his conduct. [254]

a. **M.P.C. view:** The Model Penal Code follows the "subjective"

approach to this problem: D shows the required extreme recklessness *only* if he ***"consciously disregards*** a substantial and unjustifiable risk." [254]

b. Circumstantial evidence: Even in a state following the subjective standard, it's usually not very hard for the prosecution to satisfy its burden of proving, beyond a reasonable doubt, that D was aware of the very high probability of death. That's because D's subjective awareness of the great danger, like any other element of a crime, can be proved by ***circumstantial evidence.*** Thus if the fact pattern that is apparent to D is one that would ***cause almost any ordinary person to be aware of the risk,*** the jury is entitled to ***infer*** that D, too, "must have been aware" of the risk. [255]

Example: D drives 35 mph over the speed limit, crosses into the opposing lane, causes oncoming drivers to swerve to avoid him, and then knowingly runs a red light because he is traveling too fast to stop. At the light, D crashes into another car, killing V, a passenger in that car. Under California law, D is required to be "subjectively aware" of the risk. *Held* (on appeal), the jury properly found the required awareness: "[W]hether [D] was subjectively aware of the risk is best answered by the question: ***how could he not be?"*** The jury properly reasoned that "because ***anyone*** would be aware of the risk, [D] was aware of the risk." *People v. Moore* (Cal. 2010). [255]

c. Intoxication: If D fails to appreciate the risk of his conduct because he is ***intoxicated,*** even courts that would ordinarily follow a subjective standard (and the M.P.C.) ***allow a conviction.*** [256]

III. FELONY-MURDER

A. Generally: Under the ***felony-murder rule, if D, while he is in the process of committing certain felonies, kills another (even accidentally), the killing is murder.*** In other words, the intent to commit any of certain felonies (unrelated to homicide) is sufficient to meet the *mens rea* requirement for murder. [256]

1. Common law and today: The felony-murder rule was applied at common law, and continues to be applied by most states today. [256]

Example: D, while carrying a loaded gun, decides to rob V, a pedestrian. While D is pointing his gun at V and demanding money, the gun accidentally goes off, and kills V. Even though D never intended to kill V or even shoot at him, D is guilty of murder, because the killing occurred while D was in the course of carrying out a dangerous felony.

B. Dangerous felonies: Nearly all courts and legislatures today restrict application of the felonymurder doctrine to ***certain felonies.*** [256-258]

1. "Inherently dangerous" felonies: Most courts today use the ***"inherently dangerous"*** test — only those felonies which are inherently dangerous to life and health count, for purposes of the felony-murder rule. [257]

a. Two standards: Courts are ***split*** about how to determine whether a felony is "inherently dangerous." Some courts judge dangerousness in the ***abstract*** (e.g., by asking whether larceny is in general a dangerous crime), whereas others evaluate the felony based on the ***facts of that particular case*** (so that if, say, the particular larceny in question is committed in a very dangerous manner, the felony is "inherently dangerous" even though most other larcenies are not physically dangerous). [257]

b. Listing: In courts that judge "inherent dangerousness" in the abstract, here are felonies that are typically considered inherently dangerous: ***robbery, burglary, rape, arson, assault*** and ***kidnapping.*** By contrast, the various theft-related felonies are generally not considered inherently dangerous: larceny, embezzlement and false pretenses. [257]

C. Causal relationship: There must be a ***causal relationship*** between the felony and the killing. First, the felony must in some sense be the "but for" cause of the killing. Second, the felony must be the ***proximate cause*** of the killing. [258-261]

1. "Natural and probable" consequences: The requirement of proximate cause between the felony and the death is usually expressed by saying that D is only liable where the death is the ***"natural and probable consequence"*** of D's felonious conduct. [258]

a. Broad reading: However, "natural and probable consequence" is given a quite ***broad*** (easy-to-satisfy) reading in felony-murder cases.

Example: Suppose that during a robbery, D carries a gun that *accidentally discharges* and kills the person being robbed. Most courts would say that the death *was* the "natural and probable consequence" of D's conduct even though that death was completely accidental and undesired (and not very likely to occur, when viewed from

the starting-point of the underlying felony).

b. Substitute for proximate cause: So think of a consequence as being the "natural and probable consequence" of D's conduct as long as that conduct brought about the consequence without the intervention of any very ***bizarre additional events.***

2. Robberies, burglaries and gunfights: Most commonly, proximate cause questions arise in the case of ***robberies, burglaries and gunfights.*** [259-261] (We'll simplify here by just referring to the felon as being the "robber.")

a. Robber fires shot: If the fatal shot is fired by the ***robber*** (even if accidentally), virtually all courts agree that D is the proximate cause of death, and that the felony-murder doctrine should apply. This is true whether the shot kills the robbery victim, or a ***bystander.*** [259]

Example 1: On a city street, D points a gun at V, and says, "Your money or your life." While V is reaching into his pocket for his wallet, D drops his gun. The gun strikes the pavement and goes off accidentally, killing V. D's acts of robbery are clearly the proximate cause of V's death, and D is guilty of murder under the felony-murder rule.

Example 2: Same facts as above example. Now, assume that when the gun strikes the pavement and goes off, it kills B, a bystander 20 feet away. D's acts are the proximate cause of B's death, so D is guilty of murdering B under the felony-murder doctrine.

b. Victim or police officer kills bystander: Where the fatal shot is fired by the ***robbery victim*** or by a ***police officer,*** and a ***bystander*** is accidentally killed, courts are split as to whether the robber is the proximate cause of the death. California, for instance, does not apply the felony-murder doctrine in any situation where the fatal shot comes from the gun of a person other than the robber. In other states, the result might depend on whether the robber fired the first shot, so that if the first shot was fired by the victim and struck a bystander, the robber would not be guilty. [259]

c. Victim, police officer or other non-felon kills one robber: Where ***one robber is killed*** by a ***non-felon*** — such as by the robbery victim or by police officers attempting to make an arrest — this presents the ***weakest case*** for holding the other robbers liable for felony- murder. Courts disagree on whether to apply felony-murder

in this situation.

i. **Doctrine does not apply:** The ***majority*** approach is that the felony-murder doctrine ***does not apply*** in this "death directly caused by an innocent non-felon" scenario. This result is sometimes justified on the rationale that the felony-murder doctrine is intended to ***protect only innocent persons,*** so it should not apply where a robber is killed.

Example: D and X are co-robbers. X is killed by a police officer who is trying to apprehend the pair. Most courts would hold that D is not guilty of felony-murder. [Cf. *State v. Sophophone* (2001)]

Note on "depraved heart" as alternative: In any robbery situation, in addition to the possibility of "felony-murder" as a theory, examine the possibility of using "depraved heart" as an alternate theory. For instance, if D, while committing a robbery, initiates a gun fight, and a police officer shoots back, killing a bystander, it may be easier to argue that D behaved with reckless indifference to the value of human life (thus making him guilty of "depraved-heart" murder) than to find that the felony-murder doctrine should apply (since many courts hold that the felony-murder doctrine applies only where the killing is by the defendant's own hand or the hand of his accomplice). [261]

D. Accomplice liability of co-felons: Frequently, the doctrine of felony-murder combines with the rules on ***accomplice*** liability. The net result is that if two or more people work together to commit a felony, and one of them commits a killing during the felony, the others may also be guilty of felony-murder. [261-262]

1. **Test:** In most courts, all of the co-felons are liable for a killing committed by one of them, if the killing was: (1) committed ***in furtherance of the felony;*** and (2) a ***"natural and probable" result*** of the felony. [262]

   a. **Intentional killing:** If the killing by one co-felon is ***intentional*** rather than accidental, the other co-felons will probably be liable under accomplice principles as long as the killing was committed "in furtherance" of the felony. This will normally be true even though the other co-felons can show that they ***did not desire or foresee*** the killing.

   i. **Not in furtherance:** But if the other co-felons can show that the killing was ***not committed for the purpose of furthering the felony,*** they may be able to escape accomplice liability.

[262]

Example: *A* and *B* rob a convenience store together. As *A* knows, *B* is carrying a loaded gun, but *B* has never used the gun on any previous robberies and is generally opposed to violence. Unknown to either, the new owner of the store is V, an old enemy of B's. *B* decides to shoot *V* to death during the course of the robbery, even though *V* is not threatening to call the police or resisting the robbery in any way.

A will have a good chance of persuading the court that the killing was not "in furtherance of" the robbery, and thus of escaping accomplice liability for felony-murder.

b. Accidental killing: Similarly, one felon will commonly be guilty of murder based on another felon's ***accidental*** killing. [261]

Example: *A* and *B* decide to rob a convenience store together. *A* carries no gun. *A* knows that *B* is carrying a loaded gun, but also knows that *B* has never used a gun in similar robberies in the past, and that *B* does not believe in doing so. During the robbery, *B* accidentally drops the gun, and the gun goes off when it hits the floor, killing V, the convenience store operator.

Because *B* was holding the gun "in furtherance" of the robbery when he dropped it, and because an accident involving a loaded gun is a somewhat "natural and probable" consequence of carrying the loaded gun during the felony, there is a good chance that the court will hold not only that *B* is guilty of felony-murder, but that *A* is also guilty of felony-murder as an accomplice to B's act of felony-murder.

E. "In commission of" a felony: The felony-murder doctrine applies only to killings which occur ***"in the commission of"*** a felony. [263-264]

1. **Causal:** There must be a ***causal relationship*** between felony and killing. [263]

2. **Escape as part of felony:** If the killing occurs while the felons are attempting to ***escape,*** it will probably be held to have occurred "in the commission of" the felony, at least if it occurred reasonably close, both in ***time and place,*** to the felony itself. [263]

3. **V dies while trying to escape peril:** Similarly, if V has been confined by D (while D commits, say, robbery or burglary), and dies while trying to ***escape the confinement,*** the death will probably be found to be "in the commision of" the felony. [263]

Example: D breaks into V's house, ties V up in a chair, and robs V's safe. After D returns home with the loot, V suffers a fatal heart attack while trying to remove his bonds. This will be felony-murder because a court will conclude that the death occurred "during the commission of" the robbery.

4. **Killing before felony:** Even if the killing occurs ***before*** the accompanying felony, the felony-murder doctrine will apply if the killing was in some way in furtherance of the felony. [264]

   Example: D intends to rape V. In order to quiet her, he puts his hand over her mouth, thereby asphyxiating her. D is almost certainly liable for felony-murder, even though he killed V before he tried to rape her, and even though the final felony was only an attempted rape (since one cannot rape a corpse).

F. **Felony must be independent of the killing:** For applicaton of the felony-murder doctrine, the felony must be *independent* of the killing. This prevents the felony-murder rule from turning virtually any attack that culminates in death into automatic murder. [264-265]

   Example: D kills V in a heat of passion, under circumstances that would justify a conviction of voluntary manslaughter but not murder. Even though manslaughter is obviously a "dangerous felony," the felony-murder rule will not apply to upgrade the manslaughter to felony-murder. The reason is that the underlying felony must be independent of the killing, a requirement not satisfied here.

1. **Assault:** The "felony must be independent of the killing" rule is why it's ***not*** felony-murder when D commits an ***assault or battery*** against V (but doesn't intend to kill V), and V unexpectedly dies as a result.

   Example: D, without provocation, intends to punch V in the jaw, but not to seriously injure him or kill him. V, while falling from the blow, hits his head on the curb and dies. Even though U D was committing the dangerous felony of assault or battery, the crime will not be upgraded to M felony-murder, because the felony was not independent of the killing. M A

G. **Model Penal Code approach:** The Model Penal Code does ***not*** adopt the felony-murder rule *per se.* Instead, the M.P.C. establishes a ***rebuttable presumption*** of "recklessness...manifesting extreme indifference to the value of life" where D is engaged in or an accomplice to robbery, rape, arson, burglary, kidnapping or felonious escape. Thus if an unintentional killing occurs during one of these crimes, the prosecution gets to the jury on the issue of "depraved-heart" murder. But D is free to ***rebut*** the presumption that he acted with reckless indifference to the value of human life. The M.P.C. provision is thus quite different from the usual felony-murder provision, by which D is *automatically* guilty of murder even if he can show that he was not reckless with respect to the risk of death. [265]

IV. DEATH PENALTY AS PUNISHMENT FOR MURDER

A. Death penalty generally: At least 35 states now authorize the ***death penalty*** for some kinds of murder. [266-268]

1. **Not necessarily "cruel and unusual":** The death penalty is not necessarily a "cruel and unusual" punishment, and thus does not necessarily violate the Eighth Amendment. *[Gregg v. Georgia* (1976)] [266]

2. **Must not be "arbitrary or capricious":** However, a state's death-penalty scheme must not be ***"arbitrary or capricious"*** That is, the state may not give too much discretion to juries in deciding whether or not to recommend the death penalty in a particular case. Typically, the state avoids undue discretion by listing in the death penalty statute certain ***aggravating circumstances*** (e.g., the presence of torture) — then, if the jury finds one or more of the aggravating circumstances to exist beyond a reasonable doubt, the jury may recommend the death penalty. In general, this "aggravating circumstance" approach has been upheld by the Supreme Court as constitutional. [266]

3. **Mandatory sentences not constitutional:** By contrast, it is usually ***unconstitutional*** for a state to try to avoid undue jury discretion by making a death sentence ***mandatory*** for certain crimes (e.g., killing of a police officer, or killing by one already under life sentence). The Supreme Court has held that the states must basically allow the jury to consider the ***individual circumstances*** of a particular case (e.g., the presence of extenuating circumstances), and a mandatory-sentence scheme by definition does not allow this. *[Woodson v. North Carolina* (1976)] [266]

4. **Racial prejudice:** A defendant can avoid a death sentence by showing that the jury was motivated by ***racial*** considerations, in violation of his Eighth Amendment or equal protection rights. However, the Supreme Court has held that any proof of impermissible racial bias must be directed to the ***facts of the particular case,*** and may not be proved by large-scale ***statistical studies.*** *[McCleskey v. Kemp* (1987).] [266]

5. **Other limits:** Here are several other important limits on capital

punishment:

a. No felony-murder death penalty: Where D's guilt of murder stems solely from the application of the ***felony-murder*** doctrine, and D did not directly precipitate the killing, attempt to kill or desire to kill, D can't be subjected to the death penalty. *[Enmund v. Florida* (1982)] [268]

b. No non-murder crimes against individuals: Where the crime is against an ***individual*** and did not lead to ***death,*** capital punishment violates the Eighth Amendment. So ***rape,*** even of a ***child,*** may not be punished by death. *[Kennedy v. Louisiana* (2008)] [268]

i. Crimes against state: On the other hand, there is so far no Eighth Amendment problem with imposing death for serious crimes against the ***state,*** such as ***treason,*** espionage and terrorism, even if no death resulted. *Id.*

c. Execution of the mentally retarded: The execution of the ***mentally retarded violates*** the Eighth Amendment. *[Atkins v. Virginia* (2002)]

d. Juveniles: The execution of persons who were ***juveniles*** (under 18) at the time the crime was committed violates the Eighth Amendment. *[Roper v. Simmons* (2005)]

V. DEGREES OF MURDER

A. First-degree murder: Most states recognize at least two degrees of murder. ***First-degree murder*** in most states is a killing that is ***"premeditated and deliberate."*** [268-270]

1. Only short time required for premeditation: Courts do not require a long period of premeditation. Traditionally, no substantial amount of time has needed to elapse between formation of the intent to kill and execution of the killing. Most modern courts require a reasonable period of time during which deliberation exists, but even this is not a very stringent requirement — five minutes, for example, would suffice in most courts even today. [269]

a. Planning, motive or careful manner of killing: Like any other form of intent, premeditation and deliberation can be shown by

circumstantial evidence. Typical ways of showing that D premeditated are: (1) ***planning activity*** occurring prior to the killing (e.g., purchase of a weapon just before the crime); (2) evidence of a ***"motive"*** in contrast to a sudden impulse; and (3) a ***manner*** of killing so precise that it suggests D must have a preconceived design. [269]

2. Intoxication as negating deliberation: If D is so ***intoxicated*** that he lost the ability to deliberate or premeditate, this may be a defense to first-degree murder (though not a defense to murder generally, such as second-degree murder). [269]

3. Certain felony-murders: Statutes in some states make some or all ***felony-murders*** (typically, those involving rape, robbery, arson and burglary) first-degree. [270]

4. Model Penal Code: The Model Penal Code does ***not*** divide murder into first-and second-degree, and attaches no significance to the fact that D did or did not premeditate/deliberate. [269]

B. Second-degree murder: Murders that are not first-degree are second-degree. These typically include the following classes: [270]

1. No premeditation: Cases in which there is ***no premeditation.*** [270]

2. Intent to seriously injure: Cases where D may have premeditated, but his intent was not to kill, but to do ***serious bodily injury*** (a *mens rea* sufficient for murder). [270]

3. Reckless indifference: Cases in which D did not intend to kill, but was ***recklessly indifferent*** to the value of human life. [270]

4. Felony-murders: Killings committed during the course of felonies other than those specified in the first-degree murder statute (i.e., typically felonies other than rape, robbery, arson and burglary). [270]

VI. MANSLAUGHTER — VOLUNTARY

A. Two types of manslaughter: In most states, there are two types of manslaughter: (1) ***voluntary manslaughter,*** in which there is generally an ***intent to kill;*** and (2) ***involuntary manslaughter,*** in which the death is ***accidental.*** [270]

B. "Heat of passion" manslaughter: The most common kind of voluntary manslaughter is that in which D kills while in a ***"heat of passion,"*** i.e., an extremely ***angry*** or disturbed state. [271]

1. Four elements: Assuming that the facts would otherwise constitute murder, D is entitled to a conviction on the lesser charge of voluntary manslaughter if he meets four requirements: [271]

[1] **Reasonable provocation:** He acted in response to a ***provocation*** that would have been sufficient to cause a ***reasonable person*** to ***lose his self-control*** (i.e., to act "in the heat of passion"). [271]

[2] **Actually act in "heat of passion":** D was ***in fact*** in a "heat of passion" at the time he acted; [271]

[3] **No time for reasonable person to cool off:** The lapse of time between the provocation and the killing was not great enough that a ***reasonable person*** would have ***"cooled off,"*** i.e., regained his self-control; [271] and

[4] **D not in fact cooled off:** D did not ***in fact*** "cool off" by the time he killed. [271]

2. Consequence of missing hurdle: If D fails to clear hurdles [1] or [3] above (i.e., he is actually provoked, and has not cooled off, but a reasonable person would have either not lost his self-control or would have cooled off), D will normally be liable only for ***second-degree*** murder, not first-degree, since he will probably be found to have lacked the necessary premeditation. But if D trips up on hurdles [2] or [4] (i.e., he is not in fact driven into a heat of passion, or has in fact already cooled off), he is likely to be convicted of ***first-degree*** murder, since his act of killing is in "cold blood." [271]

C. Provocation: As noted, D's act must be in response to a ***provocation*** that is: (1) sufficiently strong that a ***"reasonable person"*** would have been ***caused to lose his self control;*** and (2) strong enough that ***D himself*** lost his self-control. [271-274]

1. Lost temper: The provocation need not be enough to cause a reasonable person to kill. The provocation merely needs to be enough that it would make a reasonable person ***lose his temper.*** [271]

2. **Objective standard for emotional characteristics:** Courts generally do ***not*** recognize the peculiar ***emotional*** characteristics of D in determining how a reasonable person would act. *(Example:* All courts agree that the fact that D is unusually bad-tempered, or unusually quick to anger, is not to be taken into account.) [272]

3. **Particular categories:** Courts have established certain rules, as a matter of law, about what kind of provocation will suffice: [272]

   a. **Battery:** More-than-trivial ***battery*** committed on D is usually considered to be sufficient provocation. [272]

   Example: V, a man, slaps D, a man, because D has failed to pay back a debt. This will probably constitute adequate provocation, so if D then flies into a rage and kills V, this will be manslaughter rather than murder.

   i. **D initiates:** However, if D brought on the battery by his own initial aggressive conduct, he will ***not*** be entitled to a manslaughter verdict.

   ii. **Assault:** If V ***attempts*** to commit a battery on D, but fails (thereby committing a criminal assault), most courts regard this as sufficient provocation.

   b. **Mutual combat:** If D and V get into a ***mutual combat,*** in which neither one can be said to have been the aggressor, most courts will treat this as sufficient provocation to D. [273]

   c. **Adultery:** The classic voluntary manslaughter situation is that in which Husband surprises Wife in the act of ***adultery*** with her paramour, and kills either Wife or Lover. This will almost always be sufficient provocation. (But courts do not necessarily recognize provocation where the couple is ***unmarried.)*** [273]

   d. **Words alone:** Traditionally, ***words alone*** cannot constitute the requisite provocation — no matter how ***abusive, insulting*** or ***harassing,*** D will be guilty of murder, not manslaughter, if he kills in retaliation. [273]

   Example: D and V, drinking in a bar, get into an argument about the upcoming Presidential election. V calls D a moron, and then insults D's mother's chastity. D becomes enraged, pulls out a knife, and without deliberation stabs V in the stomach, intending to kill him. V dies.

D has committed murder, not voluntary manslaughter. No words of insult, standing alone, will be deemed sufficiently provocative as to cause the target's homicidal rage to be "reasonable."

i. **Words carrying information:** But if the words ***convey information,*** most courts today hold that the words will suffice if a reasonable person would have lost his self-control upon hearing them.

Example: V says to D, formerly his best friend, "You know, I've been having an affair with your wife for the last six months. She's a heck of a girl, and we'd like you to give her a divorce so that we can get married." This is probably sufficient provocation, so that if D kills V, he is probably entitled to a manslaughter verdict.

4. **Effect of mistake:** If D ***reasonably*** but ***mistakenly*** reaches a conclusion which, if accurate, would constitute sufficient provocation, courts will generally allow manslaughter. *(Example:* Based on circumstantial evidence, D reasonably but erroneously suspects that his wife has been sleeping with his best-friend. Probably this will suffice as provocation.) [274]

5. **Actual provocation:** Remember that the provocation must be not only sufficient to cause a reasonable person to lose his self-control, but also sufficient to have ***in fact*** enraged D. [274] C

Example: D finds his wife together with V, his best friend. D has in fact suspected the affair for some time, and thus cooly says to himself, "Now's my chance to kill V and get off with just voluntary manslaughter." He cold-bloodedly shoots V in the heart. Even though the provocation would have been sufficient to cause a reasonable person to lose control, D does not qualify for manslaughter here because he was not in fact enraged at the moment of the shooting.

D. **"Cooling off" period:** The ***time*** between D's discovery of the upsetting facts and his act of killing must be sufficiently short that: (1) a ***reasonable person*** would not have had time to "cool off"; U and (2) D himself did not ***in fact*** cool off. [274]

1. **Rekindling:** But even if there is a substantial cooling-off period between the initial provocation and the killing, if a ***new provocation*** occurs which would ***rekindle*** the passion of a reasonable person, the cooling-off rule is not violated. This is true even if the new provocation would not ***by itself*** be sufficient to inflame a reasonable person. [274]

E. Other kinds of voluntary manslaughter: In addition to manslaughter based upon a "heat of passion" killing, there are a number of other situations in which voluntary manslaughter may be found. [275]

1. "Imperfect" defenses: Mostly, these other kinds of voluntary manslaughter are situations in which D has an ***"imperfect defense,"*** i.e., what would otherwise be a ***complete defense or justification*** does not exist due to D's ***unreasonable mistake*** or for some other reason: [275]

a. Where applicable: Most importantly, most states recognize ***"imperfect self defense."*** [275] That is, most states entitle D to have a murder charge lowered to voluntary manslaughter if D ***killed to defend himself*** but is not entitled to an acquittal because:

[1] he was unreasonably mistaken about the ***existence of danger;*** or

[2] he was unreasonably mistaken (perhaps because of ***intoxication)*** about the ***need for deadly force,*** or the proper level of non-defense required; or

[3] he was the ***aggressor.***

b. Imperfect defense of others: Similarly, if D uses deadly force in ***defense of another,*** but does not meet all of the requirements for exculpation, some courts give him the lesser charge of voluntary manslaughter. *(Example:* If D witnesses a fight between V and X, and honestly but unreasonably concludes that X was the aggressor, D may be entitled to manslaughter for killing V.) [276]

c. Other situations: If D comes close to qualifying for the defense of ***prevention of crime,*** or ***necessity*** or ***coercion,*** he may be similarly entitled to reduction to manslaughter. [276]

2. Mercy killings: Some courts — and many juries — frequently give D a lesser verdict of voluntary manslaughter when he commits a ***mercy killing,*** i.e., a killing to terminate the life of one suffering from a painful or incurable disease. [276]

3. Intoxication rarely suffices: Most states do ***not*** permit D's voluntary ***intoxication*** to reduce murder to manslaughter. [276]

VII. MANSLAUGHTER — INVOLUNTARY

A. Involuntary manslaughter based on criminal negligence: A person whose behavior is ***grossly negligent*** may be liable for ***involuntary manslaughter*** if his conduct results in the accidental death of another person. [276-278]

1. Gross negligence required: Nearly all states hold that ***something more than ordinary tort negligence*** must be shown before D is liable for involuntary manslaughter. Most states require ***"gross negligence".*** Usually, D must be shown to have disregarded a very substantial danger not just of bodily harm, but of ***serious*** bodily harm or death. [276]

a. Model Penal Code: The M.P.C. requires that D act ***"recklessly".*** (The M.P.C. also requires that D be aware of the risk, as discussed below.) [277]

2. All circumstances considered: The existence of gross negligence is to be measured in light of ***all the "circumstances."*** The ***social utility*** of any objective D is trying to fulfill is part of the equation. [277]

Example: D kills V, a pedestrian, by driving at 50 mph in a 30 mph residential zone. D's conduct may be grossly negligent if D was out for a pleasure spin, but not if D was rushing his critically ill wife to the hospital.

3. "Inherently dangerous" objects: Where D uses an object that is ***"inherently dangerous,"*** the courts are quicker to find him guilty of involuntary manslaughter. This is especially true where the accident involves a ***firearm.*** [277]

4. Defendant's awareness of risk: Courts are split as to whether D may be liable for manslaughter if he was ***unaware*** of the risk posed by his conduct. [277]

a. Awareness usually required: As noted, most states require D to have acted with "gross negligence" or "recklessness." In these states, courts usually require that D have been ***actually aware*** of the danger. [277]

i. Model Penal Code agrees: The M.P.C., which requires "recklessness" for involuntary manslaughter, similarly requires actual awareness. Under the M.P.C., a person acts recklessly only when he ***consciously disregards*** a substantial

and unjustifiable risk. [277]

5. **Victim's contributory negligence:** The fact that the ***victim*** was ***contributorily negligent*** is ***not*** a defense to manslaughter. (However, the victim's negligence may tend to show that the accident was proximately caused by this action on the victim's part, rather than by any gross negligence on D's part.) [278]

6. **Causal link required:** The gross negligence must be ***causally related*** to the death. So, for instance, if the death would have occurred ***even if D had not been grossly negligent,*** she won't be guilty of involuntary manslaughter. [278]

   Example: D gets drunk, drives home, and has a fatal collision with a car driven by V when V goes through a red light. Assume that D drove at a correct speed, and obeyed all other traffic regulations, If the jury believes that the accident would have happened the same way had D not been drunk (which seems likely), then D won't be guilty of involuntary manslaughter — in that event, his drunken driving, though grossly negligent, wouldn't be the cause in fact or the proximate cause of V's death.

7. **Vehicular homicide:** Many states have defined the lesser crime of ***vehicular homicide,*** for cases in which death has occurred as the result of the defendant's poor driving, but where the driving was not reckless or grossly negligent. (Most successful involuntary manslaughter cases also involve death by automobile.) [278]

   a. **Intoxication statutes:** Also, some states have special statutes which make it a crime to cause death by ***driving while intoxicated.*** [278]

   b. **Criminally negligent homicide:** Additionally, some states define the crime of ***"criminally negligent homicide,"*** whose penalties are typically less than the penalties for involuntary manslaughter. These statutes are not limited to vehicular deaths. *(Example:* The M.P.C. defines the crime of "negligent homicide," which covers cases where D behaves with gross negligence, but is ***not aware*** of the risk posed by his conduct.) [278]

B. **The misdemeanor-manslaughter rule:** Just as the felony-murder rule permits a ***murder*** conviction when a death occurs during the course of certain felonies, so the "misdemeanor-manslaughter" rule permits a conviction for ***involuntary manslaughter*** when a death occurs

accidentally during the commission of a misdemeanor or other ***unlawful act.*** [279-280]

1. **Most states apply:** Most states continue to apply the misdemeanor-manslaughter rule. [279]
2. **Substitute for criminal negligence:** The theory behind the rule is that the unlawful act is treated as a ***substitute for criminal negligence*** (by analogy to the "negligence *per se*" doctrine in tort law). [279]
3. **"Unlawful act" defined:** ***Any misdemeanor*** may serve as the basis for application of the misdemeanor-manslaughter doctrine. Also, some states permit the prosecution to show that D violated a ***local ordinance*** or ***administrative regulation.*** And if a particular ***felony*** does not suffice for the felony-murder rule (e.g., because it is not "inherently dangerous to life"), it may be used. [279]

   a. **Battery:** The most common misdemeanor in misdemeanor-manslaughter cases is ***battery.*** [279]

   Example: D gets into an argument with V, and gives him a light tap on the chin with his fist. D intends only to stun V. Unbeknownst to D, V is a hemopheliac and bleeds to death. Since D has committed the misdemeanor of simple battery, and a death has resulted, he is guilty of manslaughter under the misdemeanor-manslaughter rule. The same result would occur if as the result of the light tap, V fell and fatally hit his head on the sidewalk.

   b. **Traffic violations:** The violation of ***traffic laws*** is another frequent source of misdemeanor-manslaughter liability. [279]

   Example: D fails to stop at a stop sign, and hits V, a pedestrian crossing at a crosswalk. V dies. Even if D does not have the "gross negligence" typically required for ordinary voluntary manslaughter, D's violation of the traffic rule requiring that one stop at stop signs will be enough to make him guilty of manslaughter under the misdemeanor-manslaughter rule.

4. **Causation:** There must be a ***causal relation*** between the violation and the death. [279]

   a. ***Malum in se:*** In the case of a violation that is ***"malum in se"*** (dangerous in itself, such as driving at an excessive speed), the requisite causal relationship is often found so long as the violation is the "cause in fact" of the death, even though it was not "natural and probable" or even "foreseeable" that the death would occur.

That is, in *malum in se* cases, the usual requirement of "proximate cause" is often suspended. [279]

b. *Malum prohibitum:* But if D's offense is *"malum prohibitum,"* (i.e., not dangerous in itself, but simply in violation of a ***public-welfare*** regulation), most states *do* require a showing that the violation was the proximate cause of the death. [280]

i. Licensing requirements: The requirement of a close causal relationship often arises with respect to ***licensing*** requirements: If the jurisdiction requires a license to pursue some activity, but D would be entitled to the license as a matter of right, his conducting of the activity without a license, coupled with a harm (a death) stemming from the activity, normally ***won't trigger*** the misdemeanor-manslaughter rule, because the failure to get a license is not deemed to be the proximate cause of the harm. (See *supra,* p. C-20).

5. Model Penal Code abolishes: The Model Penal Code ***rejects*** the misdemeanor-manslaughter rule in its entirety. However, under the M.P.C., the fact that an act is unlawful may be ***evidence*** that the act was reckless (the Code's *mens rea* for manslaughter). [280]

VIII. ASSAULT, BATTERY AND MAYHEM

A. Battery: The crime of ***battery*** exists where D causes either: (1) ***bodily injury;*** or (2) ***offensive touching.*** [285]

1. Injury or offensive touching: Any kind of physical injury, even a bruise from a blow, will meet the physical harm requirement. Also, in most states an ***offensive touching*** will suffice. *(Example:* D, without V's consent, kisses V. Since this is an offensive touching, it will constitute battery in most states even though V was not physically injured.) [285]

2. Mental state: D's ***intent*** to inflict the offensive touching or the injury will suffice, of course. But also, in most states, if the contact is committed ***recklessly,*** or with gross negligence, this will also suffice. [285]

Example: D throws a baseball with a friend, in a crowded city street. The ball strikes V,

a passerby. If a court finds that D behaved recklessly, he will probably be guilty of battery, even though he did not intend to touch or injure V.

3. **Degrees of battery:** Simple battery is generally a misdemeanor. However, most states have one or more additional, aggravated, forms of battery, some of which are felonies. *(Examples:* Some states make it aggravated battery if D uses a deadly weapon, or acts with "intent to kill" or with "intent to rape.") [285]

B. Assault: The crime of ***assault*** exists where either: (1) D ***attempts to commit a battery,*** and fails; or (2) D places another in ***fear of imminent injury.*** [286]

1. **Attempted-battery assault:** D is guilty of assault if he ***unsuccessfully attempts*** to commit a battery. *(Example:* D shoots at V, attempting to hit him in the leg. The bullet misses. D is guilty of the attempted-battery form of assault.) [286]

2. **Intentional-frightening assault:** Some states also recognize a second form of assault, that in which D intentionally ***frightens his victim*** into fearing ***immediate bodily harm.*** [286]

Example: During an attempted bank robbery, D points his gun at V, a customer at the bank, and says, "One false step and I'll fill you full of lead." This is assault of the intentional-frightening variety; the fact that D's threat is conditional does not prevent the crime from existing.

a. **Words alone:** ***Words alone*** will ***not*** suffice for assault. The words must be accompanied by some overt gesture (e.g., the pointing of a gun) or other physical act. [286]

3. **Aggravated assault:** Simple assault is a misdemeanor. However, most states recognize various kinds of felonious ***aggravated assault*** (e.g., "assault with intent to kill" or "assault with intent to rape"). [287]

C. Mayhem: The common-law crime of ***mayhem*** is committed whenever D intentionally ***maims*** or permanently ***disables*** his victim. Thus mayhem is a battery causing ***great bodily harm.*** [287]

1. **Injury must be permanent:** The injury must not only be serious, but ***permanent.*** *(Example:* It is not mayhem to break V's jaw, or to cut him with a knife in a way that causes a small scar. On the other hand,

it is mayhem to cut out V's eye, or to make him a cripple by shooting off his kneecap.) [287]

IX. RAPE

A. Rape defined: Rape is generally defined as ***unlawful sexual intercourse with a female without her consent.*** [287-292]

1. **Intercourse:** It is not necessary that D achieve an emission. All that is required is that there be a sexual ***penetration,*** however slight. [287]

2. **The spousal exception:** Common-law rape requires that the victim be one ***other than the defendant's wife.*** However, this complete spousal exemption at common law has been weakened by statutory reform. [288]

   a. **Forcible rape even while living together:** A substantial minority of states now permit prosecution for ***forcible rape*** even if H and W are living together. In other words, in these states, the spousal exemption is virtually eliminated. [288]

   b. **Separated or living apart:** An additional substantial minority eliminate the spousal exemption based on the parties' current living arrangements or marital status. Some of these eliminate the exemption where the parties are ***not living together.*** Others eliminate it only if the parties are separated by court order, or one has filed for divorce or separation. [288]

3. **Without consent:** The intercourse must occur without the woman's ***consent.*** [288]

   a. **Victim drunk or drugged:** If D causes V to become ***drunk, drugged*** or ***unconscious,*** the requisite lack of consent is present. In some but not all states, consent is lacking if the woman is drunk, drugged or unconscious even if this condition was not induced by D. [288]

   b. **Fraud:** If consent is obtained by ***fraud,*** the status depends on the nature of the fraud. Where D tells a lie in order to induce V to agree to have what V knows is intercourse with him, the fraud is "in the inducement" and does ***not*** vitiate the consent. *(Example:* D says to V, "Have sex with me, and I promise we'll get married tomorrow."

Even if D is knowingly misleading V about the probability of marriage, D has not committed rape.) [288]

i. **Fraud in the essence:** But if the fraud is such that V does not even realize that she is having intercourse at all ("fraud in the essence"), this will suffice for rape. *(Example:* D, a doctor, has sex with V by telling her that he is treating her with a surgical instrument. This is rape.) [288]

c. **Mistake no defense:** Most courts ***do not recognize*** the defense of ***mistake*** as to consent. This stems from the fact that most courts view rape as a crime of ***general intent.*** In other words, most courts require the prosecution to prove only that D voluntarily committed an act of sexual intercourse — consequently, whether D mistakenly thought the woman consented is irrelevant. [288]

i. **Negligence standard:** But a small minority of courts ***allows*** a mistake about whether the victim has consented to negative the crime, but only if the mistake is a ***"reasonable"*** — i.e., non-negligent — one.

4. **Force:** The vast majority of rape statutes apply only where the intercourse is committed by ***"force"*** or "forcible compulsion." In other words, it is not enough that the woman fails to consent; she must also be "forced" to have the intercourse. (If the woman is unconscious or drugged, or is under-age, force is not an element of the crime; but in other instances of rape, force is required.) [290-291]

a. **Threat of force:** D's ***threat*** to commit ***imminent serious bodily harm*** on the woman will be a substitute for the use of actual physical force, in virtually all states. Some states also recognize the threat to do other kinds of acts not involving serious bodily harm (e.g., a threat of "extreme pain or kidnapping" may suffice under the Model Penal Code). [290]

i. **Implied threats or threats of non-imminent harm:** On the other hand, ***implied threats,*** or threats to commit harm on some ***future occasion,*** or ***duress*** stemming from the victim's circumstances, are all things that will ***not suffice,*** because they are not threats to use force on the particular occasion. [290]

b. Resistance: Traditionally, rape did not exist unless the woman ***physically resisted.*** This requirement is gradually being weakened. [291]

i. Reasonable resistance: No state requires that the woman resist "to the utmost" anymore, as some states used to. Typically, the woman must now make merely ***"reasonable"*** resistance, as measured by the circumstances. *(Example:* Where D is threatening V with a gun or knife, presumably it is "reasonable" for V not to resist at all.) [291]

5. Homosexual rape: Because common-law rape is defined so as to require both penetration and a female victim, there can be no common-law ***homosexual rape.*** (However, a majority of states have amended their rape statutes to be gender-neutral, so that homosexual rape is now the same crime as heterosexual rape in most states.) [291]

B. Statutory rape: All states establish an ***age of consent,*** below which the law regards a female's consent as ***impossible.*** One who has intercourse with a female below this age is punished for what is usually called "statutory rape." [292]

1. Reasonable mistake: In most states, even a ***reasonable belief*** *by* D that the girl was over the age of consent is not a defense. [292]

a. M.P.C. allows: But the Model Penal Code allows the "reasonable mistake as to age" defense, at least where the offense is garden-variety statutory rape (intercourse with a girl under the age of 16). [292]

2. Encouragement by girl: The fact that the under-age girl has ***encouraged*** the sex is irrelevant. Also, the fact that the girl has lied about her age is no defense (unless it contributes to D's reasonable mistake as to age, in a state following the minority rule recognizing reasonable mistake as a defense). [292]

X. KIDNAPPING

A. Definition of kidnapping: Kidnapping is the ***unlawful confinement*** of another, accompanied by either a ***moving*** of the victim or a ***secreting*** of him, done for the purpose of accomplishing some other unlawful objective (e.g., collecting a ransom or committing a robbery). [293]

1. **Asportation:** Assuming that the crime does not involve secret imprisonment, the prosecution must show that the victim was ***moved*** ("asportation"). [293]

   a. **Large distance not required:** The asportation need not be over a large distance. *(Example:* D accosts V on the street, and makes her walk a few feet to his car, where he detains her. The requisite asportation will probably be found.) [293]

   b. **Must not be incidental to some other offense:** However, the asportation must not be merely ***incidental to some other offense.*** [293]

   Example: D, in order to rob V, forces him to stand up and put his hands against the wall, while D empties V's pockets. There is probably no asportation since there was no independent purpose to the confinement and movement; therefore, there is probably no kidnapping. But if B had been bound and gagged and left in a strange place to allow D to escape, this probably *would* be kidnapping.

CHAPTER 10
THEFT CRIMES

I. INTRODUCTION

A. List of theft crimes: There are seven crimes that can loosely be called "theft" crimes:

1. *Larceny*
2. *Embezzlement*
3. *False pretenses*
4. ***Receipt of stolen property***
5. *Burglary*
6. *Robbery*
7. ***Extortion*** (blackmail) [307]

B. Distinguishing the basic three: The three "basic" theft crimes are ***larceny, embezzlement*** and ***false pretenses.*** Most exam questions relating to theft focus on the distinctions among these three categories. Therefore, you must focus on two particular dividing lines: [307]

1. **Larceny vs. embezzlement:** First, focus on the dividing line between ***larceny*** and ***embezzlement.*** This comes down to the question, "Was possession originally obtained unlawfully [larceny] or lawfully [embezzlement]?" [307-308]

2. **Larceny vs. false pretenses:** Second, focus on the dividing line between ***larceny*** and ***false pretenses.*** This comes down to the question, "What was obtained unlawfully, mere possession [larceny] or title [false pretenses]?" [308]

Note on consolidation: Some American states have now consolidated the three main theft crimes into one basic crime of "theft." But for the most part, you will generally be called upon to make these distinctions among the three common-law crimes. [308]

II. LARCENY

A. Definition: Common-law larceny is defined as follows: [308]

1. The ***trespassory***

2. ***taking*** and

3. ***carrying away*** of

4. ***personal property***

5. of ***another*** with

6. ***intent to steal.***

Example: D, a pickpocket, removes V's wallet from V's pocket, and runs away with it, without V discovering for some time what has happened. D has committed common-law larceny. That is, he has taken property that belonged to another and that was in the other's possession, and has carried it away, with an intent to steal it.

B. Trespassory taking: The requirement of a "trespassory taking" means that if D is ***already in rightful possession*** of the property at the time he appropriates it to his own use, he cannot be guilty of larceny. [308-312]

Example: D rents a car from V, a car-rental agency. At the time D consummates the rental transaction, he intends to use the car for one week (and so notifies V), then return it. After the week has passed, D decides to keep the car permanently, without paying any further rental fee. At common law, D is not guilty of larceny. This is because at the time he made the decision to appropriate the car, he was already in rightful possession, under the rental contract. But if at the moment D rented the car he intended to steal it, this would be a "trespassory taking" and thus larceny.

1. **Taking by employee:** Where an ***employee*** steals property belonging to the employer, and the employee had at least some physical control over the property at the time he made the decision to steal it, the existence of the requisite "trespassory taking" can be unclear. [310]

   a. **Minor employee:** If the employee is a relatively low-level one, the court is likely to hold that she had only ***custody,*** so that the employer retained possession. In this event, the employee would commit the necessary trespass, and would be guilty of common-law larceny. [310]

   Example: D is an entry-level bank clerk at V, a bank. D takes a stack of $100 bills out of her cash drawer, and walks out of the bank with them. A court would probably hold that D had only temporary "custody" of the bills in her cash register, not true "possession." Therefore, when D left the bank with the bills, she trespassorily took the bills from V's possession, and is guilty of common-law larceny.

   i. **Property received from third person:** But if the low-level employee receives property for the employer's benefit from a ***third person,*** the employee will generally be deemed to have possession, not mere custody — if he then later appropriates it, he is not guilty of larceny.

   Example: D, a messenger, works for V, a business. D goes to the bank and picks up money from the bank, which is V's property needed for payroll. Here, D has possession, not mere custody, so if he then absconds with the money he is not guilty of larceny. Instead, he would be guilty of embezzlement.

   b. **High employee:** If the employee is one who has a ***high position,*** with broad authority, he will usually be deemed to have possession, not just custody, of property that he holds for the employer's benefit. Therefore, if he subsequently appropriates the property for his own purposes, he is not guilty of larceny, but rather, embezzlement. [310]

   Example: D, the president of V, a publicly-held corporation, has the right to sign checks on V's bank accounts. He writes a check for $1,000, which he uses for his own purposes, and in a way that is not authorized by his employment contract with V. D has possession of the contents of the bank account, not mere custody, so his use of the money for his own purposes is embezzlement rather than larceny.

2. **Transactions in owner's presence:** If the owner of property delivers it to D as part of an exchange transaction which the owner ***intends to***

be completed in his presence, D receives only custody, and the owner retains "constructive possession." Therefore, if D appropriates the property, the requisite trespass exists, and the crime is larceny. [310]

Example: D drives into V's gas station. He asks for his tank to be filled up, and drives off without paying. Since the transaction was to be completed in V's presence, V retained "constructive possession" of the gas, and D's driving away was a trespassory taking and thus larceny. Some courts might call this "larceny by trick," but this is merely a particular way in which larceny can be committed, not a separate crime.

3. **Lost or mislaid property:** Where D finds ***lost or mislaid property,*** he may or may not commit the requisite trespass, depending on his state of mind at the time of the finding. [311-311]

   a. **Initial intent to keep it:** If D ***intends to keep the property*** at the time he finds it, he has committed the requisite trespass, and can be liable for larceny. (But he will not be guilty of larceny unless he also either knows who the owner is, or has reason to believe that he may be ***able to find out*** who and where the owner is. If D does not have such knowledge or reasonable belief at the time of finding, he does not become guilty of common-law larceny even if, subsequently, he discovers the owner's identity.) [311]

   b. **No initial intent to keep:** Conversely, if D does ***not*** intend to keep the property at the time he finds it (that is, he intends to try to return it to the owner), his possession is rightful and there is no trespass. Then, if D later changes his mind and does keep the property, he is ***not guilty of larceny*** at common law, since he is already in lawful possession. [311]

   c. **Property delivered by mistake:** The same rules apply where the owner of the property delivers it to D ***by mistake*** — D is not guilty of larceny, unless ***at the time he receives the property,*** he both realizes the mistake and intends to keep the property. [311]

   d. **M.P.C. changes rule:** The Model Penal Code changes the common-law trespass rules in cases of lost, mislaid or misdelivered property. Under the M.P.C., D's intent at the time he obtains the property is ***irrelevant*** — instead, D becomes liable for theft if "with purpose to deprive the owner thereof, he ***fails to take reasonable measures*** to ***restore the property*** to a person entitled to have it."

[311]

Example: D finds a wallet on the street, with money in it. At the time he picks it up, he intends to return it to V, its owner, who is identified on a driver's license inside the wallet. After D keeps the wallet on his dresser for two days, he decides, "I think I'll just keep it — no one will ever know." At common law, D is not guilty of larceny, because at the time he found the wallet, he intended to return it V. But under the M.P.C., D becomes guilty of larceny at the moment he decides to keep the property and fails to take reasonable steps to get it back to V.

4. **Larceny by trick:** If D gains possession of property by ***fraud or deceit,*** the requisite trespassory taking takes place. The larceny in this situation is said to be ***"by trick"*** — larceny by trick is simply one way in which larceny may be committed, not a separate crime. [312]

Example: D rents a car from V, a car rental agency. At the moment of the rental transaction, D has already decided that he will not return the car, and will not pay for it. D has committed larceny of the "by trick" variety, because his initial taking of possession was obtained by fraud or deceit.

a. **Distinguished from false pretenses:** Distinguish the taking of possession by fraud or deceit (leading to larceny by trick) from the taking of ***title*** by fraud or deceit (which is not larceny at all). If title passes, the crime is theft by false pretenses. [312]

C. **Carrying away ("asportation"):** D, to commit larceny, must not only commit a trespassory taking, but must also ***carry the property away.*** This is called ***"asportation."*** [312]

1. **Slight distance sufficient:** However, as long as every portion of the property is moved, even a ***slight distance*** will suffice. [312]

Example: D enters V's car, turns on the lights and starts the engine. At that point he is arrested. At common law, this would probably not be enough movement to satisfy the asportation requirement. But many courts today would hold that since D brought the car under his dominion and control, he did enough to satisfy the requirement. If D drove the car even a few feet, *all* courts would agree that he had met the asportation requirement.

D. **Personal property of another:** Common-law larceny exists only where the property that taken is ***tangible personal property.*** [313]

1. **Intangibles:** Thus at common law, one could not commit larceny of ***intangible*** personal property, such as stocks, bonds, checks, notes, etc. But today, all states have expanded larceny to cover many intangible items such as stocks and bonds; some states also cover such

items as gas and electricity and services. [313]

2. **Trade secrets:** Some courts have held that the taking of ***trade secrets*** can constitute larceny. [313]

E. Property of another: The property taken, to constitute larceny, must be property ***belonging to another.*** Where D and another person are ***co-owners,*** the common-law view is that there can be no larceny. [314]

1. **Recapture of chattel:** If D is attempting to ***retake*** a ***specific chattel*** that belongs to him, D will not be guilty of larceny, because he is not taking property "of another." In most states, this is also true if D is genuinely ***mistaken*** (even if unreasonably) in thinking that the thing he is taking belongs to himself rather than the other person. But this rule does not apply where D is taking ***cash*** or some other property in satisfaction of a ***debt*** (though the "claim of right" defense may exist here; see *infra*, p. C-103). [314]

Example 1: D's bicycle is stolen. Two days later he sees what is apparently the same bike, chained to a lamp post. D genuinely believes that this is his own stolen bike. He cuts the chain and removes the bike. If the bike was in fact his own, D is clearly not guilty of larceny, because he has not taken the property "of another." If D genuinely believes that the bike was his — even if this belief is unreasonable — most courts will similarly hold that he has not committed larceny. L

Example 2: D is owed $100 by V. D sees V's bicycle (worth $75) parked on the street. If D takes the bike as a substitute form of payment, he probably cannot defend on the grounds that the bike is not "property of another." On the other hand, most states would allow him to raise the "claim of right" defense, discussed in Par. F(2) below.

F. Intent to steal: Larceny is a crime that can only be committed ***intentionally,*** not negligently or M recklessly. [314-318]

1. **Intent to permanently deprive owner:** D must thus generally be shown to have an intent to ***permanently deprive*** the owner of his property. An intent to take property ***temporarily*** is not sufficient. [314]

Example: D enters V's car, intending to take it on a three-mile "joy ride." After one mile, D crashes the car, destroying it totally. At common law, D is not guilty of larceny, because he did not intend to permanently deprive V of his property.

a. **Substantial deprivation:** But if D intends to use the property for such a long time, or in such a way, that the owner will be deprived

of a ***significant portion of the property's economic value,*** the requisite intent to steal exists. [315]

Example: D takes a lawnmower belonging to V, with an intent to keep it all summer and fall. This probably constitutes larceny, because D intends to deprive V of a substantial part of the useful life of the mower.

b. Issue is intent, not result: The issue regarding permanent-or-substantial-deprivation is D's ***intent,*** not what actually happens. [315]

Example: In the above example concerning the joy ride, D did not meet the intent-to steal requirement because he did not intend to permanently deprive V of the car, even though this was the result of D's acts. Conversely, if D takes a car with intent to resell it or strip it for parts, D will not avoid a larceny conviction because the police stop him one block away with the car in perfect condition.

c. The sell-back-to-owner, reward and refund exceptions: Courts have relaxed the intent-to-permanently-deprive requirement in several fact patterns commonly resorted to by thieves. Thus the requisite intent to steal will be ***found*** in the following scenarios, even though arguably the thief was not intending to permanently deprive the owner of the property:

□ The thief intends to ***"sell"*** the property ***back to the owner;***

□ The thief takes the property for the purpose of claiming a ***reward*** for "finding" it;

□ The thief takes an item on display in a store and brings it to the cashier, falsely claiming that he bought and paid for it on a previous occasion, and asking now for a ***refund.*** *[People v. Davis* (1998)] [315]

2. Claim of right: If D takes another's property under a ***claim of right,*** D will not be found to have had the requisite guilty intent. [316-317]

a. Money taken to satisfy claim: Thus if D takes V's property with an intent to ***collect a debt*** which V owes D, or to satisfy some other kind of ***claim*** which D has against V, D will not be guilty of larceny. D is especially likely to have a good defense where D's claim against V is a "liquidated" one, that is, one is with a fixed monetary value. [316]

Example: D works for V. V fires D, and illegally refuses to pay D D's last week of

wages, equaling $100. D reaches into V's cash register and removes $100 and walks out with it. D is not guilty of larceny, because his intent was to collect a debt which V owed him.

i. **Mistake:** Most significantly, D lacks the requisite intent for larceny even if he is ***mistaken*** about the validity of his claim against V. And this is true even if D's mistake is ***unreasonable,*** so long as it is sincere. [316]

Example: D works for V. V fires D, and refuses to pay him for three weeks of vacation pay, which D genuinely believes is owed to him. Assume that under applicable legal principles, and as any reasonably knowledgeable employee would understand, D was not entitled to any vacation pay, because D had taken all the vacation to which he was entitled up to the moment he was fired. D nonetheless reaches into V's cash register and removes three weeks' pay. D is not guilty of larceny, because he took pursuant to an honest, though unreasonable and mistaken, belief that he had a legally-enforceable claim against V for the money.

b. **Usually not a defense to robbery:** Most states hold that the "claim of right" defense is ***not available*** where D is charged with a crime of ***violence,*** including ***robbery.*** [317]

Example: V owes D $25. D and V meet on the street, and V refuses to pay any of the money back, even though it is overdue. D sees that V has the entire sum owed, $25, on V's person. D takes the $25 back by force. Most courts would hold that this is robbery, because the "claim of right" defense is not available for crimes of violence such as robbery. *[People v. Reid* (1987)]

III. EMBEZZLEMENT

A. Definition: Embezzlement usually is defined as follows: [318-321]

1. A ***fraudulent***

2. ***conversion*** of

3. the ***property***

4. of ***another***

5. by one who is ***already in lawful possession*** of it. [319]

B. No overlap with larceny: Embezzlement statutes are generally construed so as ***not to overlap*** with larceny — a given fact pattern must be either larceny or embezzlement, and cannot be both. [319]

C. Conversion: For most larceny, D needs only to take and carry away the property. But for embezzlement, D must ***convert it,*** i.e., deprive the

owner of a significant part of its usefulness. If D merely uses the property for a short time, or moves it slightly, he is not guilty of embezzlement (regardless of whether he ***intended*** to convert it). [319]

> **Example:** D's boss lends D the company car to do a company errand, and D decides to abscond with it or sell it. The police stop D after he has driven the car for one mile. D is not technically guilty of embezzlement, since he has not yet deprived the company of a significant part of the car's usefulness, and thus has not converted it. **D. Property of another:** The property must be ***"property of another."*** [319-321]

1. **Meaning of "property":** Embezzlement statutes typically are somewhat broader than larceny statutes, in terms of the ***property*** covered. Anything that can be taken by larceny may be embezzled (i.e., not just tangible personal property but, for instance, stocks and bonds). Also, some embezzlement statutes cover real property (e.g., D uses a power of attorney received from O to deed O's property to D). [319]

2. **Property "of another":** The property must be property belonging to ***another*** rather than to D. [319-321]

   a. **D to pay from own funds:** Thus if D has an obligation to ***make payment from his own funds,*** he ***cannot embezzle*** even if he fraudulently fails to make the payment. [319]

> **Example:** D, a coal mine operator, has his employees sign orders directing D to deduct from their wages the amount that each owes to a grocery store. D deducts the amount, but then fails to pay the store owner. D is not guilty of common-law embezzlement, because he did not misappropriate the employees' money, but rather, failed to make payment from his own funds. He is civilly liable but not criminally liable. *[Commonwealth v. Mitchneck* (1938)]

      i. **Model Penal Code changes:** The Model Penal Code changes the common-law rule described above, by creating a new crime of "theft by failure to make the required disposition of funds received." The provision applies wherever D not only agrees to make a payment but ***reserves funds*** for this obligation. D in *Mitchneck*, *supra*, would be liable under the M.P.C. rule.

   b. **Co-owners:** One who is ***co-owner*** of the property together with another cannot, at common law, embezzle the joint property, because it is deemed to be his "own." Thus one ***partner*** in a

business cannot commit common-law embezzlement against the other. (But some modern embezzlement statutes explicitly apply to co-owned property.)

E. **"By one in lawful possession":** The main distinction between larceny and embezzlement is that embezzlement is committed by one who is ***already in lawful possession*** of the property before he appropriates it to his own use. [321-321]

Example: D, a lawyer, is appointed trustee of a trust for the benefit of V. The trust principal consists of $10,000, held by D in a bank account named "D in trust for V." D takes the money and buys a new car for himself. D is guilty of embezzlement, because he took property of which he was already in lawful possession.

1. **Employees:** Most commonly, embezzlers are ***employees*** who misappropriate property with which there employer has entrusted them. [321-321]

   a. **Minor employee:** But remember that a ***low-level employee*** may be held to have received only ***custody*** of the item, not true "possession." If such a minor employee takes the property for his own purposes, he would be committing larceny rather than embezzlement. (Many states have changed this rule by statute, however — they make it embezzlement rather than larceny for any employee to take property in his possession or "under his care," thus covering even low-level employees who have only custody.) [321]

2. **Finders:** Recall that one who finds ***lost or mislaid property,*** or to whom property is ***mistakenly delivered,*** is not guilty of common-law larceny if he gains possession without intent to steal (see *supra*, p. C-95). But most embezzlement statutes don't cover this situation either. However, some states have special ***"larceny by bailee"*** statutes covering this situation, and other states have embezzlement statutes that explicitly cover finders and other bailees. [321]

F. **Fraudulent taking:** The taking must be ***"fraudulent."*** [321-322]

1. **Claim of right:** Thus if D honestly believes that he has a ***right*** to take the property, this will usually negate the existence of fraud. Thus if D mistakenly believes that the property is **his,** or that he is authorized to use it in a certain way, this will be a defense (probably even if the

mistake is unreasonable). [322]

2. Debt collection: Similarly, if D takes the property in order to ***collect a debt*** owed to him by the owner (or even a debt which D believes the owner owes him), D is not an embezzler. [322]

Example: D, president of V Corp., is dismissed by the board of directors. The board refuses to pay D a $20,000 bonus, which D genuinely believes the company was contractually committed to pay D for D's work in the prior year. D writes himself out a check for $20,000. D's taking here is probably not "fraudulent" and D is not an embezzler, even if D's claim of right was a mistaken one.

3. Intent to repay: If D takes ***money,*** it is ***no defense*** to an embezzlement charge that D ***intended to repay*** the money. This is true even if D has a complete ***ability*** to repay the money. [322]

Example: D, president of V Corp., "borrows" $10,000 from the corporate treasury with which to play the stock market. At the time of this borrowing, D has a net worth of several million dollars, and honestly intends to repay the money within one week. D is arrested before he can repay the money. It is clear that D is guilty of embezzlement, despite his intent and ability to repay.

Note: But if the property is something other than money, and D shows that he has an intent to return the ***very property taken*** (and has a substantial ability to do so at the time of taking), this ***will*** be a defense to embezzlement. *(Example:* D uses the company car for a two-hour personal trip, intending to return it. He is not an embezzler even if he accidentally destroys the car.)

IV. FALSE PRETENSES

A. Definition: The crime of obtaining property by false pretenses — usually called simply ***"false pretenses"*** — has these elements: [322]

1. A ***false representation*** of a

2. ***material present or past fact***

3. which ***causes*** the person to whom it is made

4. to ***pass title to***

5. his ***property*** to the misrepresenter, who

6. ***knows*** that his representation is false, and ***intends to defraud.*** [322]

B. Nature of crime: Thus false pretenses occurs where D uses fraud or deceit to obtain not only possession but also ***ownership*** (title). The crime differs from larceny with respect to what is obtained: in larceny, D

obtains possession only, not title. [322]

C. False representation of present or past fact: There must be a ***false representation*** of a ***material present or past fact.*** [323-324]

1. Non-disclosure and concealment: The false representation is usually an explicit verbal one. But there are other types of misrepresentation that will qualify: [323]

a. Reinforcing false impressions: It is a misrepresentation to knowingly ***reinforce a false impression*** held by another. [323]

Example: Buyer wants to buy Seller's ring, which as Seller knows Buyer thinks is diamond. Seller knows that the ring is really glass. Seller quotes a price that would be a low price for diamonds, but hundreds of times too high for glass. Seller has probably committed a false representation as to the nature of the ring by reinforcing what he knows to be Buyer's misconception.

b. Concealment: Similarly, the requisite misrepresentation can exist if D takes affirmative acts to ***conceal*** a material fact. [323]

Example: D, owner of a car whose engine block is broken, paints the engine block in such a way as to conceal the defect, then sells the car to V at a price that would be a fair price for a car with a good engine. D would probably be held to have made a misrepresentation by his act of concealment and would therefore be guilty of false pretenses.

c. Fiduciary relationship: If D is in a ***fiduciary relationship*** with the other party, he will generally have an affirmative duty to speak the truth, and is thus not free to remain silent. [323]

Example: D has long been the family jeweler for V and his family. D knows that V trusts D in matters relating to jewelry. V sees a ring in D's window and says, "Oh, what a lovely diamond ring; I'll pay you $1,000." D knows that the ring is cubic zirconium, but remains silent and accepts the $1,000. Because D probably had a fiduciary relationship with V based on their past dealing and V's extra trust in D, D has probably made a misrepresentation and can be guilty of false pretenses.

d. Silence normally not enough: But these are all ***exceptions*** to the ***general rule:*** a party to a bargaining situation may generally ***remain silent*** even though he knows that the other party is under a false impression (provided that D did not cause that false impression in the first place). [323]

2. False promises not sufficient: Most courts hold that the representation must relate to a ***past or present fact. False promises,***

even when made with an intent not to keep them, are ***not*** sufficient in most courts. (But an increasing ***minority*** of courts do treat knowingly false promises as sufficient.) [323]

Example: D borrows money from V Bank, promising to repay it on a particular date. D in reality has no intention of ever repaying the money, and plans to abscond with it to South America. In most courts, this is not taking money by false pretenses, but in an increasing minority of courts it is.

D. Reliance: The victim must ***rely*** upon the representation. [324]

1. **Belief required:** Thus if the victim does ***not believe*** the representation, there is no crime of false pretenses. [324]

2. **Materiality:** Also, the false representation must be a ***"material"*** one. That is, it must be a U representation which would play an important role in a ***reasonable person's decision*** whether to enter into the transaction. [324]

E. Passing of title: Remember that ***title,*** not merely possession, must pass for false pretenses. Generally, this turns on what the ***victim intends*** to do. [325]

1. **Sale as opposed to loan or lease:** If the victim parts with property in return for other property or money, there is a transfer of title if a ***sale*** occurs, of course. But if the victim merely ***lends*** or ***leases*** his property, only possession has been transferred, so that the offense is larceny by trick rather than false pretenses. [325]

2. **Handing over money:** Where V ***hands over money*** to D, this will usually be a passing of title, and the crime will thus be false pretenses. *(Example:* D borrows money from V, a bank, by lying on the credit application. The bank is deemed to have passed over title to the money in return for D's promise to repay with interest, so D has committed false pretenses.) [325]

   a. **Money for specific purposes:** But if V gives D money with the understanding that D will apply it towards a ***particular purpose,*** this is likely to be a passage of possession rather than title, and thus larceny rather than false pretenses. This is especially the case where it can be argued that D has taken the money in "constructive trust" for V.

Example: V, a client, gives $1,000 to D, a lawyer who is assisting V in the sale of some property. V tells D that D should use the money to pay off a tax lien against the property. Instead, D gambles away the money. Assuming that from the very moment of the transfer of funds D intended to misuse the money — thus preventing the case from being embezzlement — D would be guilty of larceny rather than false pretenses, because the property was given to him earmarked for a specific purpose.

F. Property "of another": The property received by D must have belonged to ***"another."*** [325]

1. Joint ownership: Thus as in embezzlement and larceny, most courts still hold that property D ***co-owns*** with V is not property of another. [326]

a. Modern view finds liability: But modern courts are increasingly likely to hold that where D takes property belonging to himself and a co-owner, this *is* property of "another" and thus false pretenses. [326]

G. D's mental state: False pretenses is essentially a crime requiring intent. However, the intent requirement is deemed met if either: (1) D ***knows*** that the representation is untrue; (2) D ***believes,*** but does not know, that the representation is untrue; or (3) D ***knows that he does not know*** whether the representation is true or false. [326]

Example: D has a painting found in his attic, signed "van Gogh." D knows nothing about art or the circumstances in which the painting came to be in his attic. D nonetheless tells V, a prospective amateur buyer who also knows nothing about art, "This painting is a genuine van Gogh." Because D knows that he does not in fact know the provenance of the painting, D has committed the requisite false representation. He is therefore guilty of false pretenses when he makes the sale to V at a price that would be appropriate for a genuine van Gogh.

1. Unreasonable belief in truth: But if D ***believes*** the representation to be true, he is not liable for false pretenses even if his belief is ***unreasonable.*** [326]

2. Claim of right: If D goes through the transaction under a ***claim of right,*** this will be a defense to false pretenses just as to embezzlement or larceny. This is true, for instance, where D uses subterfuge to collect a debt. [326]

Example: V owes D $1,000, which V has refused to repay in a timely way. D then offers to sell V a ring which D says is a true diamond worth $2,000. The ring is in fact cubic zirconium worth $20. V agrees to buy the ring for $1,000. Assuming that D's

purpose in entering into the "fraudulent" transaction was merely to recoup the $1,000 that V owed him, D's misrepresentation is not truly fraudulent, and D is not guilty of false pretenses.

a. **Mistake:** The same is probably true even if D is ***mistaken*** as to the validity of his claim of right.

H. Defenses: [326]

1. **Gullibility of victim:** D may ***not*** defend a false pretenses case by showing that the misrepresentation was one which would not have deceived an ordinarily intelligent person. In other words, the ***victim's gullibility*** is no defense. [327]

2. **No pecuniary loss:** Similarly, the fact that V has suffered no actual ***pecuniary loss*** is usually not a defense. So long as D has knowingly made the requisite material false representation of fact that causes V to transfer property, the fact that the trade may be approximately "even" is irrelevant. [327]

Example: D sells office supplies to V, a large company, by bribing V's purchasing agent. The prices charged by D are "ordinary" prices in the trade, neither as low as some charge nor as high as others charge. D cannot defend a false pretenses prosecution on the grounds that V has suffered no financial loss. This is because D has acquired property (V's money) by fraud, and V would not have paid the money had it known that the sales were procured by bribery of an employee.

I. Related crimes: Here are some statutory crimes, found in many jurisdictions, that are related to false pretenses but deal with slightly different situations: [327]

1. **Bad checks:** Most jurisdictions make it a crime to obtain property by writing a ***bad check.*** This crime is committed even if the check never clears and the title never transfers (which would not be the case for false pretenses). [327]

2. **Forgery:** The crime of ***forgery*** exists where a document (usually a check or other negotiable instrument) is ***falsified.*** The falsification must relate to the ***genuineness*** of the instrument itself. Again, it is not necessary that the forged document actually be used to obtain property from another. *(Example:* D steals checks from V, then signs V's name to them. If D is found with the checks in his possession, he is already liable for forgery even if he has not used the checks to gain

property.) [327]

3. **Mail-and wire-fraud:** The federal ***mail-fraud*** and ***wire-fraud*** statutes make it a federal crime to use the mails or "wires" (i.e., electronic communication methods like phone or email) as part of a ***"scheme or artifice to defraud"*** a victim of his property. [327]

   a. **Success not required:** One significant aspect of the mail-and wire-fraud crimes is that ***the scheme does not have to be successful*** for liability to exist. So despite the name, federal mail fraud and wire fraud are really inchoate ***"attempt-like"*** crimes.

   Example: D decides to run a Ponzi scheme. He sends 100 letters to would-be investors, promising to invest their money in privately-held Internet startups, and to deliver the investors an annual rate of return of at least 20%. D secretly intends to deliver "profits" to early investors not by making Internet investments but by using money from later investors. Before anyone invests in the scheme, D is arrested.

   D can be convicted of federal mail fraud, because he has devised a "scheme or artifice to defraud," and has used the U.S. mails in support of that scheme. The fact that no victim has actually been injured in the scheme (or has even turned over money to D) doesn't matter.

V. CONSOLIDATION OF THEFT CRIMES

A. **Consolidation generally:** Some states, though still a minority, have joined two or more of the group of larceny, embezzlement and false pretenses into a ***unified*** crime called "theft." [329]

1. **M.P.C. consolidation:** The M.P.C. achieves a similar, though not identical, consolidation. Larceny and embezzlement are consolidated as "theft by unlawful taking or disposition." "Larceny by trick" (classically a form of larceny) and false pretenses are combined into "theft by deception." Also, several new crimes are created, including "theft of property lost, mislaid, or delivered by mistake" (which previously could have been either larceny or embezzlement, depending on the facts). [329]

VI. RECEIVING STOLEN PROPERTY

A. **Targetted at fences:** The crime of ***"receipt of stolen property"*** is directed primarily at ***"fences,"*** middlemen who buy goods at a very low price from thieves and resell them to end-users. [330]

B. Elements of offense: Most stolen property statutes make it a crime to: [330]

1. ***receive***
2. *stolen property*
3. with ***knowledge*** that it has been stolen and
4. **with** *intent to deprive* the owner.

C. Discussion:

1. **"Stolen":** Most statutes cover not only property taken by larceny, but also property that was taken by ***embezzlement*** or ***false pretenses.*** [330]

2. **Trap laid by police:** If property is sold by a thief who is cooperating with the police, or by the police themselves, the fence who buys it is ***not guilty*** of receiving stolen property, even if he believes the property is stolen. This is because the property is no longer in fact stolen. However, the fence will typically be guilty of ***attempted*** receipt of stolen goods. [330]

3. **Knowledge that property is stolen:** Statutes typically say that D must have ***"known"*** that the property was stolen. However, knowledge in the sense of certainty is typically ***not*** required. [330]

   a. **Belief:** Thus in all states, it is enough that D ***believes that the goods are stolen.***

   b. **Suspicion:** On the other hand, if D merely ***suspected*** that the goods might be stolen (in the sense that he recognized a possibility that they were stolen), this will not meet the knowledge requirement. And needless to say, the mere fact that a ***reasonable person*** in C D's position would have suspected that the goods were stolen, or would have believed A them to be stolen, is not enough (though this will of course be circumstantial evidence as p to what D actually believed). [330]

   c. **Model Penal Code applies presumption:** The M.P.C. institutes a ***presumption*** that a U dealer possesses the required knowledge or belief in some circumstances (e.g., he is found L in possession of

property stolen from two or more persons on separate occasions, or buys E for far below the goods' reasonable value). But under the M.P.C., the dealer can rebut this presumption. [330]

VII. BURGLARY

A. Common-law definition: The common-law crime of burglary is defined as follows: [331]

1. The ***breaking*** and

2. ***entering*** of

3. the ***dwelling of another***

4. at ***night***

5. with ***intent to commit a felony*** therein. [331]

a. Modern statutes: Modern statutes eliminate most of these requirements (as discussed below) for at least the lowest degree of the crime. [331]

B. Breaking: At common law, there must be a ***"breaking."*** This means that an ***opening*** must be ***created*** by the burglar. [331]

> **Example:** If Owner simply leaves his door or window *open*, the requisite breaking does not exist. However, no force or violence is needed; the mere opening of a closed but unlocked door, followed by entry, suffices.

1. No consent: Also, breaking does not exist at common law if D is ***invited*** into the house (assuming that he does not stray into a portion of the house where he was not invited).

2. Statutes modify: Most states no longer require breaking for all degrees of burglary. [331]

C. Entry: There must also be, at common law, an ***entry*** following a breaking. However, it is sufficient that ***any part*** of D's anatomy enters the structure, even for a moment. [331]

> **Example:** D reaches his hand through a window to grab an item just on the inside of the window; this suffices for breaking and entering, so if D carries the property away, he has committed common-law burglary.

1. Maintained: Nearly all states continue to impose the requirement of

an entry. [331]

D. Dwelling of another: The common law required that the structure be the ***dwelling of another.***Thus a place of business did not suffice. [331]

1. Modified by statute: All states now have at least one form of statutory burglary that does not require that the structure be a dwelling (though nearly all require that there be either a building or a vehicle). [331]

E. Nighttime: At common law, the breaking and entering had to occur ***at night.*** [331]

1. Not now required: No state now requires, for all degrees of burglary, that entry be at night.

F. Intent to commit felony therein: At common law, the burglar must, at the time he entered, have ***intended to commit a felony*** once he got inside. [331]

1. Crime intended: Today, an intent to commit a ***felony*** is not required. However, all states require that D have an intent to commit ***some crime*** (at least a misdemeanor) within the structure. [331]

VIII. ROBBERY

A. Definition: Robbery is defined as *larceny* committed with two additional elements: [332]

1. The property is taken from the ***person or presence*** of the owner [332]; and

2. The taking is accomplished by using ***force*** or putting the owner in ***fear.*** [332]

Example: D accosts V on the street at night, and says to V, "Give me your wallet or I'll punch you in the face." V complies, and D carries the property away. D has committed robbery, because D has committed larceny (the taking and carrying away of the property of another with intent to permanently deprive him of it), and has done so by taking the property from V's person, and putting V in fear of what would happen if he did not comply with D's demand.

B. Presence or person of V: The property must be taken from the ***presence or person*** of its owner. [332]

1. "Presence" of victim: Most robberies take place directly from the

victim's "person." But it is enough that the taking is from V's ***"presence."*** The test for "presence" is whether V, if he had not been intimidated or forcibly restrained, could have prevented the taking. [332]

Example: D enters V's house and bedroom. While pointing a gun at V, who is on the bed, D takes V's purse from her dresser, and carries it away. Since the property was taken from V's "presence" — V could have prevented the taking if not intimidated — robbery has taken place even though the taking was not from V's "person."

C. Use of violence or intimidation: The taking must be by use of ***violence*** or ***intimidation.*** [332]

Example 1: V is walking down the street, and is momentarily distracted by a near collision. D stealthily plucks V's wallet out of V's half-open purse. V does not realize what has happened until some time later. D has committed larceny but not robbery, because D did not use violence or intimidation.

Example 2: Same basic fact pattern as prior example, except that D simply snatches V's purse from her grasp. V has no chance to resist, though she is aware for a fleeting second of what is happening. This is not robbery, because there has been no violence or intimidation. (But if V had been able to put up even a brief struggle, the requisite violence would exist for robbery.)

1. Intimidation: A ***threat of harm*** may suffice in lieu of violence. V must be placed in ***apprehension*** of harm. *(Example:* D pulls a gun on V, and says, "Your money or your life." This is robbery even though no actual force is used.) [332]

a. "Reasonable person" standard not applied: It is irrelevant that a ***"reasonable person"***would not have been apprehensive of bodily harm. Thus if V is frightened of bodily harm due to his unusual timidity, robbery will exist even though most people would not have been afraid. [332]

D. No simultaneous larceny and robbery: The same transaction ***cannot*** give rise to ***simultaneous convictions*** for larceny and robbery. This is because robbery is a form of larceny, with the additional element of force present. [332]

E. "Armed" robbery: One aggravated form of robbery, defined in most states, is ***"armed*** robbery." U This exists where D uses a ***deadly weapon.*** [333] _

1. **Gun need not be loaded:** Armed robbery is usually found even though D's gun is ***unloaded.*** E Some cases hold that even a ***toy pistol*** suffices, though probably this would happen only if V is shown to have believed that the pistol was real. [333]

IX. ARSON

A. Nature of offense: At common law, arson is the ***malicious burning*** of the ***dwelling*** of ***another.*** [333]

1. **Act posing great risk of fire:** The *mens rea* requirement for arson is ***"malice,"*** not "intent." Therefore, D need ***not*** be shown to have intended to create a burning — it's enough that D intentionally took an action under circumstances posing a ***large risk*** of a burning. [333]

> **Example:** D, a sailor, intends to steal rum from the hold of a ship. He lights a match to see better, and the rum catches fire. Since D's act is "malicious" (i.e., wrongful), and since it posed a large risk of a burning of the dwelling of another (people live on the ship), D can be found guilty of arson, even though he did not intend the burning. *[Regina v. Faulkner]*

2. **Dwelling:** The property burned must be a ***dwelling.***

> **Example:** D starts fire to an office building. Because this is not a dwelling, D cannot be guilty of common-law arson.

a. **"Of another":** Furthermore, the dwelling must be "of ***another,"*** i.e., must not belong to the defendant.

> **Example:** D sets fire to his own house, in order to collect the insurance proceeds. If only D's house burns, he's not guilty of common-law arson. That's true even if the house is co owned by D's wife W. (But if the fire spreads to another house, D is guilty, even if he didn't expect or desire the spreading.)

X. BLACKMAIL AND EXTORTION

A. Definition: If D obtains property by a threat of ***future harm,*** he is guilty of ***extortion.*** The crime is called "blackmail" in some states (but there is no significant difference between what some states call blackmail and other call extortion). [333]

1. **Distinction:** Distinguish extortion from robbery: robbery exists where the property is taken by use of violence or threat of ***immediate*** harm, whereas extortion exists where the threat is of future harm. [333]

B. Nature of threat: The threat can be of various types: to cause physical harm to V or his family or relatives; to ***cause economic injury;*** or (most commonly) to ***accuse V*** of a crime, or to divulge disgracing information about V. [333]

Example: D secretly photographs V, a married man, in the arms of V's lover. D shows V copies of the photos, and threatens to send the photos to V's wife if V does not pay D $2,000. This is extortion, because D has threatened to cause V future harm (exposure) if V does not give D property.

C. Attempt by D to recover property: Suppose D uses threats of future harm to ***recover property*** that V has taken from D. Courts are split as to whether D may defend against an extortion charge by showing that he was operating under a ***"claim of right."*** Most courts today would probably allow this defense, provided that D is merely recovering the same property or value that V previously, and wrongfully, took from him. [334]

Example: D, a storekeeper, watches V shoplift $50 worth of merchandise. D is unable to stop U V as V leaves the store. The next day, V comes back to the store. D, after writing down V's M license plate number, tells V, "If you don't sign a confession to shoplifting and pay me $50, I M will turn you in to the police." Most courts today would probably hold that this is not extortion by D, because D is merely making an effort to reclaim property which V has taken from him.

1. **Reasonable mistake:** Some of the courts allowing D a defense on facts like those in the above example would probably also grant a defense where D has made a ***reasonable mistake*** about whether V owed the property or money to D. *(Example:* On the facts of the above example, some courts would grant D a defense to extortion if he showed that he mistakenly, but reasonably, believed that V had stolen $50 of merchandise.) [334]

   a. **M.P.C. allows:** The Model Penal Code seems to take this approach, by granting a defense if D "honestly claimed [the property] as restitution...or as compensation for property or lawful services." [334]

CHAPTER 1
SOME BASIC ISSUES IN CRIMINAL LAW

I. A BRIEF INTRODUCTION TO CRIMINAL LAW

A. Nature of criminal law: In this book, we discuss “criminal law.” More precisely, we cover ***“substantive”*** criminal law as opposed to “procedural” criminal law. Substantive criminal law is mainly concerned with how crimes are defined, how those who commit them should be punished, and what defenses or mitigating factors should be recognized once the prosecution has proved the existence of each element of a crime. (By contrast, criminal *procedure* is concerned mainly with how the police investigate crimes and gather evidence, with constitutional limits on the use of evidence by the prosecution, and with the mechanics by which criminal cases are tried.)

B. What is a “crime”: If substantive criminal law is concerned with how crimes are defined, we should start with an idea of what it means to say that something is a “crime.” In the broad but not-very-helpful sense, a crime is anything that any state or federal legislatures says is a crime. Dressler Hnbk, § 1.01[A][1].

1. More helpful approach: But what we really want to know is, when should a given act be treated by society as a crime rather than merely a “civil wrong” (e.g., a breach of contract or a tort)? Crimes are different from civil wrongs in several aspects:

- □ A crime causes ***“social harm,”*** that is, harm to the entire community, not just to the private victim (whereas civil wrongs such as torts or breaches of contract are generally perceived as injuring only some private individual);
- □ Crimes are therefore prosecuted by an attorney representing the ***community*** — the district attorney — rather than by a party’s private attorney (which is what happens in breach-of-contract and tort cases);
- □ We ***“punish”*** a criminal. Whereas in the tort and breach-of-contract scenarios we merely try to ***compensate*** the victim at the expense of the wrongdoer, in the case of a crime we attempt to impose a ***“societal condemnation and stigma,”*** typically in the form of a

prison sentence or fine.

See generally Dressler Hnbk, § 1.01[A][1].

C. Felonies vs. misdemeanors: Modern criminal statutes, like the English common law, typically divide crimes into two broad categories: ***felonies*** and ***misdemeanors.*** *Id.* at 1.01[A][2]. Jurisdictions vary on exactly where they draw the dividing line between these two categories. A good general rule, at least for state as opposed to federal crimes, is that:

- a ***felony*** is a ***serious*** crime that is punishable by ***at least one year in a state prison;*** and
- a ***misdemeanor*** is a ***lesser*** crime for which the maximum penalty is either: (a) incarceration for less than a year, typically in a city or county jail rather than in a state prison; or (b) a fine or (c) both. Cf. Dressler Hnbk, § 1.01[A][2].

1. "Violations": Additionally, many jurisdictions have a third category of offense called ***"violations,"*** which are so minor that no incarceration is permitted, and which are usually not considered "crimes." Id. Cf. Model Penal Code § 1.04(5) (defining a violation in most cases as an offense for which "no other sentence than a fine ... or other civil penalty" is authorized, and saying that a violation "does not constitute a crime[.]")

D. Theories of punishment: What is the ***purpose*** of punishing a person who commits what society has decided to classify as a criminal act? There are two main philosophies on this question, which are often labeled ***"utilitarianism"*** and ***"retributivism."*** The two differ in the main objectives that a system of punishment should try to achieve.

1. Utilitarianism: ***Utilitarianism*** derives from the theories of 19th-century English philosopher Jeremy Bentham. The basic concept of utilitarianism is that society should try to ***maximize the net happiness of people*** – "the greatest good for the greatest number." Cf. Dressler Hnbk, § 2.03[A][1]. Utilitarians believe that "the pain inflicted by punishment is justifiable if, but only if, it is expected to result in a reduction in the pain of crime that would otherwise occur." *Id.* Utilitarians cite the following as the narrow objectives that a system of criminal law and punishment should try to achieve:

- □ Most importantly, the utilitarians stress ***"general deterrence."*** That is, if D commits a crime, we should punish D mainly in order to "convince the ***general community*** to forgo criminal conduct in the future." *Id.*
- □ Next, the utilitarians seek ***"specific deterrence"*** (sometimes called ***"individual*** deterrence"). That is, if D commits a crime, we should punish D to deter her from committing additional crimes in the future. This will happen by two "sub-methods": (a) if we incarcerate D, then D will be "incapacitated" from committing additional crimes while in prison or jail; and (b) after conviction, and especially incarceration, D will be "intimidated" into not committing any more crimes, out of fear of further punishment.
- □ Lastly, the utilitarians stress ***"rehabilitation."*** That is, the criminal justice system should try to prevent D from committing further crimes not by causing him to fear the pain of further punishment in the future but by educating him or otherwise ***"reforming"*** him. The rehabilitative function is stressed especially in the juvenile justice system.

Cf. Dressler Hnbk, § 2.03[A][2].

2. Retributivism: ***Retributivists,*** on the other hand, believe that the principal – maybe even the sole — purpose of the criminal law should be to ***punish the morally culpable.*** Cf. Dressler Csbk, pp. 38-39.

a. Deterrence not principal focus: Retributivists, because of their focus on moral blameworthiness, do ***not*** regard either general or specific ***deterrence*** as being very important objectives to be served by the criminal law. "That future crime might also be prevented by punishment is a happy surplus for a retributivist, but no part of the justification for punishing." Moore, quoted in Dressler Csbk, p. 38.

i. Rehabilitation: For similar reasons, retributivists do not think the criminal law should be spending much effort towards *rehabilitation* of offenders. Retributivists think that punishment is about *achieving moral justice,* and that "proponents of rehabilitation demean offenders by treating them as sick, childlike, or otherwise unable to act as moral agents." Dressler Hnbk, § 2.04[A][2].

E. Types of punishment: There are three main ***types*** of punishments in criminal law: (1) ***imprisonment;*** (2) the ***death penalty;*** and (3) the imposition of ***monetary fines.*** Putting aside the special issues posed by the death penalty (see *infra,* p. 7 and p. 266), the states and federal governments have ***wide latitude*** to choose how long a prison sentence, and how great a fine, to impose for any particular crime.

1. "Shaming" punishments: Courts occasionally impose a fourth type of punishment, by trying to publicly ***"shame"*** the defendant, usually by requiring him to make some sort of ***public apology or confession*** as a condition of his probation. Judges imposing shaming punishments typically have both a ***deterrent*** purpose (to make the shaming so unpleasant and humiliating that the defendant will be specifically deterred, and the public will be generally deterred) and a ***retributive*** purpose (to give the defendant a taste of his own medicine). Judges sometimes also claim to be seeking a ***rehabilitative*** effect (to help the defendant learn his lesson so that he will re-enter law-abiding society).

a. Courts split: Shaming punishments are controversial, and appellate courts have been ***split*** about whether and when to reverse them. By and large, as long as the punishment is ***reasonably proportional*** to the offense and not likely to inflict major permanent psychological damage, appellate courts seem mostly to ***uphold*** them. The case in the following example illustrates the tendency to uphold shaming punishments.

Example: D pleads guilty to federal mail theft, for having stolen several letters from individuals' mailboxes. Although D is only 24 at the time of his plea, he already has a significant prior criminal history. Federal sentencing guidelines permit a sentence of 2 to 8 months imprisonment. The trial judge sentences D to the lowest time (2 months). But the judge adds a condition to D's post-imprisonment probation: D must perform 8 hours of community service by wearing or carrying in front of a San Francisco post office a large sign saying "I stole mail; this is my punishment." D argues on appeal that this punishment was imposed for the sole purpose of humiliating him, and therefore does not fulfill any of the three permissible purposes of punishment recognized by the federal Sentencing Reform Act, deterrence, protection of the public, and rehabilitation.

Held, for the prosecution. There was evidence that D did not fully understand the gravity of his offense, and held the illusion that his crime was a victimless one. The trial judge, by attempting to create a situation in which D and his crime would be publicly exposed, hoped both to rehabilitate D and to protect the public. Even though

the condition here caused D shame or embarrassment, it was "reasonably related to the legitimate statutory objective of rehabilitation" and thus not invalid.

(A dissent argues that "humiliation is not one of the three proper goals under the Sentencing Reform Act," and that the goal of a punishment like the one here is "to degrade the object of shame, ... to dehumanize him." This type of punishment "recalls a time in our history when pillories and stocks were the order of the day.") *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004).

II. CONSTITUTIONAL LIMITS ON PUNISHMENT

A. The U.S. Constitution generally: The ***U.S. Constitution*** imposes important limits on punishments that may be imposed by federal and state legislatures.

1. Bill of Rights: The Bill of Rights (the first 10 amendments to the Constitution) imposes several limits on the criminal process. By its terms, the Bill of Rights applies only to the federal government, not the states (but see below for how the Bill of Rights affects the states). Some of the more important Bill of Rights guarantees that limit what conduct may be criminalized, or limit how that conduct can be prosecuted, are these:

- ☐ The ***First*** Amendment orders Congress to "make no law ... abridging the ***freedom of speech."*** This provision limits, for instance, Congress' right to criminalize expressive conduct (e.g., flag burning).
- ☐ The ***Fourth*** Amendment bars the government from making ***"unreasonable searches and seizures."*** Evidence gathered by the police in violation of this amendment must generally be excluded from the defendant's criminal trial.
- ☐ The ***Fifth*** Amendment bars the government from trying a person twice for the same charge (the ***"Double Jeopardy"*** clause).
- ☐ The ***Fifth*** Amendment also bars the government from depriving a person of "life, liberty, or property, without ***due process of law."*** This Due Process clause guarantees criminal defendants a certain amount of procedural fairness. For instance, if Congress were to pass a criminal statute that was unreasonably vague, so that reasonable people could not tell what conduct was forbidden and what was not, a prosecution under that statute would likely violate the Due Process clause.

□ The ***Eighth*** Amendment prohibits Congress from imposing ***"cruel and unusual punishments."*** For instance, the death penalty for any crime other than murder has effectively been found to be cruel and unusual under the Eighth Amendment.

Cf. Dressler Hnbk, § 4.02[A].

2. Extension of Bill of Rights to the states: As I just mentioned, the Bill of Rights applies by its terms only to the federal government. But the ***Fourteenth Amendment,*** enacted after the Civil War, imposes limits on what ***state*** governments can do. One clause of the Fourteenth Amendment prohibits states from depriving any person of "life, liberty, or property, without due process of law[.]" In the criminal law context, the effect of this Fourteenth Amendment Due Process clause is to ***make nearly all of the Bill of Rights guarantees applicable to the states.***

Example: If a state were to impose the death penalty for petty theft, this would violate the Eighth Amendment ban on cruel and unusual punishments, as made applicable to the states via the Fourteenth Amendment's Due Process clause.

B. The "legality" principle: One important limit on the criminal law that has Constitutional underpinnings is the principle of ***"legality."*** Under this principle, "a person may not be punished unless her conduct was ***defined as criminal ... before she acted."*** Dressler Hnbk, § 5.01[A]. So the legality principle is essentially a rule against ***"retroactive punishment."***

1. Constitutional underpinnings: The legality principle is not expressly stated anywhere in the Constitution. But several clauses of the Constitution are inspired by the legality principle, i.e., by the idea that retroactive punishment is unfair:

□ Art. I, § 9, prohibits Congress from passing any ***"bill of attainder,"*** and Art. I, § 10 prohibits the states from doing so. A bill of attainder is legislation that ***singles out for punishment*** a particular ***individual or easily-identified group.***

□ Art. I, § 9, also prohibits Congress from passing any ***"ex post facto"*** law, and Art. I, § 10, prohibits the states from doing so. An *ex post facto* law is a law that either ***makes conduct criminal*** that was ***not criminal at the time committed,*** increases the ***degree of***

criminality of conduct beyond what it was at the time it was committed, or increases the ***maximum permissible punishment*** for conduct beyond what it was at the time of commission. *Calder v. Bull,* 3 U.S. 386 (1798).

- The Due Process clauses of the Fifth and Fourteenth Amendments prohibit most legislatures and courts from behaving in a way that would criminalize conduct without giving ordinary people ***fair warning*** of what is being prohibited. As we'll see immediately below, a statute that is unduly vague, or that gives the police undue discretion in when to make an arrest, is likely to be found to violate due process.

2. The problem of vagueness: The legality principle means that criminal laws that are ***unreasonably vague*** may not be enforced. Typically, the constitutional ground for declining to enforce an unreasonably vague criminal statute is that enforcement would violate the ***due process*** rights of the person charged.

a. Rationale: There are actually two distinct but related reasons why unreasonably vague statutes are held to violate the due process rights of persons charged under them:

- First, and most obviously, if a statute is unreasonably vague, it does not provide ***fair warning*** of what is prohibited. As the Supreme Court has put it, "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the ***person of ordinary intelligence*** a ***reasonable opportunity to know what is prohibited,*** so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford,* 408 U.S. 104 (1972).
- Second, an unreasonably vague statute gives ***too much discretion to law enforcement personnel,*** raising the risk that unpopular or powerless groups will be unfairly singled out for punishment. The Supreme Court has therefore held that a criminal statute must "establish ***minimal guidelines*** to govern law enforcement," because otherwise the statute may "permit a standardless sweep [that] allows policemen, prosecutors, and juries to ***pursue their personal predilections."*** *Kolender v. Lawson,* 461 U.S. 352 (1983). Or, as the idea is sometimes phrased, giving too much

discretion to law enforcement officials raises the danger of ***"arbitrary and discriminatory enforcement."*** *City of Chicago v. Morales* (discussed immediately *infra).*

b. Loitering laws: Laws against ***"loitering"*** or ***"vagrancy"*** pose these twin dangers of lack-of-fair-warning and selective-enforcement especially vividly. For instance, in ***City of Chicago v. Morales,*** 527 U.S. 41 (1999), the Supreme Court struck down as violative of due process a Chicago ordinance designed to prevent gang members from congregating in public places. A 5-member majority of the Court believed that the ordinance failed to give the required minimal guidelines to govern law enforcement, and three members of that majority believed that it also failed to give fair warning of what was prohibited.

i. Facts: The ordinance in *Morales* made it a criminal offense (punishable by up to six months imprisonment) if the following sequence of events occurred:

□ A police officer reasonably believed that at least one of the two or more persons present in a public place was a "criminal ***street gang*** member";

□ The persons were "loitering," defined as "remaining in any one place with ***no apparent purpose";***

□ The officer then ordered all of the persons to ***disperse*** themselves "from the area." (In fact, the ordinance *required* the officer to issue such an order.)

□ Finally, a person (the defendant) ***disobeyed this order.*** (It didn't matter whether the person turned out to be a gang member or not.)

ii. Lack of fair notice: Three members of the Court believed that the ordinance violated the Due Process clause because it was "so vague and standardless that it leaves the ***public uncertain*** as to the conduct it prohibits." The main problem was that a member of the public could not know which conduct constituted "loitering" as defined in the statute — i.e., remaining in a place with "no apparent purpose" — and which was not. For instance, would there be "no apparent purpose"

and thus loitering for a person to stand in public talking to another person? What about a person who checks her watch and looks expectantly down the street? Similarly, once the police officer issued the dispersal order, the loiteror would not know from the text of the ordinance how far he had to move, or how long he would have to remain apart from the others.

iii. **Lack of guidelines for law enforcement:** Then, a 5-member majority of the Court concluded that the ordinance failed to ***"establish minimal guidelines to govern law enforcement."*** For instance, the ordinance was not limited to people whom the police suspected of being gang members (as long as one member of the group was reasonably suspected of being such), nor to persons whom the police suspected of having a *harmful* purpose (since it applied to anyone whose purpose was not apparent to the observing officer). "Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member." To make the ordinance's vagueness worse, it failed to apply to the type of loitering that seems to have been the Chicago City Council's intended target: gang loitering motivated "either by an apparent purpose to publicize the gang's ***dominance*** of certain territory, thereby ***intimidating*** nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal ***drugs"*** So the law not only gave too much discretion to the police, but also encouraged them to focus on possibly non-harmful loitering (loitering with "no apparent purpose") rather than on the types of gang loitering known to be harmful.

iv. **Easy to cure:** But Justice O'Connor, concurring in the result, pointed out that it would be easy for Chicago to ***cure*** the problem by a simple redrafting of its ordinance so that it limited the definition of loitering to mean "to remain in any one place with no apparent purpose other than to ***establish control*** over identifiable areas, to ***intimidate*** others from entering those areas, or to ***conceal*** illegal activities." (Chicago took O'Connor's invitation, and redrafted its statute in

essentially this way. Cf. Dressler Csbk, pp. 115-16. The constitutionality of the revised version does not seem to have been decided in any reported opinion as of early 2007. It seems likely that a majority of the present Court would conclude that the redrafting cured the vagueness problem.)

C. The principle of proportionality: As a general principle, theories of punishment agree that the punishment for a given crime should be roughly ***proportional*** to that crime's seriousness. This is the principle of ***"proportionality."***

1. Retributivists: Retributivists *(supra,* p. 2) are especially likely to believe in the principle of proportionality — since retributivists believe that the main purpose of the criminal law is to require that criminals pay their debt to society by undergoing punishment, they believe that more serious crimes deserve more serious punishment. Cf. Dressler Hnbk, §6.03[A].

a. Utilitarians: Utilitarians, by contrast, are likely to be less wedded to the proportionality principle. Since utilitarians focus on deterrence, they advocate punishing a given crime by the least amount that will suffice for general and specific deterrence, and this amount may not correspond to the moral blameworthiness of the particular crime. *Id.* at § 6.02. For instance, if a particular crime were very dangerous but not especially blameworthy, a utilitarian would typically advocate greater punishment than she would for a highly-blameworthy but not especially socially-dangerous crime.

2. The Eighth Amendment: The ***Eighth Amendment*** to the U.S. Constitution prohibits the federal government from imposing ***"cruel and unusual punishment"*** on those convicted of crimes. The Amendment is indirectly applicable to the states as well, by operation of the Fourteenth Amendment's Due Process clause.

a. Effect on proportionality principle: The extent to which the Eighth Amendment imposes the proportionality principle on federal and state governments is unclear — Supreme Court precedents are somewhat inconsistent, especially as to punishments other than death. To match the Supreme Court's treatment of the subject, we divide our discussion of the Eighth Amendment's limits on

criminal punishments into three categories: (1) the death penalty (Par. D below); (2) life without parole (Par. E); and (3) all prison sentences short of life without parole (Par F).

D. Capital punishment (the death penalty): In the case of ***capital punishment,*** the proportionality principle as reflected in the Eighth Amendment imposes ***real limits*** on the circumstances in which government may impose that penalty. Because this penalty is so severe and irrevocable, the Court has held that it is "reserved for a ***narrow category*** of crimes and offenders," including only the worst offenders. *Roper v. Simmons*, 543 U.S. 551 (2005). In brief, the Court has held that the death penalty may be imposed in ***"ordinary" murder*** cases, but ***not*** in any of the following situations:

[1] cases ***not involving homicide;***

[2] ***homicide*** cases where the defendant is ***mentally retarded;*** and

[3] ***homicide*** cases where the ***defendant was a juvenile*** at the time of the killing.

We consider the "ordinary murder" situation, plus the three special situations listed above, in sequence.

1. **Murder cases:** In "ordinary" murder cases — that is, cases involving ***non-mentallyretarded*** defendants who were ***adults*** at the time of the killing — the death penalty does not necessary violate the Eighth Amendment, though it may do so if certain procedures are used. (For instance, the Amendment will be violated if the jury is given ***unbridled discretion*** about whether to impose death or, conversely, death is made mandatory in some class of cases). Capital punishment in this "ordinary murder" situation is discussed further *infra*, pp. 261-263.

2. **Non-homicide cases against victims who are individuals:** Where the crime is against an individual and ***does not lead to death,*** the Court has held that capital punishment ***violates the Eighth Amendment.*** So ***rape,*** even of a child, ***may not be punished by death.*** See ***Kennedy v. Louisiana,*** 129 S.Ct. 1 (2008), a 5-4 decision. The majority in *Kennedy* relied in part on the argument that "by in effect making the punishment for child rape and murder equivalent, a state that punishes child rape by death may ***remove a strong incentive*** for

the rapist not to kill the victim."

a. **Crimes against state:** On the other hand, there is so far no Eighth Amendment problem with imposing death for serious crimes that are not committed against an *individual* but are instead directed against the ***state,*** such as ***treason, espionage*** and ***terrorism***, even though no death resulted. *Id.*

3. **Execution of the mentally retarded in murder cases:** Even if the defendant *has* committed murder, the Court has held that if he is ***mentally retarded,*** executing him ***violates the Eighth Amendment.*** See ***Atkins v. Virginia,*** 536 U.S. 304 (2002), a 6-3 decision.

a. **Rationale:** The majority in *Atkins* reasoned that:

□ the severity of the appropriate punishment necessarily depends on the ***culpability*** of the offender, and retarded people have ***lesser culpability;*** and

□ the ***deterrent*** function of the death penalty is less likely to be served, because the defendant's cognitive impairments make him less likely to be deterred (e.g., because he has a "diminished ability to … ***learn from experience*** [or to] ***process the information of the possibility of execution*** as a penalty").

b. **Test for "mentally retarded":** Furthermore, a 2014 case shows that the states are ***not*** free to ***define*** "mental retardation" in what the Supreme Court considers an unduly narrow way. In ***Hall v. Florida,*** 134 S.Ct. 1986 (2014), Florida took the position that no defendant who scored ***higher than 70*** on an IQ test would be deemed to be mentally retarded; such a defendant would therefore not be spared from the possibility of execution under *Atkins.* But the Supreme Court, by a 5-4 vote, held that Florida's bright-line rule that no one with an IQ test score over 70 should be deemed retarded was ***too inflexible*** to meet the requirements of the Eighth Amendment. The majority opinion, by Justice Kennedy, made two arguments:

i. **Range of scores:** First, an individual's "IQ" is best understood as a ***range*** of scores rather than as a single score. So a defendant who happens to score above 70 on one test can't by that fact alone be deemed retarded — only if the entire range

of his scores on ***several administrations*** falls below 70 is the requisite low-IQ demonstrated.

ii. **"Adaptive functioning" evidence:** Second, the *Hall* majority said, even a defendant with an IQ tested consistently above 70 must be given the opportunity to show that he has ***such large deficits in "adaptive functioning"*** that his practical intellectual capacity is comparable to that of many people with sub-70 IQ scores. So, for instance, the defendant must be permitted to show that before adulthood, he acquired various ***life skills*** at a much slower-than-usual rate, leaving him with major intellectual deficits, and thus entitling him to be spared the death penalty.

(1) Summary: As Kennedy's opinion put the idea, "intellectual disability is a ***condition, not a number."*** Kennedy also indicated that evidence of the defendant's ***upbringing*** — including beatings or other punishment for his mental shortcomings (as repeatedly occurred in the case of the defendant in *Hall)* — must also be admitted if the evidence demonstrates the defendant's intellectual disabilities.

4. **Execution of juveniles:** Just as the Court has held that the mentally retarded (even if they commit murder) may not be executed, so the Court has held that persons who were ***juveniles*** at the time they committed murder may not be executed. In ***Roper v. Simmons,*** 543 U.S. 551 (2005), the Court held by a 5-4 vote that the execution of persons who were juveniles (under 18) at the time the crime was committed violates the Eighth Amendment.

a. **Rationale:** The majority in *Roper*, again in an opinion by Justice Kennedy, relied in part on the "stark reality that the United States is the ***only country in the world*** that continues to give official sanction to the juvenile death penalty."

b. **Less culpable:** Also, the *Roper* majority said, "today our society views juveniles ... as ***'categorically less culpable*** than the average criminal.' "And, the majority said, society has reached this conclusion because of several ways juveniles are on average

different from adults:

- □ Juveniles have "[a] ***lack of maturity*** and an ***underdeveloped sense of responsibility,"*** leading them to be "overrepresented statistically in virtually every category of ***reckless behavior."***
- □ Juveniles are "more vulnerable or susceptible to ***negative influences*** and outside pressures, including ***peer pressure."***
- □ Finally, "the ***character*** of a juvenile is ***not as well formed*** as that of an adult. The personality traits of juveniles are more ***transitory,*** less fixed."

Kennedy noted that the Court's prior Eighth Amendment cases had held that "the death penalty is reserved for a ***narrow category*** of crimes and offenders," including only the worst offenders. The differences between juveniles and adults, Kennedy said, justified the conclusion that "juvenile offenders cannot with reliability be classified among the worst offenders[.]"

Note: A majority of the Court believes that "juveniles are different," constitutionally speaking, even *outside* of the death-penalty context. Therefore, the Court has also severely limited states' right to sentence juveniles to the next-most-severe penality, life without parole. See *Graham v. Florida,* discussed immediately below.

E. Life Without Parole ("LWOP"): Just as the Supreme Court has long held that the death penalty is so severe that its use must be subjected to rigorous Eighth Amendment scrutiny, so the Court in recent years has held that the punishment of ***"life without parole" ("LWOP,"*** as we'll call it) is constitutionally suspect, at least where it is imposed on persons who were ***juveniles*** at the time of the crime. The Court has articulated rules limiting the use of LWOP for juveniles in two different scenarios: (a) when no one is killed during the crime; and (b) when someone is killed.

1. Non-homicide cases *(Graham v. Florida):* First, in 2010, the Court took on the task of deciding whether LWOP is ever allowable when a juvenile commits a ***non-homicide*** offense. For this situation, the Court issued a ***categorical rule:*** when a person under the age of 18 commits a crime without taking a life, ***states are absolutely forbidden to impose an LWOP sentence. Graham v. Florida,*** 130 S.Ct. 2011 (2010).

a. Alignment of votes: The actual outcome (that D's LWOP sentence was overturned) was decided by a 6-3 vote. But the vote was a

narrow 5-4 in favor of the *categorical* rule that an LWOP sentence is *never* constitutional where the defendant is a juvenile and there is no killing. (Chief Justice Roberts concurred only in the result: he agreed that D himself should not have been given an LWOP sentence, but believed that such cases should be decided case-by-case rather than by the majority's new categorical rule.)

b. What the decision requires: In *Graham*, the majority opinion (once again by Justice Kennedy) did ***not*** say that a juvenile convicted of a non-homicide crime must ultimately ***be released*** from prison. But, Kennedy said, the states must give such persons ***"some meaningful opportunity to obtain release*** based on ***demonstrated maturity and rehabilitation."***

c. Rationale: Kennedy wrote that LWOP sentences have some special features in common with death sentences, and in contrast to all other sentences. Like a death sentence, an LWOP sentence "alters the offender's life by a ***forfeiture that is irrevocable.*** It deprives the convict of the most basic liberties without giving hope of restoration[.]"

i. Goals of punishment: Furthermore, Kennedy said, an LWOP sentence for a juvenile who does not kill does not further the various appropriate ***goals*** of punishment: retribution, deterrence, incapacitation, and rehabilitation. For example, the severity of an LWOP sentence won't act as a ***deterrent,*** because juveniles tend to act impulsively and are therefore less likely to take punishment into account. And ***incapacitation*** is an appropriate goal only if the sentencer has made a judgment that the offender is incorrigible, and "the characteristics of juveniles" make such a finding of incorrigibility questionable.

d. Broad significance: *Graham* marks the first time, outside of the death penalty context, that the Court has issued a ***categorical rule*** entirely excluding a ***certain group of cases*** from a ***particular punishment*** based on Eighth Amendment grounds.

2. Murder cases *(Miller):* Following *Graham,* in a pair of 2012 cases a narrowly divided Court went even further, by placing some limits on LWOP sentences for juvenile offenders even where the offender *has*

committed a murder. But this time, the Court did ***not*** impose a categorical rule, i.e., a rule entirely eliminating a particular punishment for a particular type of case. Instead, the Court said merely that the legislature may not impose ***mandatory*** LWOP even upon a juvenile offender found guilty of murder — the sentencing judge must be given the ability to ***consider the individual details*** of the case and of the offender's character and life circumstances. The twin cases are generally cited under the name ***Miller v. Alabama,*** 132 S.Ct. 2455 (2012).

a. **Rationale:** As Justice Kagan wrote for the majority in *Miller*, "A judge or jury must have the opportunity to ***consider mitigating circumstances*** before imposing the harshest possible penalty for juveniles." She continued, "By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate [the] ***principle of proportionality,*** and so the Eighth Amendment's ban on cruel and unusual punishment."

3. **Extremely long terms of years still allowed:** At least as of this writing (early 2015), no constitutional principle seems to prevent a state from merely giving lip service to the anti-LWOP rulings in *Graham* and *Miller*, by imposing extremely long sentences, such as a term of years longer than the young defendant's ***life expectancy.***

Example: *D* is 14 years old at the time he shoots a victim during a robbery. The victim recovers. The trial judge sentences D to a 70-year prison term, longer than D's life expectancy. *Held* (by an intermediate appeals court), D's contention that the 70-year term is a "de facto life sentence" is not correct. Therefore, the sentence is not a violation of *Graham,* and is upheld. *Gridine v. State,* 89 So.3d 909 (Fla. App. 2011). (As of this writing in early 2015, the case is on appeal to the Florida Supreme Court.)

F. **Prison sentences short of LWOP:** Outside of the special areas of death and life without parole (LWOP), the role of the Eighth Amendment as a limit on the length of prison sentences is much ***weaker,*** even in non-homicide cases. The Justices continue to disagree about what if any effect the Eighth Amendment should have on the length of prison sentences that may be imposed in non-homicide non-LWOP cases. But it's clear that it will be at best ***extremely difficult*** for a criminal defendant, even in a non-homicide case, to succeed with the argument

that his non-LWOP prison sentence is so long compared with the severity of his offense as to constitute a violation of the Eighth Amendment.

1. **D loses his argument *(Ewing):*** The most recent case on this "long sentence but not LWOP" issue is ***Ewing v. California,*** 538 U.S. 11 (2003). There, the Court concluded by a 5-4 vote that the Eighth Amendment was ***not violated*** where California's ***"three strikes"*** law was used to produce a ***25-years-to-life sentence*** for a repeat offender who on the present occasion stole $1200 of merchandise.

   a. **The statute:** Under the California three strikes law, a defendant who had one prior "serious" or "violent" felony must, upon conviction of a new felony, be sentenced to "twice the term" otherwise provided for the new crime. A defendant who had two or more prior serious or violent felony convictions must be sentenced to "an indeterminate term of life imprisonment." No defendant with two or more such convictions could become eligible for parole in ***less than 25 years.***

   b. **D's conviction:** D had a long string of prior convictions. The most serious were four 1993 convictions, one for first-degree robbery and 3 for burglary, all of which occurred at the same apartment complex over a five-week period. For these four felonies, D was convicted in late 1993, sentenced to a bit less than 10 years, and paroled in 1999. In early 2000, while still on parole, D went into the pro shop of a country club and shoplifted three golf clubs, priced at a total of $1200. He was convicted of one count of felony grand theft (personal property in excess of $400). Under the threestrikes law, the four serious or violent 1993 felonies meant that he now had to be sentenced to at least 25-years-to-life, and that's the sentence he got.

   c. **D's constitutional claim:** D claimed that the sentence of 25-years-to-life under the three-strikes law, as a punishment for stealing $1200 worth of property, was unconstitutionally disproportionate, and thus violated the Eighth Amendment.

   d. **Not a violation:** By a 5-4 vote, the Court disagreed with D, and ***affirmed*** his sentence. Three members of the Court believed that in

non-capital cases, the Eighth Amendment contains merely a ***"narrow proportionality principle,"*** which they said was not violated by the sentence here. Another two members believed that the Eighth Amendment contains ***no proportionality principle at all.*** These two groups created the five votes to strike down D's Eighth Amendment claim.

e. Dissents: Four members of the Court dissented in *Ewing.* The main dissent was by Justice Breyer, who said that this was in his opinion one of the "rare" cases in which the Court could say that the punishment was "grossly disproportionate" to the crime.

i. Rationale: Breyer viewed the sentence given to D as being a "real time" 25 years (since D couldn't be considered for parole before this time). Breyer then concluded that this sentence was drastically longer than sentences California had imposed, even on recidivists, for non-capital crimes prior to the three-strikes law. For instance, prior to the three-strikes law no one with D's criminal profile could have served more than 10 years in prison.While California had a legitimate interest in dealing more harshly with recidivists, Breyer believed that the 25-years-to-life sentence was "overkill."

f. Significance: *Ewing* stands for the proposition that in non-death-penalty cases, ***it will be exceptionally hard for a non-juvenile defendant*** to convince the Court that his sentence ***is so disproportionate as to violate the Eighth Amendment.*** And that's true even if the crime ***did not involve a death.***

III. SOURCES OF CRIMINAL LAW

A. Common law in England: Our criminal law derives from English law. Originally, criminal law in England was "common law," i.e., judge-made law. That is, "the definitions of crimes and the rules of criminal responsibility were promulgated by courts rather than by the parliament." Dressler Hnbk, § 3.01[A]. When modern courts (and this outline) refer to the "common law definition" of a crime, they are referring to the definition of the crime as worked out by English judges in decisions, mostly from before 1900.

B. Rise of statutes: In the last couple of centuries, both in England and the U.S., common-law crimes have largely been ***replaced by statutes.***

1. U.S. today: *In the United States* today, in nearly every state ***statutes enacted by legislatures*** form either the ***sole or the overwhelmingly-principal source of criminal laws.***

   a. Abolition of common-law crimes: Most states have passed statutes that expressly ***abolish common-law crimes.*** In such a state, a person cannot be convicted of any conduct that is not formally proscribed by statute. Dressler Hnbk, § 3.02[A].

   i. "Reception" statutes: A few states (e.g., Michigan and Rhode Island) still recognize common-law crimes as a sort of supplement to statutorily-defined crimes. These states have done so by means of so-called "reception" statutes, which were enacted at the time the state codified its criminal law, and which provide that any act that constituted, say, a common-law felony at the time of codification should be deemed to be a felony post-codification. In other words, the common-law definitions were said to be "received" into the codification. Even in these few reception states, however, common-law crimes are of very little practical importance, because specific statutes typically criminalize the same conduct, and prosecutions are almost always brought based on the specific statute. *Id.*

C. The Model Penal Code: The ***Model Penal Code (M.P.C.)*** is an important source of substantive-law principles.

1. Origin: The M.P.C. was drafted by the American Law Institute, a private non-profit group of prominent lawyers, judges and law professors that also publishes the various Restatements. The M.P.C. was published in 1962, but has remained extremely influential on both judges and state legislatures.

2. Not directly binding: The M.P.C. is not directly enforceable in any state. But over half the states have enacted criminal statutes that draw heavily on M.P.C. wording or concepts. K&S, p. 133. (New York, New Jersey, Pennsylvania and Oregon have enacted an especially

large number of M.P.C. provisions. Dressler Hnbk, § 3.03.) Therefore, we cite frequently to the M.P.C. in this outline.

D. Statutory construction: Criminal statutes, like any other statutes, must be interpreted by courts. Here are two important principles of criminal statutory interpretation, followed by many (but not all) courts:

1. **Common-law term:** When a statute uses a ***term*** that has a tightly-defined ***meaning at common law,*** and the statute does not define the term as tightly, the court will typically ***give the term its common-law meaning,*** especially if there is no evidence that the legislature intended to impose a different meaning.

   Example: A statute passed by the California Legislature in 1850 makes it murder to kill a "human being," and does not define "human being." That same year, the legislature abolishes common-law crimes. The murder statute is not modified thereafter in any relevant way. In 1970, the California Supreme Court has to decide whether D, by striking his pregnant ex-wife in the abdomen in order to kill her fetus, can be said to have killed a "human being."

   Held, for D. If there is no evidence to the contrary, the court must assume that the legislature intended in 1850 to adopt the common-law definition of "human being." Since a fetus was not deemed to be a human being at common law, D cannot be prosecuted for murder. (Also, prosecuting D now for murder would violate his due process rights, since a fair reading of California precedents existing at the time of the attack would not have put a reasonable person in D's position on notice that his act might be considered murder). *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970).

2. **The "rule" of lenity:** Many courts apply — or at least say that they apply – the ***"lenity"*** doctrine. The lenity doctrine says that criminal statutes must be ***"strictly construed"*** against the prosecution: if a statute has two reasonable interpretations, the one that is more favorable to the defendant must be applied.

   a. **Often not strictly applied:** But many courts do not in practice apply the lenity doctrine (or, as is sometimes said, they "strictly" construe the lenity doctrine itself – see Dressler Hnbk, § 5.04). Courts declining to give full application to the doctrine fear that doing so will cause people who ought to be punished to escape that punishment.

      i. **Supreme Court view:** The Supreme Court, when it is construing federal criminal statutes, takes this extremely narrow view of the lenity doctrine. As the Court has put it, the

doctrine applies “only if, after seizing everything from which aid can be derived, we can make ***no more than a guess*** as to what [the legislature] intended.” *Reno v. Koray*, 515 U.S. 50 (1995). This approach means that if a court feels that it can make more than a pure guess about legislative intent, it is not required to give the statute the most pro-defendant reading.

ii. **Tie-breaker:** In other words, in the view of courts (like the U.S. Supreme Court) that do not favor the lenity doctrine, the doctrine merely ***“serves as a tie-breaker*** — after all interpretive means leave us unable to determine the meaning of the statute, it will be construed strictly against the government.” Dressler Csbk, p. 107.

CHAPTER 2
ACTUS REUS AND *MENS REA*

Introductory note: All crimes have several basic common elements. This chapter treats all but one of the major ones: (1) a ***voluntary act*** *("actus reus");* (2) a ***culpable intent*** *("mens red");* and (3) ***"concurrence"*** between the *mens rea* and the *actus reus* (i.e., a showing that the act was the result of the culpable intention). The fourth major element, ***causation*** of harm, is discussed in the following chapter, *infra,* p. 55.

I. *ACTUS REUS*

A. Significance of *"actus reus"* concept: The requirement that the defendant have committed a voluntary act *("actus reus")* can best be understood by analyzing three basic kinds of situations in which the requirement may be held not to have been met. The required voluntary act is distinguished from: (1) ***thoughts, words,*** states of ***possession*** and ***status;*** (2) ***involuntary acts*** (e.g. sleep-walking); and (3) ***omissions*** (i.e., failure to act).

B. Distinguished from thoughts, words, possession and status: *Mere thoughts* are never punishable as crimes. Even the crime of conspiracy, and the various crimes of attempt, exist only where the defendant has gone beyond thoughts, however evil and detailed, and committed an ***overt act.*** The refusal to punish mere thoughts stems both from fears of "thought control" as well as from practical problems of enforcement and proof.

1. Statement of intent made to third party: Even if the defendant has confessed his evil intent to some third person, this will usually not be enough to constitute the *actus reus.* For instance, a statement "I intend to kill X" would not constitute the requisite criminal act. See K&S, p. 179-181.

a. Words as acts: But there a few situations in which, by the nature of the crime in question, words may constitute the requisite act. For instance, in some jurisdictions, an agreement between two persons to commit a crime is a sufficient act to constitute conspiracy; similarly, words spoken to encourage another to commit a crime might well be enough to give rise to a prosecution for aiding and abetting criminal activity. See K&S, p. 179-181.

2. **Possession as criminal act:** Mere ***possession*** of an object may sometimes constitute the necessary criminal act. For instance, possession of narcotics frequently constitutes a crime in itself.

   a. **Knowledge of possession:** However, the act of "possession" is almost always construed so as to include only ***conscious*** possession. Thus if the prosecution fails to prove that the defendant knew that he had narcotics on his person, there can be no conviction.

   b. **Knowledge of guilty character of object:** But for possession to be a criminal act, it is not necessarily required that the defendant have been aware of the object's ***illegal or contraband nature.***

   Example: D is prosecuted for possession of marijuana, and is convicted. *Held,* on appeal, D was entitled to have the jury instructed that it could not find him guilty unless it was convinced that he knew that he had the marijuana in his possession. But he was *not* entitled to have an instruction that he could be convicted only if he knew that the drug was illegal contraband. *People v. Gory,* 170 P.2d 433 (Cal. 1946).

   c. **Model Penal Code:** The Model Penal Code provides that possession can be a criminal act only if the defendant knew he had possession of the object, ***and*** "was aware of his control thereof for a sufficient period to have been able to terminate his possession." M.P.C. §2.01(4).

   d. **Presumptions:** The prosecutor's burden of proving knowing possession is frequently made easier by ***statutory presumptions.*** For instance, New York Penal Law § 265.15(3) provides that if an illegal weapon is found in an automobile, all persons in the car shall be presumed to be in possession of the weapon, unless it is on the person of one of them.

      i. **Overcoming presumption:** However, a defendant can always overcome such a presumption of possession by producing evidence that he did not know of the object's presence, or that he had no control over it.

      ii. **Possible unconstitutionality:** Such presumptions, even though rebuttable, have occasionally been held unconstitutional.

      iii. **Weapons presumption upheld:** Most presumptions, however, have been found ***constitutional.*** For instance, the New York

weapon-in-automobile presumption referred to above was found to be ***constitutional*** by the Supreme Court, at least as it was applied on the facts of that case; *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

3. **Status:** A defendant may not be convicted for merely having a certain ***status or condition,*** rather than committing an act. Thus the Supreme Court has held that a statute making it a crime to be a ***narcotics addict*** imposed an unconstitutional cruel and unusual punishment. *Robinson v. State of California*, 370 U.S. 660 (1962).

   a. **Act stemming from condition:** But the Supreme Court and other courts have refused to extend very far the *Robinson* court's prohibition on status crimes. For instance, the Court held that a defendant could constitutionally be punished for the crime of public drunkenness, even though some evidence suggested that he was a chronic alcoholic who once he became intoxicated had no control over his actions (and could thus not prevent himself from being found drunk in public). *Powell v. State of Texas*, 392 U.S. 514 (1968).

C. **Act must be voluntary:** An act cannot satisfy the *actus reus* requirement unless it is ***voluntary.***

1. **Model Penal Code examples:** The Model Penal Code, §2.01(2), lists three particular kinds of acts which it holds to be ***involuntary:***

   a. **Reflex or convulsion:** "A ***reflex*** or ***convulsion";***

   b. **Unconsciousness or sleep:** "A bodily movement during ***unconsciousness*** or ***sleep";***

   c. **Hypnosis:** "Conduct during ***hypnosis*** or resulting from hypnotic suggestion."

   d. **Other acts:** The Code also provides that an act is involuntary if it is "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual." § 2.01(2)(d).

2. **Reflex or convulsion:** An act consisting of a ***reflex or convulsion*** presents the clearest case for being involuntary, and thus not giving

rise to criminal liability.

Example: D is walking down the street, when he is stricken by epileptic convulsions. While in the midst of these convulsions, his arm jerks back, and he strikes X in the face. The striking of X was not a voluntary act, and cannot give rise to criminal liability.

Note: But if D knew beforehand that he was subject to such seizures, and unreasonably put himself in a position where he was likely to harm others (e.g., by driving a car), this initial act might subject him to criminal liability. See more about this *infra,* p. 18.

a. **Quick but conscious decision:** But an act is voluntary, not reflexive, as long as the defendant has ***time to make some decision*** as to whether to take that action. For instance, if D is about to fall, and reaches out to grab someone or something to stop himself, he has not acted reflexively, since his mind has "quickly grasped the situation and dictated some action." L, p. 210.

3. **Unconsciousness:** It is universally agreed that an act performed during a state of ***"unconsciousness"*** does not meet the *actus reus* requirement. But there is a great deal of dispute about exactly what constitutes "unconsciousness."

   a. **Defendant who "blacks out":** The most difficult issue, which arises frequently, occurs when the defendant testifies that prior to the crime, he "blacked out," and has no recollection of committing the crime. Virtually all courts agree that his ***amnesia*** by itself does not constitute a defense. But if the defendant can demonstrate that ***at the time of the crime,*** he was on ***"automatic pilot,"*** so to speak, and was not conscious of what he was doing, there is a good chance that his act will be held to be involuntary.

Example: D (the black radical, Huey Newton) is tried for the murder of a police officer. D testifies that he and the officer were involved in a skirmish, that the officer shot him in the stomach, that D felt a "sensation like...boiling hot soup had been spilled on my stomach," and that he does not remember anything that happened next until he was found at the entrance of a hospital. A doctor also testifies on D's behalf that such a gunshot wound in the stomach is very likely to produce shock and unconsciousness.

Held (on appeal), the California Penal Code prevents anyone from being convicted for an act he committed "without being conscious thereof." D produced enough evidence of unconsciousness that he was entitled to have the jury instructed that if it found him to have been unconscious, it could not convict him. The conviction is therefore reversed. *People v. Newton*, 87 Cal. Rptr. 394 (Cal. Ct. App. 1970).

i. **Relation to insanity defense:** At first glance, this unconsciousness defense, often called the defense of ***automatism,*** appears almost indistinguishable from the insanity defense. But there are some important practical differences between the two defenses. First, in most states, there is a statutory requirement that any defendant acquitted by reason of insanity be ***committed*** to a mental institution automatically; there is seldom such a requirement as to a defendant successfully using the automatism defense. See *infra*, p. 92.

ii. **Burden of proof:** Another difference is that the insanity defendant often has the burden of establishing, by a preponderance of the evidence, that he was insane at the time of the crime. Many courts, however, require the defendant merely to present ***some evidence*** supporting his automatism defense, and then shift to the prosecution the burden of proving (beyond a reasonable doubt) that the defendant was not acting unconsciously.

4. **Hypnotism:** There is dispute about whether acts performed under ***hypnosis*** are always (or indeed ever) sufficiently "involuntary" that they cannot give rise to liability. The Model Penal Code, as noted, provides in § 2.01(2)(c) that such acts are always involuntary.

   a. **Contrasting view:** But the opposite view, that liability should attach even to acts performed under hypnosis, relies on the often-stated view that no one will perform acts under hypnosis that are deeply repugnant to him (and that therefore the hypnotized subject must be exercising his will to some extent).

5. **Self-induced state:** Although the defendant's acts while unconscious, while in the midst of an epileptic seizure, etc., will not meet the *actus reus* requirement, his acts ***prior to*** such a state may be enough to meet the requirement. For instance, if the defendant had himself hypnotized for the purpose of emboldening him to commit a crime, the act requirement would be met; this would probably be the case, for example, if a ***cult member*** allowed himself to be hypnotized by a leader known to induce his subjects to commit crimes while

hypnotized. See Nutshell, p. 139.

a. **Risk knowingly imposed on others:** Similarly, the act requirement may be met where a person ***knowingly puts himself*** in the position of ***imposing risk*** on others. For instance, a driver who drinks heavily, and then falls asleep at the wheel, could undoubtedly be held guilty of manslaughter or vehicular homicide; his act consists of drinking and getting in the driver's seat, not of losing consciousness while driving.

i. **Tendency to get seizures:** Similarly, if a driver who knows that he is subject to ***epileptic seizures*** nonetheless drives, and causes a fatal accident while having one, he might well be convicted of negligent homicide.

D. Omissions: A completely distinct effect of the *actus reus* requirement is to prevent criminal liability from arising from most ***omissions*** to act (as distinguished from affirmative actions). For instance, if the defendant sees a stranger drowning in front of him, the defendant will normally ***not be criminally liable*** for failing to attempt to rescue, even though this could have been done with perfect ease and safety. (This principle also bars tort liability; see Emanuel on *Torts*.)

1. **Distinguished from affirmative acts:** In most situations, it is not difficult to distinguish between an affirmative action and an omission to act. If A pushes B into a lake, where he drowns, we would all agree that A has acted affirmatively; if A merely comes upon B already in the water, and walks away, we would agree that A has simply failed to act to save B. But there are situations in which the line between acting and failing to act is fuzzier.

a. **Respirator cases:** One such situation arises when a physician is faced with the care of a ***comatose patient,*** whose life can only be maintained by the use of artificial means, such as a ***respirator.*** If the physician fails to use the respirator, or uses it and then turns it off, has he acted affirmatively, or has he simply omitted to act?

i. **Omission to act:** Most commentators agree that the physician's decision not to use the respirator, or to turn it off, constitutes an ***omission*** to act; that is, it is "not a positive act

of killing the patient, but a decision not to strive any longer to save him." (Glanville Williams, quoted in K,S&P, pp. 214-15.) As Williams points out, if a respirator is so constructed that it turns itself off every 24 hours, we would all probably agree that the doctor's decision not to turn it back on again was an omission; there should be no moral difference between failing to reset such a machine and switching off a machine that has been constructed so as to run continuously. *(Id.)*

2. Limited liability for omissions: Anglo-American law has always been much less willing to impose liability for omissions than for affirmative acts. Various reasons for this have been advanced, including: (1) the fact that rules governing failure to act would necessarily be much vaguer than rules prohibiting affirmative conduct and would be likely to violate the principle that forbidden conduct must be carefully specified; (2) the difficulties of deciding which of the various people who could have acted and did not should be prosecuted (e.g., which of the hundreds of people in Times Square who watch V get stabbed to death and do nothing, if any, should be charged?); and (3) the general feeling that there is an important causal difference between precipitating an event and merely failing to intervene to prevent it. (E.g., if an old woman dies of pneumonia in New Jersey, does it make sense to say that the failure of a particular physician in Florida to attend to her "caused" her death, just as did the failure of every other physician in the world to do so?). As to this last point, see Fletcher, p. 596.

a. Exceptions to no-liability rule: Liability for omissions has been limited by ***restricting*** that liability to a few special situations. The exceptions — situations in which there will be liability for failing to act — may be summarized by saying that there is liability only where there is present either:

[1] a ***statute*** that explicitly makes it a crime to omit the act in question; or [2] some ***other special factor*** giving rise to a distinct ***legal duty*** to act.

Example: D is charged with abusing two young children of a friend of hers, and involuntarily causing the death of one of them. The prosecution claims that the children lived with D under an agreement whereby their mother paid for their care.

The evidence shows that the children were malnourished and did not get proper medical attention. The judge's instructions to the jury do not suggest that the jury must, in order to convict, find that D had a legal duty of care that she breached.

Held, D's conviction reversed. "[T]he duty neglected must be a legal duty, and not a mere moral obligation." In the absence of a statute imposing a duty, the legal duty can arise because of one's status relation to another (e.g., mother to child); because one has assumed a contractual duty to care for another; or because one has "voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid." Here, it may well have been the case that, as the prosecution charged, the "contractual duty" or "voluntary assumption of care" grounds was applicable. But because the jury was not instructed that they must find a legal duty to exist before they may convict, D's conviction cannot stand. *Jones v. U.S.*, 308 F.2d 307 (D.C. Cir. 1962).

3. **Statutory requirement:** There are a number of ***statutes*** which impose a ***duty to take affirmative action*** in particular situations. For instance, the Internal Revenue laws make it a crime to fail to file an income tax return. Similarly, many states have statutes making it a crime to fail to report a crime in a certain situation. Where omission is explicitly made a crime, most of the practical conceptual difficulties mentioned above are not present.

4. **Existence of "legal duty":** Courts recognize four principal categories in which the defendant will be held to have been under a ***special legal duty to act,*** so that his failure to do so may make him criminally liable.

   a. **Special relationship:** A ***special relationship*** between the defendant and the victim may give rise to such a duty to act. A close ***blood relationship*** is the clearest example.

   Example: A parent who fails to give food or medical attention to his child could be held liable for murder or manslaughter, based upon the parent-child relationship and the corresponding duty to furnish necessities.

      i. **Interdependence:** Other relationships, not involving ties of blood or marriage, may be characterized by such ***mutual dependence*** that a failure to aid may give rise to liability. For instance,suppose two mountain climbers are alone together, and one falls into a crevasse; the other probably has a duty to attempt a rescue (if it could be done with reasonable safety). Similarly, two roommates living together might have a duty to render assistance to each other. L, p. 216.

ii. ***Beardsley*** **case:** But if the relationship is more casual, the court is less likely to find a duty to assist. Thus in *People v. Beardsley*, 113 N.W. 1128 (Mich. 1907), the defendant and his mistress went on a drunken and adulterous weekend fling; she took an overdose of morphine towards the end of it, and he did nothing to save her (other than to ensconce her in the apartment of a friend of his, lest she be found by the defendant's wife in their own apartment). The court held that the defendant had had no legal duty to render aid to her; the decision stressed that the mistress knew the risk involved, and that she had had "ample experience in such affairs."

b. Duty based on contract: A legal duty may arise out of a ***contract.*** The contract need not be between the defendant and the victim; thus if a lifeguard is hired to guard a city beach, he may be criminally liable if he stands by and does not attempt to save a drowning swimmer (perhaps even if the swimmer had no apparent right to be on this particular beach). L, p. 217. Similarly, if the defendant is hired by a baby's mother to feed and care for the baby, the defendant will be liable for the infant's death by malnutrition. *Jones v. U.S., supra,* p. 19.

i. **Extent of duty:** But it does not follow, of course, that every breach of a contractual duty can give rise to liability-by-omission. The prosecution almost certainly needs to show ***willfulness*** and ***knowledge of the danger,*** and the defendant has a chance to show excuse or justification. See *infra,* p. 105.

c. Danger caused by defendant: A duty to assist may arise from the fact that the ***danger was caused*** (even ***innocently)*** by the ***defendant.*** The courts are obviously quicker to impose such a duty where the danger was caused by a negligent or intentional act on the part of the defendant, but will also sometimes impose such a duty where the danger was caused completely innocently.

Example: D starts a fire in a building in which he has an indirect ownership. Evidence indicates that he started the fire accidentally, but that once the fire was underway, he refrained from calling the fire department or trying to extinguish it (allegedly to collect insurance proceeds).

Held, D may be convicted of arson. *Commonwealth v. Cali,* 141 N.E. 510 (Mass.

1923).

d. Undertaking: Even if the defendant starts out by being under no duty to render assistance to a person in distress, he may come under such a duty if he ***undertakes to give assistance.*** This will be particularly true if he leaves the victim worse off than he was before (e.g., by moving an accident victim so that his bleeding and bone injuries are worsened). But it may also be true even if all that has happened is that other potential rescuers are dissuaded from helping, in reliance on the fact that the defendant is already doing so. However, there would probably be no liability if the defendant has not even worsened the victim's position to this latter extent; see L, p. 218.

e. Statutory duty: It was noted previously that a statute may explicitly provide for liability based upon an omission. But a statute may also ***indirectly*** give rise to liability, by ***imposing a duty of care*** that the defendant has not met. For instance, many states have statutes requiring a motorist who has played even an innocent role in an accident to render and/or call for first aid for his victim. If the motorist fails to do so (e.g., a hitand-run driver), and the victim dies, the violation of the statute (which by itself might only be a misdemeanor) might serve as the basis for a manslaughter conviction.

Quiz Yourself on
ACTUS REUS

1. Cain hates Abel and wants to kill him. Cain, Abel and their third brother, Seth, visit the Grand Canyon. Abel is peering over the edge.

   (A) Cain pushes Seth into Abel, causing Abel to fall to his death. Has *Seth* committed an act that could result in criminal liability?

   (B) Instead of the facts in Part A, assume that Cain tells Seth: "If you don't kill Abel, I'll tell Mom you've been eating forbidden fruit." If Seth pushes Abel off a cliff under this threat, has he committed an act that could result in criminal liability?

2. King George III, an epileptic, has a seizure in a crowded bus. During his seizure, he hits another passenger, breaking his jaw. In hitting the passenger, has George committed the *actus reus* required for a crime (in this case, battery)?

3. Sigmund Freud is addicted to cocaine.

(A) First, assume Freud is arrested under a state statute making it a crime to be addicted to a controlled substance. (The arrest comes about because Freud's doctor realizes that Freud is addicted, and informs the police of this fact.) Is the statute constitutionally valid, as applied to Freud?

(B) Now, assume that Freud is arrested for possession of cocaine when a police officer spots a baggy of the stuff on the passenger seat of Freud's car during a routine traffic stop. The statute makes it a crime to possess cocaine, even if the possession is exclusively for the defendant's own use on account of the defendant's drug addiction. Is the possession statute constitutionally valid, as applied to Freud?

4. India Hauser, champion swimmer, is lounging on a riverbank reading John Stuart Mill's autobiography. Ima Gonner, India's sworn enemy, strolls up in her bathing suit and goes for a dip in the river. In fact the water is deeper than Ima expected, and she begins to drown. India looks up from her book and watches, laughing, as Ima drowns. When Ima goes down for the last time, India sighs and says: "Oh well. Back to the Mill."

(A) Is India criminally liable for Ima's death?

(B) Assume the same facts as above, except that Ima went into the river because India told her, "Go on in and swim. The water's only three feet deep." (India actually believed this, because a friend whom India had reason to trust told her that the water was only three feet deep.) Is India criminally liable for Ima's death?

Answers

1. (A) No. All crimes require an *"actus reus"* (an act). The act must be

a voluntary one. Here, the *actus reus* requirement is not satisfied, because Seth's act was not voluntary; he was, in effect, Cain's weapon. Since there was no voluntary act on Seth's part, he cannot be criminally liable.

(B) Yes. Here, Seth's actual act was voluntary, even if he wouldn't have done it "but for" Cain's threat. (Note that Seth may be able to defend against criminal charges due to duress, discussed in Chap. 4 (II), although it's doubtful he'd win because duress is generally not available for homicide offenses.)

2. **No.** In order to be criminal, an act must be voluntary – that is, the act must have been committed under the actor's will and control. Where the act is the result of an epileptic seizure, it is not voluntary and thus no criminal liability will attach. (However, an epileptic might become criminally liable for *putting himself in a position* where his potential loss of muscle control is likely to cause serious damage, e.g., by driving a car. Here, the *actus reus* would be the reckless act of driving while knowingly subject to seizures.)

3. **(A) No.** Crimes that punish status (instead of acts or omissions) are considered unconstitutional, in violation of due process and the prohibition against cruel and unusual punishment under the Eighth Amendment. *Robinson v. Cal.* These include conditions like mental illness and addiction. Note, however, that a state can outlaw, say, public drunkenness – here, it's not one's status as an alcoholic that's being proscribed, but the act of being sloshed in public.

   (B) Yes. Statutes outlawing possession of narcotics are valid, provided they require that the person charged knew that he possessed the substance in question. (Note that he does not have to know it is illegal to possess the substance; he just has to know that he has it.) The fact that the possession was the direct result of an addiction, and/or the fact that the possession was for the defendant's own use, makes no difference.

4. **(A) No, because she was under no duty to act.** Normally speaking, in Anglo-American law a bystander will not be subjected to criminal liability merely for failing to assist another in distress, even though that assistance could have been given easily and without risk. Only

where the bystander has some special *legal duty* to assist can there be liability for failure to assist. Here, nothing caused such a duty to come into existence. India's intense dislike for Ima is irrelevant, since bad thoughts alone are not punishable, and India's bad thoughts did not cause India to have a duty to assist.

(B) Yes. Although normally a bystander has no duty to render assistance, there are some special situations that *will* cause a duty to assist to come into existence. One of those situations is that the defendant ***caused the dangerous situation to arise*** (whether the defendant acted negligently, intentionally, or even completely innocently). Since India's statement caused the danger to exist — even though India may have behaved non-negligently in making the statement — India then had a duty to render reasonable assistance when Ima started to drown.

II. *MENS REA*

A. Introduction: Just as the term *"actus reus"* symbolizes the requirement that there be a voluntary act, so the term ***"mens rea"*** symbolizes the requirement that there be what might be called a ***"culpable state of mind."***

1. Not necessarily state of mind: In most situations, the requirement of *mens rea* refers to what we would all agree is a mental state, either "intent" or "knowledge." But some crimes are defined in such a way that the *"mens rea"* is merely "negligence" or "recklessness"; in these cases, it is often stretching things to say that there is a particular state of mind involved at all.

a. Negligence and recklessness: When one acts negligently (even with "criminal negligence," a term that usually refers to a greater deviation from the ordinary standard of care than the deviation that would be enough to give rise to civil liability), it is hard to say that he has had any special mental state; the essence of his act is that he acted ***without consciousness*** of the risk that he was imposing. Even "recklessness" is defined in some courts as acting without consciousness of an extremely great risk (although, as is discussed

further, *infra*, p. 31, other statutes, and the Model Penal Code, require that there be a ***conscious*** disregard of a known risk for an act to be reckless.) Nonetheless, negligence and recklessness are said to fulfill the *mens rea* requirements of certain crimes.

b. Strict liability: Finally, some crimes are defined so as to require no *mens rea* at all. These are generally referred to as ***"strict liability"*** crimes, and are discussed *infra*, p. 33. Generally, they tend to be what might be called "public welfare" violations (e.g., parking without putting money in the meter). They are usually punishable only by fine and not by imprisonment, and carry no great social opprobrium.

2. Ambiguity in statute: Most crimes have a number of ***material elements,*** each of which the prosecution is required to prove (and prove, generally speaking, "beyond a reasonable doubt"). In many cases, the mental state required as to each of these material elements may not all be the same.

Example: The crime of rape requires that the defendant have intended sexual relations; it is also generally required that the defendant not be married to the victim, and that the victim not have consented. The prosecution must certainly show that the defendant ***intended*** to have sexual relations. But if the defendant argues that he mistakenly thought that the victim was his wife (e.g., he thought she was his wife, when she was in fact his wife's twin sister), or if he mistakenly thought that the victim had consented, it is not at all clear that the defendant will win. That is, it may suffice that the defendant behaved negligently, rather than intentionally, with respect to marriage or consent. See M.P.C., Comment 1 to § 2.02 (Tent. Dr. No. 4).

a. Unclear statutes: Notwithstanding this possibility that there may be different mental states required for the various elements of the crime, many statutes are ambiguous about which state is required for each element. For instance, suppose that a statute provides that "Any person who shall knowingly receive stolen property" is guilty of the crime of receiving stolen goods. This statute is ambiguous about whether the defendant be shown to have known that the property he was receiving was stolen, or must merely be shown to have known that he was receiving property, and simply negligent in failing to realize that the property was in fact stolen.

i. Model Penal Code: The Model Penal Code attempts to avoid such ambiguity in its definitions of crimes. A Comment states

that "The problem of the kind of culpability that is required for conviction must be ***faced separately*** with respect to ***each material element*** of the offense, although the answer may in many cases be the same with respect to each element." (M.P.C., § 2.02, Comment 1, Tent. Dr. No. 4.)

B. General versus specific intent: Courts have traditionally classified the *mens rea* requirements of the various crimes into three groups: (1) crimes requiring merely ***"general intent";*** (2) crimes requiring ***"specific intent";*** and (3) crimes requiring merely ***negligence.*** (Obviously this classification does not encompass crimes as to which no culpable mental state is required at all, i.e., strict liability crimes.)

1. "General intent": When courts hold that a crime requires merely ***"general intent,"*** they usually mean that all that must be shown is that the defendant ***desired to commit the act which served as the actus reus.***

2. Specific intent: Where a crime is said to require ***"specific intent"*** or "special intent," on the other hand, the courts usually mean that the defendant, in addition to desiring to bring about the *actus reus*, must have desired to do ***something further.*** L, pp. 238-39.

a. Distinction illustrated: The distinction between "general" and "specific" intent can best be illustrated by considering a crime for which general intent is usually held to be sufficient (simple assault) and a crime for which specific intent is usually held necessary (common law burglary).

i. Assault: It is enough for ***assault*** if the defendant had an "intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be...injury to another." *People v. Rocha*, 479 P.2d 372 (Cal. 1971). The prosecution is not required to show that the defendant thought that his conduct was wrong or unlawful, or even that he intended to cause bodily harm; thus if the defendant touches the victim with a knife, intending merely to graze his skin and frighten him, this will be sufficient intent, even though no actual injury is intended.

ii. **Burglary:** For common law ***burglary,*** on the other hand, it must be shown that the defendant not only intended to break and enter the dwelling of another, but also that he intended to commit a felony once he was inside the dwelling. This latter intent is a "specific intent," in the sense that it is an intent other than the one associated with the *actus reus* (the breaking and entering).

b. Significance of distinction: Those courts that adhere to the distinction between "general" and "specific" intent rely on it principally to dispose of two issues: (1) the effect of the defendant's ***intoxication;*** and (2) the effect of a ***mistake*** of law or fact. Intoxication is usually held insufficient to negate a crime of general intent, but possibly sufficient to negate the specific intent for a particular crime (e.g., a defendant who breaks and enters, but is too drunk to have any intent to commit larceny or any other felony.) See *infra*, p. 93. Similarly, a mistake of fact may be enough to negate the required specific intent (e.g., a defendant who breaks and enters, in an attempt to carry away something which he mistakenly thinks belongs to him) where the mistake might not negate the general intent (e.g., the intent to commit the breaking and entering by itself).

i. **Abandonment of distinction:** However, the terms "general" and "specific" intent are sufficiently ambiguous that many jurisdictions are now turning away from them, as does the Model Penal Code. The latter, for instance, specifies as to most crimes the precise mental state (e.g., "recklessly") required as to each material element. Where the crime is not defined with this precision, the Code, rather than providing that a "general intent" is sufficient, states that "where the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts ***purposely, knowingly*** or ***recklessly*** with respect thereto." M.P.C. § 2.02(3).

C. Common law vs. statutory crimes: When the criminal law developed in England, it did so principally as ***common law*** (i.e., "judge-made" law or "case law"). In most American jurisdictions, the original English

common-law crimes have been ***codified*** in ***statutory form.*** Thus in many jurisdictions, there are no common-law crimes at all any more, and in others there are only a few. By and large, American criminal law is statutory law. That is, conduct is criminal only if it is prohibited by statute.

1. **Statutory offenses not existing at common law:** In addition to statutory codifications of the common-law crimes, American legislatures have also enacted a huge body of modern statutory crimes that have no common-law counterpart. Many of these are defined so as to have elaborate *mens rea* requirements, similar to those of most common-law crimes. But many others are essentially strict liability crimes; these are often referred to as "public welfare" offenses or "violations," and are discussed *infra,* p. 33.

D. Presumption of intent: It will often be quite difficult for the prosecution to prove, beyond a reasonable doubt, that the defendant did something with a particular state of mind (especially "purposely" or "intentionally"). This burden is made easier by statutory and judge-made ***presumptions*** under which, from the existence of what might be called the "basic" fact, the jury is permitted to ***infer,*** beyond a reasonable doubt, the presumed fact (e.g., the fact that the defendant acted purposely or intentionally).

Example: A receipt-of-stolen-property statute might say that where *A* is a dealer in a particular type of object who is found in possession of stolen property of that type, *A* will be presumed to have known the stolen character of the object. *A* would of course be permitted to rebut the presumption, but the point is that if he didn't, the jury could infer that, beyond a reasonable doubt, *A* knew that the goods were stolen even if there was no direct evidence that he had such knowledge.

1. **Constitutional test:** It is now required, as a matter of constitutional due process, that the defendant not be convicted of a crime unless he has been proved guilty "beyond a reasonable doubt." *In Re Winship,* 397 U.S. 358 (1970). A judge-made or statutory presumption, insofar as it allows the jury to find that a material element of the crime exists merely because some other fact (the basic fact) exists, may run afoul of this due process standard. But this won't happen very often. Probably the only constitutional requirement is that the presumed fact be ***"more likely than not"*** to follow from the basic fact. (Furthermore,

all the evidence in the case, not just the presumption, may be used to determine whether the presumed fact exists beyond a reasonable doubt.)

Example: On the facts of the above stolen-property example, if it is “more likely than not” that a dealer who is in possession of stolen goods of a type the dealer customarily sells knows their stolen character, then the presumption in the example would probably not violate constitutional due process.

E. **Different states of mind:** The Model Penal Code sets forth four distinct states of mind that may give rise to culpability, depending on how the crime in question is defined: (1) “purposely”; (2) “knowingly”; (3) “recklessly”; and (4) “negligently.” Because this Model Penal Code scheme has had a substantial impact upon the drafting of criminal statutes in the seventeen years since its publication, we will focus on that scheme here. Then, we will discuss crimes and offenses not requiring any culpable mental state, i.e., strict liability.

F. **“Purposely”:** Under the Model Penal Code, § 2.02(2)(a), a person acts ***purposely*** with respect to a particular element of a crime if it is his ***“conscious object”*** to engage in the particular conduct in question, or to cause the particular result in question. If the element in question relates not to conduct or result, but to “attendant circumstances,” then the defendant has acted purposely with respect to those circumstances if he is “aware of the existence of such circumstances or he believes or hopes that they exist.”

1. **Distinguished from “intentionally”:** Most pre-Model Penal Code statutes do not use the word “purposely,” but rather, the word “intentionally.” Within the term “intentionally” is often included not only a conscious desire to bring about the results, or to engage in the conduct in question, but also the ***awareness*** that the conduct or result is ***certain to follow.*** That is, most older decisions do not distinguish between “purposely” and “knowingly.” For instance, if the defendant has a conscious desire to kill A, and he does so by putting a bomb on board a plane that contains both A and B, he would be held by these courts to have “intended” to kill B as well as A since, although he did not desire to kill B, he knew that B’s death was substantially certain to result from his actions.

2. **“Maliciously”:** Pre-Model Penal Code statutes often use the word

"malice" to denote a particular *mens rea.* The term always includes intentional conduct by the defendant, but is also usually interpreted to include ***reckless conduct,*** i.e., conduct taken in disregard of a known high probability of risk. But most decisions hold that neither negligence, nor the fact that the defendant was intentionally engaging in some other, unrelated, crime, is enough to establish that he acted "maliciously" with respect to the harm that in fact occurred.

Example: D steals a gas meter from the home of his prospective mother-in-law. However, D fails to turn off the stop tap to the meter, located only two feet away, and coal gas seeps through the walls, partially asphyxiating V, a woman sleeping next door. The applicable statute requires a finding that D acted "maliciously." The trial court judge defines "malicious" as a generally "wicked" state of mind during the commission of an act.

Held (on appeal), for D. In order to establish that D acted maliciously, the prosecution must prove that D either (1) ***intended*** to harm V or (2) acted recklessly in that he foresaw a risk of harm to V but imposed the risk on her anyway. It was not sufficient that D was "wicked," which he clearly was by stealing the meter at all. *Regina v. Cunningham,* 41 Crim. App. 155 (1957).

Note: Despite the decision in *Cunningham*, there are many situations in which a defendant who intends or desires to produce one result will be treated as if he intended or desired a different, even unexpected, one. For instance, if the defendant shoots at A, desiring to kill him, and instead the bullet hits B and kills him, the defendant will be held to have purposely killed B, under the doctrine of transferred intent. Most of the problems of unintended results of wrongful conduct are treated in the material on concurrence, *infra,* p. 45 and causation, *infra,* p. 55.

3. Conditional intent: The defendant may intend to commit a particular act only ***upon a certain condition.*** If so, shall he be deemed to have "intended" that act? Authorities differ about when the existence of a condition should be deemed to nullify the intent.

a. M.P.C. view: The Model Penal Code, in § 2.02(6), provides that the existence of such a condition is ***irrelevant,*** "unless the condition ***negatives the harm or evil sought to be prevented*** by the law defining the offense."

Example: Suppose D breaks into a house, intending to steal something only if no one is at home. Under the M.P.C., D will be found to have had the necessary intent for burglary (i.e., intent to break and enter and also intent to commit a felony; see *infra,* p. 331), since the evils sought to be prevented by laws against burglary (breaking and entering, and subsequent commissions of felonies) are present despite the condition. But if D had broken in for the purpose of having sex with the dwelling's owner, but only on condition that she consent, he will be held not to have had the necessary intent for burglary (since there is no statutory purpose to discourage consented-to

sexual intercourse). See M.P.C., § 2.02(6), Comment 8 (Tent. Dr. No. 4).

b. D requires V to comply with condition: One situation in which the issue of conditional intent arises is when the defendant threatens the victim with a harm unless the the victim ***complies with some condition:*** "I will do [illegal act X] to you unless you do [act Y]." Does the fact that D's intent is to commit illegal act X only if V fails to do Y prevent D from having the requisite intent to do act X? The Supreme Court has answered this question in the negative, at least for purposes of construing a single statute, the federal carjacking statute. The Court articulated the rule that "a defendant ***may not negate a proscribed intent*** by requiring the victim to ***comply with a condition*** the defendant has ***no right to impose."*** *Holloway v. U.S.* (summarized in the following example).

Example: On several occasions, D and his accomplice accost different Vs (motorists who have just parked their cars), point a gun at the V, and tell the V to give them the keys or they'll shoot. The accomplice later testifies that he and D would have used the gun if (and only if) a V gave the two a "hard time." A federal statute defines the federal crime of "carjacking" as the taking of a car "with the intent to cause death or serious bodily harm." In at least some of the situations charged, D and the accomplice do not in fact use violence, yet they are convicted under the statute for all counts charged. D claims that in those cases where he did not actually use violence (because the V complied with the demand for the keys), D has not met the *mens rea* for the statute.

Held, for the prosecution. "The core principle that emerges from [caselaw and scholarly commentary] is that a defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose; 'an intent to kill, in the alternative, is nevertheless an intent to kill.' "Congress must have been aware of these authorities when it enacted the statute. Therefore, Congress must have wanted D's conditional intent to use violence to satisfy the *mens rea* requirement. *Holloway v. U.S.,* 526 U.S. 1 (1999).

Note: Justice Scalia dissented in *Holloway.* He argued that "in customary English usage the unqualified word 'intent' ... *never* connotes a purpose that is subject to a condition which the speaker hopes will not occur. ... When a friend is seriously ill, for example, I would not say that 'I intend to go to his funeral next week.' I would have to make it clear that the intent is a conditional one: 'I intend to go to his funeral next week if he dies.' The carjacker who intends to kill if he is met with resistance is in the same position: he has an 'intent to kill if resisted'; he does not have an 'intent to kill.' No amount of rationalization can change the reality of this normal (and as far as I know exclusive) English usage."

4. Motive: It is often said that the defendant's ***"motive"*** in committing a certain act, as distinguished from his "intent" or "purpose," is irrelevant. The dividing line between "motive" and "intent" is often

blurry, but the idea of motive usually refers to an “ulterior” or “ultimate” intent. As one well-known illustration puts it, if A murders B in order to obtain B’s money, A’s “intent” is to kill, and his “motive” is to get the money. L, p. 241-42.

a. **Good motives no defense:** Good motives will not normally negate a state of mind that otherwise furnishes the required intent. This is most frequently demonstrated in ***mercy-killing*** cases, in which the defendant has killed a close relative to spare the latter the suffering of a terminal illness; the defendant can certainly be convicted of murder or voluntary manslaughter, even though his ultimate objective, his motive, may have been the lofty humanitarian one of sparing needless pain.

b. **Defenses of necessity, self-defense, etc.:** But there are a number of special, well-recognized, defenses as to which motive may be relevant. For instance, a defendant who commits what would otherwise be a criminal act may be entitled to the defense of ***necessity,*** if he can show that he was preventing a greater harm; his desire to prevent that greater harm might be said to be his “motive.” Similarly, a person who has killed another in self-defense might be said to have had the “motive” of self-defense. But unless the defendant’s conduct and mental state fit within one of these fairly well-defined defenses (discussed *infra*, p. 105), his motive will be irrelevant to his liability (although it may have a bearing on the sentence imposed by the court).

G. “Knowingly”: The Model Penal Code marks a modern tendency to distinguish between acting “purposely” and merely ***“knowingly.”*** A person acts “knowingly” under the Code, with respect to the nature of his conduct or the surrounding circumstances, if he is ***“aware”*** that his conduct is of a certain kind or that certain circumstances exist. More significantly, if the crime is defined with respect to a certain ***result*** of the defendant’s conduct, the defendant has acted knowingly if he was “aware that it is ***practically certain*** that his conduct will cause” that result. M.P.C., § 2.02(2)(b).

1. **“Willfully”:** Statutes often use the ambiguous term ***“willfully.”*** The Model Penal Code takes the position that for a person to have acted

willfully, it is not necessary that he acted "purposely"; it is sufficient if he acted "knowingly," unless the statute indicates otherwise. M.P.C. § 2.02(8). For instance, if murder is defined in a particular statute as the "willful taking of the life of another," the defendant can be convicted if it is shown that he knew that the victim's life was substantially certain to be taken, even if he did not desire that result (e.g., he put a bomb on board a plane carrying the victim, for the purpose of killing one of the other passengers).

2. **Subjective test:** The Model Penal Code, and most recent decisions, impose a ***subjective test*** for determining the defendant's knowledge. That is, the test is whether the defendant ***actually*** knew or believed something, not merely whether a reasonable person in the position of the defendant would have had that knowledge or belief. The effect of this is that if the defendant can show that he was ***unusually stupid*** or ***gullible,*** he may ***escape*** having knowledge imputed to him.

Example: A statute makes it a crime to "possess goods that defendant knows to be stolen." D buys a genuine Rolex gold watch, with a used-market value of $10,000, for $500 from a street vendor. D is charged with violating the stolen-goods statute, on the theory that the $500 price was so far below the lowest-plausible price for a real Rolex that D must have known the watch was stolen. D testifies that she believed that the Rolex was counterfeit, not stolen. If the jury believes D's testimony, it must acquit her, no matter how unreasonable it concludes that D's belief was.

a. **"Willful blindness":** There is one situation in which the defendant is ***not*** required to have had actual knowledge or belief of a fact for him to be held to have acted "knowingly." This is the situation that has often been called ***"willful blindness."*** It occurs where the defendant has a suspicion that something is the case, but in order to be able to deny knowledge, has purposely refrained from making inquiries which would have led to the knowledge in question. As the Model Penal Code, § 2.02(7), puts the idea, such knowledge is established if the defendant is "aware of a high probability of its existence," unless he actually believes that the fact in question does not exist.

Example: D is arrested when driving into the U.S. from Mexico, for having 110 pounds of marijuana concealed in a secret compartment in his trunk. He testifies at his trial that he was paid $100 by the owner of the car to drive it across the border, and that he, D, knew that there was some kind of void in the trunk, but did not know what was in it. The trial judge instructs the jury that it may convict if the government has

proved that D's lack of knowledge of the contents of the trunk "was solely and entirely a result of his having made a conscious decision to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth." The jury convicts.

Held, conviction affirmed. The jury instruction as to D's willful refusal to ascertain for certain that which he suspected (the presence of the marijuana) was a correct statement of the "willful blindness" doctrine. (A dissent argued that this instruction did not meet the Model Penal Code requirements, principally because it may have confused the jury into thinking that D could be convicted if he actually believed that there was no marijuana, if his belief was unreasonable.) *U.S. v. Jewell,* 532 F.2d 697 (9th Cir. 1976).

3. **Presumption of knowledge:** A statutory or judge-made ***presumption*** may be used to help prove that the defendant acted "knowingly," just as it may be used to show that the defendant had a particular "intent." One frequent illustration of this kind of presumption is in statutes governing stolen property, which typically provide that the defendant's unexplained possession of property which is in fact stolen gives rise to a presumption that he knew that it was stolen.

4. **Knowledge of attendant circumstances:** Statutes requiring that the defendant act "knowingly" are often very ambiguous grammatically, because it will often be unclear exactly ***what*** the defendant must know. In particular, it will often be unclear whether the defendant must know not only the basic nature of his action but the ***attendant circumstances*** that the definition of the crime makes important.

   a. **Requires knowledge of all attendant circumstances:** The modern approach is to interpret the term "knowingly" broadly, as applicable to ***all of the material elements of the crime,*** including all of the ***attendant circumstances*** that are made elements. See M.P.C., § 2.02(4) and Comment 6 thereto.

Example: The federal crime of "aggravated identity theft" applies where the defendant, in connection with the commission of some other crime, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." D, a Mexican citizen, in order to satisfy federal immigration and employment requirements, presents his U.S. employer with a counterfeit Social Security card. The card contains a Social Security number that happens to be assigned to someone else. When D is prosecuted for aggravated identity theft, the issue is whether the prosecution has to prove that the statute's use of the word "knowingly" applies to the phrase "identification of another person." In other words, if the prosecution shows that D knew that his Social Security card was phoney, but cannot show that he knew that the number belonged to someone else (as opposed to not being *anyone's* Social Security number), can D be convicted?

Held (by the Supreme Court), for D. The government must prove that D knew that the Social Security number on the card he was using belonged to someone else. "As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to *all the subsequently listed elements* of the crime." For instance, "[i]f we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese." Similarly, in the case of a criminal statute, "courts ordinarily read a phrase ... that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." There is no reason to believe that Congress, in enacting the present statute, intended to depart from this general understanding that the "knowingly" requirement applies to each element. *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009).

5. D need not know of illegality: On the other hand, a statute that forbids "knowingly" doing X does ***not*** require the prosecution to prove that D knew ***that doing X was illegal.*** L, § 3.5(b), p. 234. In other words, the use of the word "knowingly" does not change the traditional rule that "ignorance of the law is no excuse," i.e., that ignorance of the fact that the law forbids a particular type of conduct is no defense. (For more about the "ignorance of the law" problem, see *infra*, pp. 41-43.)

Example: A statute makes it an offense to "knowingly violate a regulation of the state Tobacco Regulation Commission. A regulation of that Commission prohibits the sale of any "tobacco product" to a person below the age of 22 unless the buyer presents official identification showing him or her to be over 18. The regulation classifies snuff as a tobacco product. D is charged with violating the statute by selling snuff to X, an undercover operative aged 21, without demanding identification.

It will not be a defense that D did not know of the regulation's existence, or the details of what conduct it forbade. In other words, to "knowingly violate" the regulation, D must be shown to have known the facts making the regulation applicable in the matter at hand (i.e., that the buyer was under 22), but need *not* be shown to have known that the regulation existed, or that it classified snuff as a regulated "tobacco product."

H. "Recklessly": A person is said to act ***"recklessly,"*** under the Model Penal Code, when he ***"consciously disregards a substantial and unjustifiable risk...."*** The Code gives a further explanation of what constitutes a "substantial and unjustifiable" risk, by saying that the risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a ***gross deviation*** from the standard of conduct that a law-abiding person would observe in the actor's situation." M.P.C. § 2.02(2)(c).

1. **Must be aware of risk:** The Code thus takes the position that for the defendant to be reckless, he must have been ***aware*** of the high risk of harm stemming from his conduct. To put it another way, the Code applies a ***subjective standard*** for recklessness.

   a. **View of some courts:** The M.P.C.'s subjective standard is in sharp contrast to the "objective" standard applied by a number of courts and statutes, under which the defendant can be reckless if he behaves extremely unreasonably (i.e., disregards an extremely high risk of harm) even where he was ***unaware*** of this risk.

   Example: D owns and runs the "New Coconut Grove," a Boston nightclub. One night, a sixteen-year old employee, while trying to replace a lightbulb in the club's basement, accidentally sets fire to some flammable decorations with a match he is using for a light. The fire spreads to the main floor of the crowded club, a panic results, and many customers die from burns and smoke inhalation. Several emergency exits are later shown to have been locked at the time. Although D himself is in the hospital at the time of the fire, he is charged with manslaughter.

   Held, D's manslaughter conviction is affirmed because he acted recklessly, not just negligently. It is irrelevant whether D knew that he was creating a large danger by the inadequate fire exits. "[E]ven if a particular defendant is so stupid [or] so heedless .. .that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary normal man under the same circumstances would have realized the gravity of the danger. A man may be reckless within the meaning of the law although he himself thought he was careful." (Nor does it matter that D did not directly cause the fire, since his reckless omission to perform his duty to protect the safety of his patrons was the equivalent of an affirmative act.) *Commonwealth v. Welansky,* 55 N.E.2d 902 (Mass. 1944).

2. **All circumstances considered:** In determining whether the risk was "substantial and unjustifiable," ***all the circumstances*** known to the defendant must be considered. These would include the end that he is seeking (which might be called his "motive"; see *supra,* p. 28). Thus if the defendant drives very fast through a residential area, his conduct might be reckless if he was simply trying to avoid being late for a movie, but would not be reckless if he were trying to get an injured person to the hospital. This would be true even though the risk imposed on the outside world would be the same in both situations; the gravity of the potential harm must be weighed against the "social benefit" that the defendant is attempting to obtain.

I. "Negligently": A number of statutes make it a crime to behave

"negligently" if certain results follow. The most common such crime is probably that of "vehicular homicide," which is in some states a variety of "criminal negligence." The Model Penal Code defines the term "negligently" so as to apply an objective, not subjective standard: a person is negligent "when he should be aware of a substantial and unjustifiable risk... The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

1. **Distinguished from civil negligence:** Most courts and statutes require a greater degree of culpability for conviction of a crime involving negligence than for the imposition of ***civil liability*** for negligence. Sometimes this is done by holding that there is no negligence unless the defendant is shown to have been ***aware*** of the risk imposed by his conduct; the Model Penal Code rejects this approach, at least as far as it is merely the defendant's ***mental attributes*** (e.g., the "heredity, intelligence or temperament of the actor") which are concerned; otherwise, the negligence standard would be "deprive[d]...of all its objectivity." M.P.C. §2.02, Comment 4.

    a. **Physical attributes:** But the defendant's ***physical characteristics*** are relevant, if they prevent him from perceiving or avoiding a risk. "If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered, as they would be under present law." M.P.C., *ibid.*

2. **Gross negligence:** The other respect in which many courts and statutes have imposed a different standard for criminal negligence than for civil negligence is by requiring a ***greater deviation*** from the standard of care which would be shown by a reasonable person. This is sometimes expressed by saying that criminal negligence is ***"gross"*** negligence. The Model Penal Code agrees with this view, insofar as it imposes liability for negligence only where there is a ***"gross deviation*** from the standard of care that a reasonable person would observe...." M.P.C., § 2.02(2)(d).

3. **Unforeseeable results:** Suppose the defendant should have known that there was a substantial risk that a particular harm would come from his act, and instead a ***different harm occurs,*** or the same harm occurs in a ***different manner*** from that which was foreseeable, or a ***different victim*** is harmed. For instance, suppose that on the facts of *Jones, supra,* the defendant was negligent in disregarding the risk that he might hit his hunting companion with a shot, and the shot in fact hit some third person whose presence was completely unforeseeable; has D committed the crime of negligent shooting while hunting? These questions of unforeseeable results (which may also arise in cases where an intentional act, or a knowing or reckless one, is involved) are discussed elsewhere, partly in the treatment of concurrence, *infra,* p. 45, and partly in the material on causation, *infra,* p. 55.

J. Strict liability: The traditional common-law crimes are all defined in such a way that they are committed only if the defendant acted intentionally, knowingly, recklessly, or at least negligently. As legislatures have become more and more active in defining crimes, however, so-called ***"strict liability"*** crimes have come into existence. These are crimes for which no culpable mental state at all must be shown; it is enough that the defendant has performed the act in question, regardless of his mental state. Among the more serious strict liability crimes are those of ***statutory rape*** (in which the defendant is guilty if he has intercourse with a girl below the prescribed age, regardless of whether he knew or should have known her true age) and ***bigamy*** (under which the defendant is guilty even if he reasonably thought that a purported divorce decree was valid, or that the prior spouse had died).

1. **Constitutionality:** The constitutionality of such strict-liability statutes, particularly ones which impose substantial criminal penalties such as imprisonment, has often been attacked by defendants, usually on the grounds that conviction without a showing of culpable intent violates the ***Due Process clause*** of the Fifth and Fourteenth Amendments. But such an argument has ***practically never succeeded.***

   Example: A federal statute makes it a crime to sell certain drugs, including opium, without a written order on a form printed by the Commissioner of Internal Revenue. The statute lists no mental state, other than that D intended to make the sale. D argues that this imposition of strict liability on him violates his due process rights. *Held* (by

the Supreme Court), the statute is valid. "The [government] may in the maintenance of public policy provide, as to certain acts, 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' "*U.S. v. Balint*, 258 U.S. 250 (1922).

2. Interpretation: The legislature seldom makes it clear that strict liability is to be imposed. Instead, statutes typically simply omit any particular mental requirement. Since many statutes (particularly old ones) fail to specify a mental state even where some *mens rea* requirement ***is*** intended, the courts are often faced with a difficult problem of statutory interpretation: did the legislature intend to impose strict liability, or did it simply omit an intended mental requirement?

a. Factors: Here are some ***factors*** that would make a court ***more likely*** to conclude that the legislature ***intended strict liability:***

[1] the violation is in the nature of ***neglect*** or ***inaction,*** rather than positive aggression;

[2] the statute has a ***regulatory*** flavor;

[3] there is no necessary ***direct injury*** to any person or property, but simply a ***danger*** of such, and it is this danger that the statute seeks to curtail;

[4] the ***penalty*** prescribed is ***small;***

[5] conviction does not do grave damage to the defendant's ***reputation;*** and

[6] it was relatively easy for the defendant to ***find out the true facts*** before she acted, making it not unfair to punish her without regard to fault.

Cf. *Morisette v. U.S.* (1952); L, §3.8, pp. 258-260.

b. Not applicable where statute codifies common law: Another important factor is that where the statute is more or less a ***codification*** of a ***common law crime,*** it is much less likely to be held to be a strict-liability offense than where the statute has brought into being a whole new kind of offense not known to the common law. This factor was, in fact, the deciding one in *Morissette, supra*, the facts of which are set forth in the following example.

Example: D enters an Air Force practice bombing range, and takes used bomb casings that have been lying around for years rusting away. He sells them as junk for an $84 profit. He is tried and convicted of "knowingly converting" government property. He defends on the grounds that he honestly believed that the casings had been abandoned, and that he was not violating the government's rights by taking them.

Held, the statute in question was not a strict-liability one, and required the prosecution to show an intent to steal (which apparently, according to the Court, was negated by D's belief that the property had been abandoned.) The statute was merely a codification of the common-law crime of larceny; therefore, the fact that Congress did not specify a requirement of intent to steal does not warrant the assumption that strict liability was intended, since intent to steal has always been an element of common-law larceny. *Morissette v. U.S.,* 342 U.S. 246 (1952).

c. Complex statute that is easy to violate innocently: If the statute is ***complex, easy to violate innocently,*** and/or ***imposes a stiff penalty*** for its violation, the court is likely to read in a *mens rea* requirement, and thus to ***refuse*** to treat the statute as imposing strict liability. The 1994 Supreme Court decision set forth in the following example illustrates this tendency.

Example: A federal statute, the National Firearms Act, makes it a crime (punishable by up to 10 years in prison) to possess a "machinegun" without proper registration. The Act defines "machinegun" to include "any weapon which shoots, ... or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." D is found to be in possession of an AR-15 rifle, which is a semi-automatic weapon that can be modified to fire as an automatic one. (When officers test D's weapon, the weapon fires more than one shot with a single pull of the trigger.) D is charged with unlawful possession of an unregistered machinegun. At trial, D argues that he did not know of the gun's automatic firing capability, and that his ignorance should shield him from any criminal liability under the statute.

Held (by the Supreme Court), for D. Although Congress was silent as to any *mens rea* requirement in this statute, one must be inferred, since the penalty for failure to comply with the statute is so severe. "In a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous. ... In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply." *Staples v. U.S.,* 511 U.S. 600 (1994).

Note: A dissent in *Staples* noted that the weapon in question here was a particularly dangerous one, making it reasonable to hold D accountable for failure to register it. According to the dissent, the absence of an express knowledge requirement in the statute "suggests that Congress did not intend to require proof that the defendant knew all of the facts that made his conduct illegal."

d. Can only be "violation" under Model Penal Code: The Model Penal Code provides that if strict (or, as the Code calls it,

"absolute") liability is imposed as to any material element of an offense, the offense can only be a ***"violation."*** A violation, under the Code, is a minor offense that does not constitute a crime, and that may be punished only by fine or forfeiture. (M.P.C. § 1.04(5)). The commentary to the Code (Comment 1 to § 2.05, Tent. Dr. No. 4) explains this position by stating: "[t]he liabilities involved [in conviction] are indefensible in principle, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of probation or imprisonment may be imposed. In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform."

i. **Applicability to other statutes:** The Model Penal Code also would impose the rule reducing all strict-liability offenses to violations even where the relevant statute or regulation is outside of the Code (e.g., a special statute preventing adulteration of food, enforced under administrative regulations). As to such non-Code statutes, the Code provides that these will be deemed to impose strict liability only "insofar as a legislative purpose to impose absolute liability... ***plainly appears."***

3. **Typical strict-liability provisions:** Here are a few examples of statutes which have been interpreted to impose strict liability, and to be constitutional:

a. **Mislabeling of drugs:** The putting into interstate commerce of any drug that is ***"adulterated*** or ***misbranded";*** 21 U.S.C. § 331(a). *U.S. v. Dotterweich,* 320 U.S. 277 (1943).

b. **Pollution:** The causing or permitting of certain ***pollutants*** to enter the atmosphere; Ariz. R. S. § 36-779.

c. **Anti-hijacking statute:** The concealment of a ***dangerous weapon*** while boarding an ***aircraft;*** 9 U.S.C. § 1472(1).

K. **Vicarious liability:** In the strict-liability situations discussed above, a person who committed acts proscribed by a statute was made liable, notwithstanding the absence of wrongful intent. A distinct kind of

absolute liability may be imposed upon one person for the ***act of another;*** this is commonly called ***"vicarious liability."*** Where vicarious liability exists, it is probably more accurate to say that it is the requirement of an ***act*** *(actus reus)* that has been dispensed with, not the requirement of a wrongful intent.

1. Employer liability: The most common form of vicarious liability is that which makes an ***employer*** or ***principal*** liable for the acts of his employee or agent.

> **Example:** D is the general manager of a drug corporation. The corporation receives an order from an out-of-state physician, and one of the employees fills it by shipping him a bottle of "Cascera Compound" pills. Unbeknownst to anyone at the corporation, the pills are mislabeled (due to a change in the official composition of such pills), in violation of a Federal statute prohibiting the interstate shipment of "adulterated or misbranded" drugs. D himself has nothing to do with this particular shipment. Nonetheless, he is convicted of violating the statute, on a vicarious liability theory.
>
> *Held*, by the U.S. Supreme Court, conviction affirmed. Anyone who has a "responsible share" in the distribution of misbranded drugs in interstate commerce can be convicted under the statute, even if that person did not physically handle the shipment. *U.S. v. Dotterweich*, 320 U.S. 277 (1943).

a. Liability of corporation for acts of its employee: Sometimes a ***corporation*** will be convicted of a crime, based on its employee's commission of criminal acts. When such a corporate conviction occurs, it can be viewed as a sort of vicarious liability — the corporate entity is being found guilty based on actions taken by another "person" (the employee). The subject of corporate criminal liability is discussed extensively *infra*, beginning on p. 233.

2. Automobile owner: Another area in which vicarious liability is frequently imposed is that of ***automobile ownership.*** Statutes frequently make a car owner liable for certain acts committed by those to whom he lends his car (e.g., parking violations), even without a showing of culpable mental state on the part of the owner.

3. Constitutionality: Convictions based on a vicarious liability theory, like those based on strict liability, are often subjected to ***constitutional attack*** by the defendant. The defendant typically argues that his conviction on a vicarious liability theory violates his federal ***due process*** rights. In general, defendants have not fared well with this theory, though there are exceptions.

a. **Defendant must have had control over offender:** If the defendant did not have any ***ability to control*** the person who performed the actual *actus reus*, his conviction is probably ***unconstitutional.*** See L, p. 270.

b. **Fine:** Where the defendant has merely been ***fined*** rather than imprisoned, the use of vicarious liability is virtually never a due process violation. This is true even if the defendant did not ***know*** that the violation was taking place, and behaved with reasonable care.

c. **Imprisonment:** But if the defendant has been sentenced to ***imprisonment*** (or even if he is convicted of a crime for which imprisonment is *authorized)* he has a better chance — courts are ***split*** about whether imprisonment based on a vicarious liability theory violates the defendant's due process rights.

i. **Tavern cases:** The issue often arises in connection with ***tavern owners:*** May the owner be sentenced to prison where his employee serves minors, if the owner was ***not aware*** that the service to a minor was taking place, and did not behave negligently? Most states have ***upheld*** the constitutionality of imprisonment in this situation; see K&S, p. 313. But some courts find a due process violation. See, e.g., *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986), holding that it is a violation of due process for D to be "convicted of a crime punishable by imprisonment for an act he did not commit, did not have knowledge of, or give express or implied consent to the commission thereof."

4. **Interpretation:** It is not always clear whether the legislature ***intended*** a particular statute to give rise to vicarious liability.

a. **Statutory reference:** Sometimes, the statute may contain words indicating that the employer or principal will be liable; e.g., "any sale of liquor [to a minor] is the act of the employer as well of that of the person actually making the sale...."

b. **Statute requires culpability:** If the statute is silent on the issue of vicarious liability, but requires a culpable mental state on the part

of the person actually committing the act (e.g., “intentionally,” “recklessly”), then normally the employer/principal cannot be convicted without a showing that he, too, had the same culpable mental state. L, p. 267.

c. No-fault statute: If the statute is silent on the issue of vicarious liability, and it is interpreted so as to place strict liability on the employee, the odds are that it will also be interpreted to provide for vicarious liability without a showing of the employer’s fault. Thus in *U.S. v. Dotterweich, supra,* p. 36, the Supreme Court jumped from a finding that the statute was intended to impose strict liability on one who actually makes a mislabeled shipment, to the conclusion that vicarious liability for a higher-up was also intended. This conclusion is criticized in L, pp. 268-69.

d. Severity of punishment: The severity of the punishment for violation of the statute is perhaps the most important factor in interpreting the legislative intent. If the punishment is relatively light (e.g., a fine), the court is likely to find both that strict liability for the actor was intended and that vicarious liability was intended. If a prison sentence is authorized by statute, on the other hand, both of these conclusions are less likely to be reached.

i. *U.S. v. Park* authorizes potential imprisonment: However, the fact that a substantial prison sentence is authorized won’t *automatically* prove that the legislature did not intend to create vicarious liability. Thus in *U.S. v. Park,* 421 U.S. 658 (1975), the U.S. Supreme Court upheld a corporate executive’s strict-liability conviction under a statute theoretically authorizing imprisonment for up to a year on a first conviction, and up to three years upon a second.

(1) **Facts:** D, president of Acme Markets, was convicted of violating an FDA-enforced statute prohibiting shipment of adulterated food. The government showed that D had been informed of unsanitary conditions at one of the company’s sixteen warehouses, and that these conditions were not rectified. D attempted to defend on the grounds that he had delegated responsibility for remedying the

situation to responsible subordinates, and that he himself was not guilty even of negligence.

(2) **Holding:** But the Court disagreed, holding that to further the statute's public welfare purposes, D could be convicted merely upon a showing that he was theoretically "responsible" for maintenance of sanitary conditions (just as he apparently was responsible for everything else that happened in the company).

L. Mistakes of fact or law: Courts have often tended to treat ***mistakes*** of fact or law by the defendant as involving a whole separate body of law, distinct from the general principles of *mens rea*. In reality, however, many questions of mistake, particularly mistakes relating to factual issues, simply pose *mens rea* issues under a different guise. Frequently, the defendant's mistake will simply ***prevent the requisite mental state*** from existing at all, and the case should be disposed of on this ground. **Example:** Suppose that rape is defined as intentionally having intercourse with one whom the defendant knows does not consent. (Most states *don't* define rape to include this knowledge element — see *infra*, p. 288.) If the defendant mistakenly believes that his victim was consenting, he should be acquitted, not because of any special doctrine of "mistake," but simply because the special intent required for the crime of rape (the intent to have intercourse where there is no consent) is lacking.

1. **Grounds for confusion:** Courts have traditionally limited the mileage a defendant can get out of his mistake in three ways: (1) by holding that the mental state required for the crime is a very general, rather than specific, one (e.g., by holding that rape requires only intent to have intercourse, not intent to have intercourse with a non-consenting woman); (2) by holding that a mistake is never a defense unless it is "reasonable"; and (3) by holding that a "mistake of law" can never be a defense.

2. **General mental state:** Since many statutes, particularly older ones, do not make clear precisely what mental state is required, there has been much scope for courts to hold that the most general kind of culpable intent suffices, and that the defendant's mistake did not

negate that broad culpable intent.

a. Moral wrong: One way that this has often been done is by application of the doctrine that the requisite general mental state exists if, under the facts as the defendant believed them to be, his conduct and intent would have been either criminal or ***"immoral."***

Example: D is tried for the offense of taking an unmarried girl under the age of sixteen out of her father's possession against his will. D defends on the grounds that he reasonably believed that the girl was eighteen, as she told him she was.

Held, conviction affirmed. Even had the facts been as D thought they were, he would still have been guilty of the moral wrong of taking a girl out of her parent's possession (despite the fact that this would not have been a crime, since she was over sixteen.) Accordingly, D will be held to have had a culpable mental state. But if D's mistake had been that he erroneously thought that her father had consented, this would be a defense since, had his understanding been correct, he would have committed no moral wrong. (A dissent argued that the "look at the facts as the defendant assumed them to be" rationale should only be applied where, on the facts as supposed by D, his conduct would have been a lesser crime, not merely a moral wrong.) *Regina v. Prince,* L.R. 2 Cr. Cas. Res. 154 (Eng. 1875).

3. **Mistake must be "reasonable":** Older cases have frequently made the blanket statement that a mistake can never be a defense unless it was ***"reasonable."*** This statement is generally made without consideration of the fact that the mistake, reasonable or otherwise, may negate the required specific mental state.

4. **Mistake of law:** Finally, the traditional view has been that a ***"mistake of law,"*** even if completely reasonable, can never be a defense. Many cases have blindly applied this rule not only where the defendant is ignorant of the fact that there was a statute proscribing his conduct (in which the "mistake of law is no excuse" doctrine is still agreed to be generally sound; see *infra,* p. 41) but also where the mistake of law is as to a ***collateral fact,*** and the mistake negates a required mental state.

Example: Suppose D honestly but mistakenly believes that she has been validly divorced, because her husband, H, has so informed here. In fact, however, the Mexican divorce procured by H would not be recognized by an American court. Now, D purports to re-marry X. According to the traditional view, D would be guilty of bigamy, because she has made a "mistake of law" about the validity of a Mexican divorce, and a mistake of law cannot be a defense.

5. **Modern view:** But ***modern*** law gives a ***much bigger role*** for mistakes. The modern approach to mistake is exemplified by the Model Penal Code. M.P.C. § 2.04(1) provides that "ignorance or

mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense."

a. **Effect of this view:** This approach makes two principal changes in the traditional case-law discussed above, one with respect to the effect of an unreasonable mistake, the other with respect to the effect of a mistake of law on a collateral factual issue. Each of these changes is discussed below.

6. **Unreasonable mistake:** If the crime is one as to which a showing of intent or knowledge is required, then even an ***unreasonable mistake*** negating such intent or knowledge will ***block conviction*** under the Model Penal Code. Suppose, for instance, that the crime of assault with intent to rape requires an intent to have what D knows is unconsented-to intercourse. D's belief that there was consent ***(however unreasonable)*** would be a defense (or, more precisely, would block a *prima facie* showing of liability).

   a. **Effect on rape convictions:** Even where the court does subscribe to the Model Penal Code rule, however, the effect of that rule will obviously depend on how the court defines the required mental state. For instance, if the court follows the majority rule that the crime of rape requires merely an intent to have intercourse, not an intent to have unconsented-to intercourse, then the Model Penal Code rule will not block liability where the defendant believes that there has been consent. See the further discussion of mistake as a defense to rape *infra,* p. 288.

7. **"Lesser crime" theory retained:** As noted above, the traditional view was that if, even on the facts as D mistakenly supposed them to be, his acts would have been either a moral wrong or a lesser crime, his mistake cannot be a defense. The M.P.C. follows this rule with respect to conduct that would be a lesser crime, but ***rejects*** it as to conduct that would merely be a moral wrong. M.P.C. § 2.04(2) provides that "although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the

defendant would be guilty of another offense had the situation been as he supposed."

Example: Suppose D steals a necklace from a costume jewelry store. The necklace is made of diamonds, and is worth $10,000, but D shows that he believed it to be merely costume jewelry worth less than $500. Since D's act would have been a crime (a misdemeanor under the M.P.C.) even had the facts been as he thought them to be, his mistake will be no defense to the felony (more than $500 stolen) charge. See M.P.C., § 223.1(2).

a. **Conviction treated as being of lesser offense:** But where the defendant makes such a showing that he mistakenly believed facts that would have made his conduct a lesser crime, the Model Penal Code does provide that upon conviction, the "grade and offense" of the crime (e.g., third-degree felony) shall be reduced to those of the crime which the defendant would have committed had the facts been as he supposed. Thus the defendant in the above example could be convicted only of a misdemeanor (nonviolent theft of less than $500), not a third-degree felony (violent theft or theft of over $500). This amounts to virtually the same thing as treating the defendant as having been convicted of the lesser offense. M.P.C. § 2.04(2).

8. **Mistake of law as to collateral fact:** Modern cases have also been more willing to recognize that the general rule that "mistake of law is no defense" should not apply at all when the mistake relates to the application of law to fact, and the fact is a collateral one. These cases recognize the validity of the rule that the defendant's mistaken belief that no statute makes the particular conduct a crime is not a defense. (This rule, and the few exceptions to it, are discussed *infra*, p. 41.) But other mistakes involving questions of law may very well constitute a defense, just as mistakes of fact can, if they ***negative the required mental state.***

Example 1: D, whose car has been repossessed by Finance Company (as the Company has a right to do under its loan agreement), breaks into the car and takes it back. His mistaken belief that the car is still his ***will*** be a defense to a theft prosecution, under the modern view, since the requisite mental intent for theft is intent to take property which one knows or believes to belong to another. The fact that D's mistake has legal aspects (i.e., who has proper title to the car) is irrelevant. But if D had taken his neighbor's car, and attempted to raise the defense that he didn't know that there was a statute making it a crime to take one's neighbor's property, this would not be a defense.

Example 2: The Ds are tried for the crime of kidnapping, which is defined to require an intent to imprison the victim "without authority of law." The Ds testify that they believed that the person they confined was the murderer of the Lindbergh baby, and that they had been assured by a police officer that he was appointing them a "special deputy" to aid with the case.

Held, even if the Ds were unreasonable in their mistaken belief that they had authority of law, this belief negated the required intent to act "without authority of law," and they may not be convicted. *People v. Weiss,* 12 N.E.2d 514 (N.Y. 1938).

Note: But if the Ds in the *Weiss* case had testified that the police officer had assured them that no statute made it a crime to seize a crime suspect, this would probably not have been a defense. In this situation, their belief would not have been as to a collateral factual issue (whether they had "authority of law"), but whether there was a statute making their conduct a crime. Admittedly there may be a blurred line between believing that one has special authority, and believing that one's act is not a crime, but the distinction is an important one in principle.

a. **Bigamy and adultery statutes:** The recognition that a mistake of law leading to a mistake of collateral fact may be a defense, has led some courts to hold that a defendant may not be convicted of ***adultery*** or ***bigamy*** where he reasonably believes that a prior divorce is valid. See, e.g., *People v. Vogel,* 299 P.2d 850 (Cal. 1956), holding that a good faith belief that the defendant's former wife had obtained a valid divorce was a defense to a charge of bigamy.

   i. **Defense of reasonable attempt to learn law:** The same result was reached on different grounds in *Long v. State,* 65 A.2d 489 (Del. 1949), in which the defendant's conviction of bigamy was reversed on the grounds that he had made full and diligent efforts to learn whether his wife's foreign divorce decree was valid. The reversal was based not on the ground that the defendant was mistaken as to a matter of fact negativing his intent, but on the theory that he had consulted a lawyer and had relied upon the latter's advice as to a matter of law. The vast majority of courts would probably not recognize this as a valid defense.

9. **Mistaken belief that conduct is not a crime:** As just stated, the rule that "mistake of law is no defense" is properly limited to situations in which the defendant ***mistakenly believes that no statute makes his conduct a crime.***

Example: Suppose that D is retarded, and does not know that rape is a crime. He can nonetheless be convicted of rape, as long as it can be shown that he intended to have unconsented-to sexual intercourse.

a. **Reasonable mistake:** In this core "D mistakenly believes that no statute makes his conduct a crime" situation, even a ***reasonable mistake*** about the meaning of the statute will ***not*** protect D. In other words, so long as the crime is not itself defined in a way that makes D's guilty knowledge a prerequisite, there is no "reasonable mistake" exception to the core "mistake of law is no defense" rule.

Example: A New York statute makes it a crime to possess a loaded pistol without a license. A provision in that statute expressly exempts "peace officers," defined in a different statute to include "correction officers of any state correctional facility or of any penal correctional institution." D is a corrections officer at a federal prison, and is charged with carrying an unlicensed pistol. He first defends (successfully in the trial court) on the grounds that he *is* a corrections officer as defined in the statute, but an appeals court rules against him on this issue, holding that the statute applies only to corrections officers at state prisons. D is then tried, and asserts the defense that he reasonably believed that the statute did not apply to him.

Held, for the prosecution. A defendant's mistaken belief that the statute does not apply to his conduct, even if that mistake is reasonable, does not by itself establish a defense. True, New York statutory law gives a defense for a "mistaken belief ... founded upon an official statement of the law contained in (a) a statute or other enactment... "However, this language was not meant by the legislature to apply to a misreading of a statute, but only to a correct reading of the statute that turns out to be invalid for some other reason. If D's "I reasonably misread the statute" defense were accepted, "the exception would swallow the rule. Mistakes about the law would be encouraged, rather than respect for and adherence to law." (But a dissent contends that D should be given the benefit of the statutory provision referring to "mistaken belief .. .founded upon an official statement of the law contained in. ...a statute or other enactment....") *People v. Marrero,* 507 N.E.2d 1068 (N.Y. 1987).

b. **Exceptions to general rule:** However, many states, and the Model Penal Code, recognize a few ***exceptions*** even to the generally-accepted rule that D may not defend on the grounds that he believed that no statute made his conduct a crime. M.P.C. § 2.04(3) recognizes two principal types of situations in which ignorance of the statute that makes the defendant's conduct a crime may constitute a defense.

i. **Law not promulgated:** First, the defendant will escape liability if he can show that the statute or regulation defining the offense was not known to him, and was not ***"published or otherwise reasonably made available*** prior to the conduct

alleged.” (M.P.C. § 2.04(3)(a).) This result is probably required by the U.S. Constitution’s prohibition of *ex post facto* laws, i.e., laws which make an action a crime that was not a crime at the time it was committed. Thus the defendant will escape liability, for instance, if a statute makes it a crime to fail to follow certain administrative regulations, and the regulations are not published in any systematic codified way (which is unfortunately the case in most states). This defense is much more likely to be available where the wrong is one which could be called *“malum prohibitum”* (conduct whose criminality and wrongfulness is not obvious, such as failing to comply with an unusual state product-labeling requirement) than where the crime is *“malum in se”* (obviously immoral, such as murder).

ii. Interpretation later found to be invalid: Second, the defendant may raise the defense that he reasonably relied upon one of the following ***official statements*** of the law, which later turned out to be ***erroneous:*** (1) A statute or other enactment (e.g., a statute purporting to repeal a different statute, where the later statute is ultimately held to be unconstitutional); (2) A judicial decision, opinion or judgment; (3) An “administrative order or grant of permission”; and (4) An “official interpretation” of the public officer or body “charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.” See M.P.C. § 2.04(3)(b).

iii. Mistake of law defense built into statute: Lastly, it’s always possible for the legislature to write a statute in such a way that a mistake of law *will* constitute a defense (or so that awareness of the criminality of the conduct is an element of the offense). The statute might provide, for instance, that whoever does a certain action ***“with knowledge”*** that that action is in violation of the statute, shall be convicted. Unfortunately, statutes are often ambiguously drafted when it comes to determining whether or not awareness that the conduct in question is illegal is an element of the offense.

(1) **“Knowingly” requirement:** For instance, the legislature frequently requires that the defendant take some action ***“knowingly,”*** and the statute then mentions other statutory provisions or regulations in a kind of shorthand manner. The defendant will typically claim that the presence of the word “knowingly” means that D must be shown to have known that the other statutory provisions or regulations were being violated; the prosecutor claims that “knowingly” merely means that D must have known the basic nature of his own acts, not known that they violated the statute. There is no strong majority approach to deciding such cases — the modern tendency is probably to ***benefit D*** by reading the word “knowingly” ***broadly.*** See, e.g., *Liparota v. U.S.*, 471 U.S. 419 (1985), where the Supreme Court held that a statute punishing “whoever knowingly uses, transfers, acquires...[food stamp] coupons in any manner not authorized by [the statute] or the regulations” required the prosecutor to show that D *knew* his conduct was in violation of the regulations.

(2) **“Willfully” requirement:** The same ambiguity arises when the legislature defines a crime in a way that requires the defendant to act ***“willfully.”*** There is a good chance that a court will conclude that D is guilty of a “willful” violation of the statute only if he ***in fact knew that his actions amounted to a criminal offense at the time he undertook them.***

10. Effect of mistake due to mental disease or defect: Suppose the defendant claims that he has a ***mental disease or defect,*** and that this mental condition caused him to make a mistake that prevented him from satisfying the intent required for the crime. Some courts ***allow*** the defendant to make this proof. But many — probably a majority — either prohibit such proof entirely (unless offered as part of a classic insanity defense), or limit it to non-expert testimony. So any time a defendant claims that his mental disease or defect caused him to make a mistake or otherwise be incapable of holding a required mental state

(typically an intent), be aware that the defendant might not be permitted to make this proof, or might be required to make the proof solely by non-expert testimony. The subject is discussed more fully *infra*, pp. 90-91.

Quiz Yourself on
MENS REA

5. John Wilkes Booth decides to kill Lincoln, because he thinks Lincoln is a tyrant. Booth notes in his diary, "I have decided to kill Lincoln the day after tomorrow." Before anything further happens, Booth is arrested by the FBI. Is Booth subject to criminal liability?

6. Kramer and George are motorists in the State of Seinfeld. The two approach an empty parking spot at the same time. After each yells at the other about who is entitled to the spot, Kramer leaves his car and walks over to George's car. Kramer pulls a screwdriver from his pocket and touches it to George's throat, hoping that the touch will scare George away. In fact, however, George reacts by twisting his head, and in so doing, cuts himself severely against the blade of the screwdriver. Kramer did not intend to physically injure George, merely to frighten him. The State of Seinfeld defines the crime of assault as occurring where one "purposely causes bodily injury to another...." A decision of the Seinfeld Supreme Court states that assault is a crime which requires "general intent." May Kramer properly be found guilty of assault?

7. The State of Mane enacts a criminal statute stating that "Any person who sells misbranded hair care products shall be guilty of a misdemeanor, punishable by up to 7 days in jail." Delilah is charged with selling to Samson a can of hair spray labelled "Makes your hair grow longer," when in fact the can makes your hair all fall out.

(A) Assume for this part that the statute's legislative history makes it clear that the Mane legislature intended that the statute shall apply even though the seller does not know (and has no reason to know) of the mislabelling. Assume further that Delilah demonstrates that she neither knew nor had any particular reason to know that the can she

sold Samson was mislabelled. May Delilah constitutionally be convicted of a statutory violation and sentenced to 6 days in jail?

(B) Assume for this part that everything specified in Part (A) remains true, except that: (1) There is no legislative history shedding any light on whether the Mane legislature intended to require any particular mental state for a violation of the statute; and (2) The statute mandates a jail sentence of between 30 days and one year upon any conviction. Should a court convict Delilah of the violation?

8. Abbott and Costello, who do not know each other, meet on the street one day and begin to talk. Abbott tells Costello that he is late for an appointment in the building they are standing near, and that he will pay Costello $250 to do him a favor. Abbott explains that he has borrowed his friend's red Porsche and parked it down the street, but has lost the keys. Having learned that Costello is an auto mechanic, Abbott asks Costello to break into the Porsche, hot-wire it, and deliver it to an address that Abbott scribbles on a piece of paper. Costello accepts the offer and carries it out. The story later turns out to be false — in fact, the Porsche belongs to a stranger, and Abbott is really a thief who has duped Costello into delivering the car to Abbott's fence. Costello is charged with auto theft, defined in the jurisdiction as "knowingly or purposefully taking a vehicle belonging to another." The case is tried before a judge, who finds that Costello actually believed Abbott's story, but that a "reasonable person" would not have believed the story. If the state follows the Model Penal Code approach to mistake, can Costello be convicted?

Answers

5. No. Intent is a state of mind and, with nothing more, is not criminal. Here, Booth has not yet committed any kind of action designed to bring about the desired result, so his intent cannot by itself give rise to criminal liability. (However, once Booth's intent was combined with some action designed to bring about the desired results, it could become culpable, even though the final act — killing — hadn't yet occurred. As we'll see in later chapters, this is the basis for the crimes

of attempt and conspiracy.)

6. **Yes.** When courts hold that a crime requires merely "general intent," they usually mean that all that must be shown is that the defendant desired to commit the act which served as the *actus reus*. Here, the act that served as the *actus reus* was the placing of the screwdriver against George's throat. Once the prosecution shows that Kramer desired to unlawfully touch George's throat for the purpose of frightening him, the fact that Kramer did not intend to injure George will be viewed as irrelevant.

7. **(A) Yes.** State legislatures have the power to enact criminal statutes that do not require a *mens rea*, particularly where the statutes regulate food, drugs and misbranded articles. Such statutes are known as "strict liability" statutes. The fact that the statute may be violated innocently does not make a conviction (or even a short jail sentence) a violation of the defendant's constitutional due process rights.

   (B) No. In a series of cases, the Supreme Court has held set out rules of thumb for determining when a statute was intended as a strict-liability (or as it is sometimes called, "public welfare offense") statute. See, e.g., *Staples v. U.S.* One of these rules of thumb is that if the penalties for violation are relatively severe, it is unlikely that the statute was intended to impose strict-liability. Here, this factor cuts strongly in favor of non-strict-liability, since a minimum sentence of 30 days in jail (with a maximum of 1 year) is relatively severe. Therefore, the judge should infer that the legislature intended that at least, the defendant must have behaved negligently in selling the mislabelled product. Consequently, the court should acquit Delilah.

8. **No.** Some older cases contain broad statements to the effect that a mistake of fact cannot be a defense unless the mistake was "reasonable." But the Model Penal Code, and nearly all modern statutes, hold that if intent or knowledge is required as an element of a crime, then even an ***unreasonable mistake*** will block conviction if it negated such intent or knowledge. See M.P.C. §2.04(1)(a). Here, Costello's belief in the truth of Abbott's story prevented Costello from having the requisite intent to take another's property or the requisite knowledge that it belonged to another — the fact that

Costello was unreasonably credulous is irrelevant. Of course, the more unreasonable Costello's belief in the truth of Abbott's story is, the less likely the judge or jury is to find that Costello *in fact believed* that story. But the facts here tell us that Costello actually believed the story, so this by itself is enough to negate purpose or knowledge.

III. CONCURRENCE

A. Concurrence generally: It is often said that there must be ***"concurrence"*** between the *mens rea* and the *actus reus*. This requirement exists principally to deal with two kinds of problems:

1. What happens when the defendant at some point has the *mens rea* necessary for a particular crime, and later commits an act meeting the physical requirements for that crime, but the mental state did not exist at the time the act occurred (e.g., D stabs his victim, intending to kill him, but just wounds him and, thinking the victim to be dead, throws the body into a river, so that drowning is the actual cause of death)?; and
2. What happens when the defendant has the *mens rea* necessary for one crime, and his act meets the requirements for a different crime (e.g., D intends to commit a simple battery on his victim, but the victim turns out to be a hemophiliac and unforeseeably bleeds to death)?

The first of these situations might be called the "temporal concurrence" problem, and the second might be called the problem of concurrence between "mind and result."

B. Concurrence between mind and act ("temporal concurrence"): The requirement that there be concurrence between the mental state and the act (the *actus reus)* is often called the requirement of ***"temporal concurrence"*** because, generally speaking, the requirement is not met if, at the time of the act, the required mental state does not exist. This may be so either because the defendant, before acting, had both formed the mental state and then abandoned it, or because he did not acquire the requisite mental state until ***after*** his act.

Example: The crime of common-law larceny is defined as the taking of another's property with intent to deprive him of it. D takes V's umbrella from a restaurant, thinking that it is his own. Five minutes later, he realizes that it belongs to V, and decides to keep it. D has not committed larceny, because at the time he committed the act (the taking), he did not have the requisite mental intent (the intent to deprive another of his property). ***The fact that he later***

acquired the requisite intent is irrelevant.

1. **Mental state must cause act:** Close analysis shows, however, that concurrence requires more than merely that the right *mens rea* must exist at the time the *actus reus* occurs. It must be the case that the *mens rea* ***caused,*** or "actuated," the *actus reus.* L, p. 284.

Example: D intends to kill V. While driving to a store to buy a gun to carry out his intent, D accidentally runs over V, killing him. D is not guilty of murder, even though the intent to kill V existed at the time the act (driving the car over V) took place. The act "must be done for the actual carrying out of the intent and not merely to prepare for its execution." L, p. 286.

2. **Voluntary intoxication:** There is at least one situation in which the *mens rea* does not even have to be in existence any more when the *actus reus* occurs, so long as a causal relation between the two can be found. That is the situation in which the defendant, in order to gather up his courage to commit a certain crime, ***voluntarily intoxicates*** himself. If he commits the crime in a drunken stupor, he will probably not successfully defend on the grounds that he no longer had the mental state necessary for the crime, since that mental state will indirectly have caused the act. See L, p. 286 and fn. 21 thereto.

3. **Concurrence must be with act, not results:** The concurrence principle requires merely that there be temporal concurrence between the *mens rea* and the *actus reus*, not concurrence between *mens rea* and the bad results. L, pp. 286-87.

   a. **Change of mind:** This means that if D does an act with an intent to achieve a ***certain result,*** the fact that he later ***changes his mind*** and doesn't desire that result will not nullify the crime, if the result occurs due to his act and the crime is defined in terms of intentionally causing that result.

   Example: D puts a bomb in V's car, which is set to blow up when the car is started. D later changes his mind, but can't warn V in time. V starts the car, and is blown to bits. The requisite concurrence between act and intent existed (since the act was the placing of the bomb, which D did with intent to kill). The fact that there was no temporal concurrence between mental state and bad result (death of V) is irrelevant, and D is guilty of intent-to-kill murder.

4. **Concurrence may be with any act that is legal cause of harm:** Most crimes are defined in terms of harmful results (e.g., homicide is

the wrongful taking of a life; rape is a non-consensual intercourse, etc.). Where the defendant takes ***several acts*** which together lead to the harmful result, it will not always be clear with which of those acts the *mens rea* must concur. In general, the concurrence requirement is met if the mental state concurs with ***any act that suffices as a legal cause*** of the harm. (What constitutes a legal cause is discussed *infra*, p. 57.)

Example: D, knowing he is subject to frequent epileptic fits, conceals this fact from his state's Motor Vehicle Department, and obtains a driver's license. While driving he suddenly has a seizure, goes out of control, and kills V, a pedestrian. If D is prosecuted for involuntary manslaughter (which usually requires a mental state of recklessness), concurrence between his mental state and his act will probably be found, since his act will be the act of driving with knowledge of his susceptibility to seizures, not the losing of control and running over V.

a. **Defendant mistaken as to victim's death:** The problem of determining which act must concur with the mental state arises in cases where the defendant has attempted to kill his victim, believes the victim to be dead, and ***destroys or conceals the body.*** If it turns out that the original murder attempt was unsuccessful, and that the efforts to conceal the body are what really killed the victim, is there concurrence? The defendant can argue that when he made the original murder attempt, there was no concurrence since the act did not lead to death, and that when he hid the body, there was no concurrence since the requisite intent to kill was no longer present.

i. **Argument generally rejected:** Most courts have ***rejected*** this type of argument. They have usually done so on the grounds that the killing-and-concealing was all part of one transaction, which should be treated as one act for purposes of the concurrence rule.

Example: D strikes V over the head, and, thinking V is dead, pushes him over a cliff. Medical evidence shows that V was actually alive when he was rolled over the cliff, and died of exposure thereafter. *Held*, for the prosecution: D set out to do both the murder and the concealment as part of one plan, and that there was therefore concurrence between *mens rea* and the acts causing death. *Thabo Meli v. Regina*, 1 All E. R. 373 (Eng. 1954).

ii. **View first act as legal cause of death:** L, p. 289, suggests that a better way to sustain a conviction in such "D is mistaken about whether V is dead" situations is to concentrate solely on

the ***first*** act (in *Thabo Meli*, the blows on the head). There is clearly concurrence between *mens rea* and this first act; the only possible difficulty is that this first act might not be viewed as the legal cause of death. However, since disposal of a body is not an unforeseen or unusual thing, particularly when it is done by the person who did the killing, the concealment is not necessarily a superseding cause, and it is not unreasonable to hold that the original act is at least one of the legal causes of death. This aspect of legal cause is discussed further *infra,* p. 69.

5. **Omission to act:** Cases involving D's ***omission to act*** can also pose a concurrence issue. Where D has failed to act in circumstances imposing a duty on her to act, the concurrence-of-timing requirement is ***met*** as long as D had the required mental state at ***any single moment when D had a duty to act*** and failed to act.

Example: Wife is angry at Husband for having an affair with Wife's best friend. At dinner one night, Wife accidentally drops a knife that lands on Husband's thigh, making a small gash. Because Husband is a hemophiliac (as Wife knows), Husband bleeds a lot, and quickly goes into shock and unconsciousness. Wife does not call 911 (which she could have easily done), and Husband bleeds to death. Had Wife called promptly, Husband would have been saved. Wife declined to call because she decided (with an intent formed only after the knife-dropping accident) that she would be better off with Husband dead.

Wife is guilty of murder. Since there was at least one moment in which Wife both (1) actively desired Husband's death and (2) simultaneously had the obligation to render Husband assistance (since she brought about the danger, however innocently — see *supra,* p. 21) but didn't, the required concurrence between mental state (intent to bring about death) and *actus reus* (here, failure to act while having a duty to act) is satisfied. The fact that Wife didn't have the "desire to kill" intent at the moment she dropped the knife doesn't matter.

C. **Concurrence between mind and result:** The second aspect of the concurrence requirement is that there must be concurrence between the *mens rea* and the ***harmful result,*** at least in the case of those crimes defined in terms of bad results (e.g., homicide, rape, etc.) It is not necessary that the actual results correspond exactly to the mental state; thus if the crime charged is an intentional one, it is not necessary that the harm match precisely in degree, manner of occurrence and victim the defendant's intention. But if what actually occurs is too far removed from what was intended, there will be held to be no concurrence, and no

liability.

1. **Different crime occurs:** Thus if the harm which actually occurs is of a completely different type from what the defendant intended, so that it is a result associated with a ***different, more heinous, crime,*** the defendant will ***not be guilty*** of the graver crime.

Example: Suppose D, a seaman, enters the hold of his ship for the purpose of stealing rum from the cargo. He lights a match to see what he's doing, and inadvertently causes the ship to catch fire. D will not be guilty of arson (defined so as to require an intent to burn), since his intent to steal cannot be substituted for the required intent to cause a fire.

   a. **Different, but not more serious, result:** The same principle also applies even where the actual result is ***not more serious*** than the intended result, but the intended result is nonetheless associated with a ***different crime*** than the intended one. In other words, the general principle is that ***the intent for one crime may not usually be linked with a result associated with a different crime.*** For instance, if D attempts to shoot V to death while the latter is coming out of his house, D will not be liable for arson if the shot misses and ruptures the stove, causing the house to burn down. (This assumes that arson is defined so as to require an intent to burn, rather than merely negligence or recklessness with respect to the risk of burning.)

   b. **Model Penal Code formulation:** The Model Penal Code follows this general rule; § 2.03(2) provides that where purposely or knowingly causing a particular result is a required element of a crime, the element is not established if the actual result is "not within the purpose or the contemplation of the actor." The Code contains several exceptions to this general principle, which are discussed at various places *infra.* (None of these exceptions would make the seaman in the above Example, or the shooter in Par. (a) above, guilty of arson.)

2. **Recklessly- or negligently-caused result:** Essentially the same rule applies where the defendant has ***negligently*** or ***recklessly*** acted with respect to the risk of a particular result, and a materially different result occurs. The necessary concurrence between the defendant's mental state and the actual harm will be found lacking. See Model Penal Code, § 2.03(3).

Example: D recklessly takes target practice with his rifle in a heavily populated area; his conduct is reckless because of the high risk that D will injure or kill a person. One of D's shots, instead of hitting a person, hits an automobile's gas tank, leading to a large fire. Assuming that the danger of causing such a fire was not large, D will not be convicted of even a lesser degree of arson (e.g., burning caused by recklessness), since his conduct was reckless only with respect to the risk of bodily harm, not burning.

3. **Felony-murder and misdemeanor-manslaughter rules:** The common-law rules on ***homicide*** contain two very important exceptions to the general principle that there will be no liability for a resulting harm that is substantially different from that intended or risked by the defendant.

   a. **Felony-murder:** First, if the defendant was engaged in the commission of certain ***dangerous felonies,*** he will be liable for certain deaths which occur, even if he did not intend the deaths. This is known as the ***felony-murder*** rule, and is discussed *infra,* p. 256.

   b. **Misdemeanor-manslaughter:** Second, if the defendant was engaged in a *malum in se* misdemeanor (i.e., a misdemeanor that is immoral, not merely contrary to some regulation), and a death occurs, the defendant may be liable for involuntary manslaughter, even though his conduct imposed very little risk of that death, and the death was a freak accident. This is known as the ***misdemeanor-manslaughter*** rule, and is discussed *infra,* p. 279.

   c. **Peculiar rules of homicide:** These two rules should probably be viewed not as exceptions to the general rules of concurrence, but rather, as special ways of defining murder and manslaughter. Thus the felony-murder rule can be viewed as a special crime the *mens rea* for which is intent to commit one of the dangerous felonies; similarly, the misdemeanor-manslaughter rule establishes a special kind of involuntary manslaughter, as to which the *mens rea* is the intentional commission of a misdemeanor.

4. **Same kind of harm but different degree:** Related to the different-kind-of-harm-thanintended problem just discussed, is the situation where the harm that results is of the ***same general type*** as that intended by the defendant, but of either ***more or less serious degree.*** Such a problem would arise if D merely intends to make a simple

battery on the V, and V turns out to be a hemophiliac who bleeds to death, or, conversely, D intends to kill V, but V suffers only a superficial wound.

a. Actual result more serious than intended one: If the actual harm is ***greater,*** and related to, the intended result, the general principle is that there is ***no liability for the greater harm.***

Example: Assume that the jurisdiction in question has a statute defining the crimes of simple battery (applicable to minor bodily harm) and aggravated battery (applicable to assault which produces "grievous bodily harm"); assume also that each statutory provision requires an intent to produce the requisite bodily harm. D gets into a minor scuffle with V, intending merely to hit him lightly on the chin; however, V turns out to have a "glass jaw," which is fractured by the blow. D will not be held guilty of aggravated battery, since his intent was only to produce the lesser degree of bodily injury required for simple battery.

i. Apparent exceptions for resulting death: But once again, the various degrees of ***homicide*** are defined in such a way that this principle's force is often negated. For instance, if D intends just to wound V slightly, and V bleeds to death because he is a hemophiliac, D will be guilty of involuntary manslaughter; see L, p. 291. This result occurs not because the rules of concurrence are suspended for involuntary manslaughter, but because one kind of involuntary manslaughter is "misdemeanor-manslaughter," and battery is one of the kinds of misdemeanors that will trigger the rule; see *infra*, pp. 279-280.

ii. Intent-to-grievously-injure murder: Similarly, if D intends to ***seriously injure*** V (e.g., by trying to shoot at his eye), in most states he will be guilty of ***murder*** if V dies from the attack. This is because most states have a form of murder as to which the *mens rea* is not intent-to-kill, but intent-to-grievously-injure. See *infra,* p. 251.

b. Actual harm less serious: If the harm which actually occurs is ***less serious*** than that intended, and is of the ***same general type*** as that intended, but associated with a different (and less serious) crime, the defendant ***is*** liable for the less severe crime. In this situation, courts have simply felt that it is not unjust to hold the defendant for the less serious crime.

Example: D shoots at V, attempting to kill him. Instead, the bullet just grazes V. D can be convicted of battery (and also of attempted murder).

5. Manner of harm: Suppose that the harm which actually occurs is of the same type as that intended by the defendant, but it occurs in a radically ***different manner*** from that anticipated or intended. In this situation, the rules of ***causation,*** discussed *infra*, p. 55, may shield the defendant from liability if the harm came about through an extraordinary intervening cause. But there is no ***concurrence*** problem in this situation.

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6. Different victim: Similarly, suppose the defendant intends to injure one victim, and ends up injuring a ***different one*** (e.g., D shoots at X, and hits V). Here again, there is no concurrence problem; the court will hold that there is sufficient relationship between the *mens rea* and the harmful result. (Nor will there generally be a causation problem; see the discussion of "transferred intent" *infra*, p. 59.)

Quiz Yourself on
CONCURRENCE

9. Guy Fawkes goes to the corner bar and says to himself, "I'm going to drink until I'm completely smashed, and then I'm going to stagger drunkenly around town until they lock me up." He drinks until, as he knows, he's completely smashed. He then leaves the bar and wanders around drunkenly. At one point, he stops to light a cigarette, drops the match, and burns down his neighbor's garage. The jurisdiction's public intoxication statute applies to "a person who intentionally appears in public in a state of intoxication." The jurisdiction's arson statute applies to one who "intentionally sets fire to real property not his own." Can Guy be convicted of arson on the grounds that his general criminal intent to commit the crime of public intoxication is transferred to his commission of the crime of arson?

10. On July 4, Dr. Evil firmly decides to do away with Austin Powers by killing him with a super-sonic freeze gun. He plans to commit the crime on July 5.

(A) For this part only, assume that during the night of July 4-5, Dr. Evil has a dream in which he is damned to hell. On the morning of July 5, he wakes up with a change of heart, and no longer plans to kill Powers. Later that day, while he is walking down the street with his supersonic freeze gun, he happens to pass Powers. He is so startled that he reflexively and unintentionally squeezes the trigger of the gun, and it goes off, freezing Powers to death. Is Dr. Evil guilty of murder?

(B) Same facts as above, except that Dr. Evil does not have the dream or the change of heart. He plans to kill Powers at Powers' home at 8:00 pm using the freeze gun. At 5:30 p.m., while Dr. Evil is en route to his favorite restaurant with the gun in hand, Powers passes by. Dr. Evil is so startled that he reflexively squeezes the trigger and the gun goes off, freezing Powers to death. Is Dr. Evil guilty of murder?

Answers

9. **No, because there is no concurrence between Guy's *mens rea* and the result.** In the case of a crime defined in terms of a bad result, the requirement of concurrence normally means that the mental state must relate to that harmful result, not to some other, quite different, harmful result associated with some other crime. So here, the mental state for public intoxication (intentionally appearing drunk in public) cannot be "transferred" to satisfy the mental-state requirement for some other crime (here, intent to burn). There are some exceptions to this requirement of concurrence (e.g., the felony-murder rule and the misdemeanor-manslaughter rule), but none of those exceptions applies on these facts.

10. **(A) No.** Although Dr. Evil had the *mens rea* for murder at one point, he did not have it at the time of the act that led to Austin Power's death. The requirement of ***"temporal concurrence"*** means that the *mens rea* and the *actus reus* must exist at the same time, and, indeed, that the *mens rea* must ***"cause"*** the *actus reus.* Here, by the time of the *actus reus* (the squeezing), the mental state (intent to shoot) was no longer present. Therefore, the requirement of temporal concurrence

is not satisfied.

(B) Still no. Although Dr. Evil did intend (eventually) to kill Austin Powers under these facts, his act of shooting was not caused by his desire to kill. For the requirement of "temporal concurrence" to be satisfied, the *mens rea* must in some way "cause" the act in order. Since that was not the case here, Dr. Evil gets off. That's true despite the fact that Dr. Evil in a sense still possessed the desire to (eventually) kill at the time he squeezed the trigger. (Of course, Dr. Evil might have a hard time convincing the trier of fact that he didn't intend to shoot at the time of the shooting — but if he could do this, he's entitled to an acquittal on the murder charges.)

***Exam Tips** on* ACTUS REAS AND MENS REA

The most common issues that arise on exams regarding the requirements of an *"actus reus"* and a *"mens rea"* are the following:

Concurrence of *Mens Reus* and *Actus Reus*

☛ ***Concurrence*** between *mens rea* and *actus reus* is sometimes tested. When it is, the situation often involves a crime defined in terms of ***result*** (e.g., murder), and the hook is that what's required is concurrence between ***mental state and act,*** not between ***mental state and result.*** So beware of cases where D changes his mind but can't avoid the bad result — lack of concurrence won't save D.

Example: D puts a bomb in V's car, set to explode when the car is started. D has a change of heart, is afraid to disarm the bomb himself, and puts a sign on the windshield of the car saying "Do not start car — call the bomb squad." The sign blows away, so V doesn't see it. She starts the car and is blown away.

D is not saved from being guilty of murder because of any lack of concurrence. The required concurrence was between *mens rea* and *actus reus* (D's voluntary act). D's culpable mental state (intent to kill) coincided with his act (placing the bomb), so the requirement of concurrence was satisfied. The fact that D's intent to kill did not coincide with the bad result (death) is irrelevant for the concurrence requirement.

Duty to act

☛ Duty-to-act is tested with some frequency on exams, because it calls for the close analysis of a fact pattern. Look for a party who ***fails to help another party in distress.*** Remember that a party is criminally liable for an omission ***only if there exists a duty for her to act.***

☞ **Trap:** Profs will try to distract you by presenting a very callous witness to an accident — one who fails to render aid. Don't be swayed by unsympathetic feelings toward the bystander. Instead, concentrate on whether she had a duty to act. ***The ordinary bystander, who has no previous involvement with the peril, has no duty to act.***

Example: A lifeguard at a public swimming pool leaves work early with the permission of her employer. While the pool is unattended a child falls in, striking her head against the edge of the pool. A bystander, B, witnesses the child's fall, but fails to act, despite her knowledge that there is no lifeguard on duty and the fact that she is a strong swimmer. B had no duty to act and cannot be found guilty of any common-law crime.

☞ **Exceptions:** There are two kinds of situations to watch for, exceptions in which there will be a duty to assist:

[1] A ***contractual obligation*** to act.

Example: D, an apartment-house landlord, receives repeated complaints about a malfunctioning heating system, and fails to respond. The lease says that the landlord will maintain the furnace. The furnace explodes and causes a fire, which leads to the death of V, the complaining tenant. D had a contractual obligation to fix the furnace, and therefore his failure to fix it met the *actus reus* requirement.

[2] A party ***undertakes to give assistance*** and fails to follow through.

Example: D, a prominent heart surgeon, is called by the U.S. Government and asked to perform an unusual heart operation for free on V, an public official. D agrees, but then without warning fails to show up at the appointed time. It's too late to find another surgeon, and V dies without the surgery. (Timely surgery would almost surely have saved him.) When D undertook to do the operation — in circumstances where he knew the search for a surgeon would stop — he incurred an obligation to do what he said he'd do, or at least to notify the government of a change of mind. His failure to perform that duty supplies the *actus reus* needed for criminal liability in V's death.

Statutory Language (as to both *Actus Reus* and *Mens Rea)*

☛ Whenever a question asks you to contemplate a party's violation of a jurisdiction's statute, pay close attention to the statute's wording. This is true whether you're focusing on the *actus reus* or the *mens rea.* *Trap:* Profs will try to fool you by drafting a statute differently than the rule prevalent in most jurisdictions or different than the common law. Remember to distinguish between *strict liability* statutes and those requiring *intent.*
These "statutory interpretation" question are pretty much freebies — you don't really need to know any substantive law to answer them, you just need to read and think carefully. So *don't waste these freebies by carelessness.*

☛ **Tips on statutory interpretation:**

☞ **Knowledge:** Look for the words "knowledge" or "knowing." This will often be a clue that a required element (knowledge as to some aspect) is missing.

Example: A statute provides: "Any person who sells an intoxicating substance to a person with knowledge that the person is under the age of 18 years shall be guilty of a misdemeanor." Observe that although most statutes that forbid the sale of alcohol to minors impose strict liability, this one does not. And, under this statute, if a bartender believes (reasonably or unreasonably) that a patron is over 18, then that required element is lacking and there is no violation.

☞ **Ambiguous elements:** If it's unclear from the wording whether knowledge is a requirement, ***argue both ways.*** *Example:* A statute provides: "Whoever assaults with a deadly weapon any federal officer engaged in the performance of his duties is guilty of a felony." It's plausible that this statute might be interpreted to require that the defendant have known or believed that the victim was a federal officer. So you should make arguments both ways on this point.

☞ Identify the specific conduct prohibited, and make sure that the conduct in question qualifies.

Example: A statute provides that "Any person who knowingly sells an intoxicating substance to a person under the age of 18 years shall be guilty of a misdemeanor." This statute prohibits a *sale* of an intoxicating substance, without any further conduct by the customer. So the fact that the customer never *drank* the liquor (or didn't get drunk) is irrelevant.

☛ **Ignorance of law:** Watch for an indication that a defendant was unaware of or did not understand a statute. Because all people are ***conclusively presumed to know the law,*** this is not a general defense.

- ☞ **Exceptions:** However, there are some (modern) crimes that are expressly defined so as to require that the defendant know of the statutory prohibition. But if that's the case, your prof will have to signal this fact to you. So if you don't see any such signal, you can presume that the general rule of "ignorance of the law is no excuse" applies.

☛ **Arson:** Pay special attention to ***arson*** problems, because element-of-the-crime issues abound when arson is involved.

> *Example:* At common law, arson could be committed only on another's *dwelling.* But many modern statutes extend the definition to buildings other than dwellings, and profs often test this point. If your prof wants to test you on a modern statutory variation on the common-law arson requirements, he/she will *have* to specify the text of the statute, so when you see the statutory text be on the lookout for coverage of buildings other than dwellings.

☛ **Civil statutory violation as evidence of *mens rea:*** Fact patterns often involve violations of *civil* (as opposed to criminal) statutes. Note that, although violation of a civil statute may be *evidence* of negligence or recklessness, a civil statutory violation alone does not automatically *satisfy* the *mens rea* requirement for negligence or recklessness.

> *Example:* A state statute requires that any person engaging in the use of fireworks have a license which is issued upon the completion of a safety course. D, who does not have a license, believes he is competent to use fireworks and brings some to X's party. D sets off some of the fireworks in X's backyard. Although D acts "reasonably," one of the fireworks explodes prematurely, causing a fire which completely destroys X's home. The criminal arson statute requires recklessness or intent to start a fire. D cannot be found guilty of arson solely because of his violation of the statute requiring a license for the use of fireworks — the prosecutor will have to show that D's overall behavior constituted recklessness.

CHAPTER 3
CAUSATION

Introductory Note: This chapter examines the requirement that the defendant's *actus reus* must have "caused" the harmful result. The prosecutor must make two distinct showings of causation: (1) that the act was the ***"cause in fact"*** of the harm; and (2) that the act was the ***"proximate"*** or ***"legal"*** cause of the harm. Problems like that of the unintended victim, or the intervening act, fall within category (2).

I. INTRODUCTION

A. Causation generally: The problems of concurrence, discussed in the previous chapter, related to the links between mental state and act, and between mental state and harmful result. We turn now to the link between ***act and harmful result.*** Where the links between the defendant's act and the harmful result that ensues are unduly tenuous, we say that there is no ***causal relationship*** between the two, and therefore no liability.

B. Two aspects of causation: In the case of any crime which is defined in terms of harmful results (e.g., murder, rape, arson etc.), the prosecution must prove that the defendant's *actus reus* "caused" the harmful result. To do this the prosecution must in reality make two different showings: (1) that the act was the ***"cause in fact"*** of the harm; and (2) that the act was the ***"proximate"*** cause (or, as the Model Penal Code puts it, the "legal" cause) of the harm. We consider each of these aspects in turn.

II. CAUSE IN FACT

A. Cause in fact generally: For an act to be a ***"cause in fact"*** of a result, it is often said that it must be the ***"but for"*** antecedent of that result. By this is meant that if the result ***would have happened anyway,*** even had the act not occurred, the act is ***not a cause in fact*** of that result.

Example: D shoots at V, but only grazes him, leaving V with a slightly-bleeding flesh wound. X then comes along and shoots V through the heart, killing him instantly. D's act is clearly not a "cause in fact" of V's death, since V would have died, and in just the manner he did, even if D had not shot him.

1. **Expansive test:** This "but for" test is obviously a very expansive one, under which every result will have literally thousands of antecedent "but for" causes in fact. In the above example, for instance, X's act is

obviously a cause in fact of V's death, since he would not have died when he did without that act. But the act of the weapons' manufacturer in making X's gun was also a "but for" cause, since if X had not had the gun, he couldn't have shot V. Similarly, the marriage between X's parents was a "but for" cause, since otherwise X wouldn't have been around at all to do the shooting.

2. **"Substantial factor" test:** But as expansive as the "but for" test is, it leaves out one category of acts which almost all courts would hold to be "causes in fact," even though they are not "but for" causes. Such a cause occurs where an act other than that of the defendant would have been sufficient to bring about the result, but the defendant's act is a ***"substantial factor"*** in bringing about the result nonetheless. Sometimes the defendant's act in this situation would have been sufficient by ***itself*** to bring about the result, but this is not necessary for it to be held to be a "substantial factor," and therefore a cause in fact.

Example: D shoots V in the leg, causing him to bleed a serious amount. X then shoots V in the arm. V dies from loss of blood from the two wounds. Medical evidence shows that V would have died from the loss of blood from the X wound even without the D wound, but that he would not have died from the D wound without the X wound. Even though D's act is therefore not a "but for" cause of V's death, D will be held to have been a cause in fact of V's death, because his act was a "substantial factor" in producing that death.

3. **Shortening of life:** In determining whether the defendant's act is a "substantial factor" in bringing about death, one obviously relevant fact is whether the act ***shortened the victim's life.*** For instance, suppose that V is shot by X, and will definitely die within a day. If D comes along and shoots V, killing him instantly, D will undoubtedly have been a "cause in fact" of the death, since his act directly shortened V's life. See L, p. 296.

   a. **Lengthening of life:** Although the fact that the victim's life has been shortened is one indication that the defendant's act was a "substantial factor," and therefore a cause in fact, of death, it is possible to imagine a situation where an act could be a cause of death even though it ***lengthened*** the victim's life. Suppose, for instance, that V is scheduled to take a plane trip, but is poisoned by D, and dies a week later. If the plane crashed, killing all aboard, V

will have lived almost an extra week, but D will nonetheless be a cause in fact of his death. See L, p. 297, fn. 25.

4. **Murder victim must have been alive at time of act:** One obvious application of the "cause in fact" requirement is that in a homicide case, the prosecution must prove that the victim was ***alive*** at the time of the defendant's act. This will not always be an easy evidentiary burden.

Example: D, driving his car, hits V, a pedestrian. D flees the scene of the accident, dragging V with him under the car. D is charged with manslaughter, on the theory that he was criminally negligent in continuing to drive after the impact. The medical evidence is inconclusive as to whether V was killed upon impact, or only after he had been dragged.

Held, D cannot be convicted, because it has not been shown beyond a reasonable doubt that V was still alive at the time of D's negligent conduct (the driving after the accident). (There was no showing that D was negligent in the first instance in hitting V.) *State v. Rose,* 311 A.2d 281 (R. I. 1973).

5. **Two people working together:** The above discussion assumes that the two concurring acts occur independently of each other. If the two occurred as part of a joint enterprise (e.g., X and D each shoot V, as part of a conspiracy to kill him), the act of each will be attributed to the other, and there will be no need to determine whether each wound was a substantial factor in killing V.

III. PROXIMATE CAUSE GENERALLY

A. Proximate cause, in general: Once it has been established that the defendant's act was a cause in fact of the harm, it remains for the prosecution to demonstrate that the act and the harm are sufficiently closely related that the act is a ***"proximate"*** or "legal" cause of that harm. This is really a problem not of "cause" as the layman understands the term, but rather of ***policy:*** is the connection between the act and the harm so attenuated that it is unfair to hold the defendant liable for that harm?

1. **Distinguished from tort concept of proximate cause:** Proximate cause in criminal law is related, but by no means identical to, the tort concept of proximate cause. Tort law, insofar as it is concerned with compensating an innocent victim, will be inclined to charge a defendant with far-reaching consequences of his act. Criminal law, on the other hand, being based upon the concept of moral fault and

punishment, generally insists upon a substantially closer connection between the defendant's act and the ensuing harm. See *Commonwealth v. Root*, 170 A.2d 310 (Pa. 1961), discussed further *infra*, p. 69, which establishes a stricter rule for proximate cause in criminal than in tort cases.

2. **More than one proximate cause possible:** Just as every event has more than one "cause in fact," so an event may have ***more than one*** "proximate" or "legal" cause. For instance, if X and Y both shoot V so that either wound would have been fatal, and he in fact dies from the combined effect of both wounds, both X and Y will be held to be proximate causes of V's death.

B. No mechanical principles: Courts have struggled for centuries to set forth mechanical principles that would establish, for all cases, when an act or event is the proximate cause of a particular result. Ultimately, however, it has come to be realized that no such mechanical rules are possible, and that the existence of proximate cause is a policy issue that must be decided on a case-by-case basis.

1. **Model Penal Code approach:** Thus the Model Penal Code expressly puts the issue in terms of the finder of fact's sense of justice: at least where the actual result involves the same "kind of injury or harm" as that intended by the defendant, the act is the proximate cause of the harmful result if it is ***"not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."*** M.P.C. § 2.03(2)(b). (The word "just" is in brackets because it is an "alternative" formulation in the Code.)

2. **Year-and-a-day rule in homicide:** One common-law attempt to establish mechanical rules concerning causation has survived to the present day: this is the rule that in homicide cases, the defendant cannot be convicted if the victim did not die until ***"a year and a day"*** following the defendant's act.

   a. **Rationale:** The theory behind this rule was that, because of the inexactness of medical science, it was impossible to say that the defendant's act was a sufficiently direct factor in producing death if the victim survived that long. Many commentators have criticized this rule in light of present-day medical knowledge, but it still

exists, either in the form of statute or case law, in the substantial majority of American states. However, "the modern trend is to abolish the rule." L, p. 318 and fn. 161 thereto.

3. Types of problems raised: Cases raising serious proximate cause issues tend to fall into two general categories: (1) those in which the type of harm intended occurred, and occurred in roughly the manner intended, but the ***victim was not the intended one;*** and (2) cases in which the general type of harm intended did occur and occurred to the intended victim, but in an ***unintended manner.*** Our discussion below (starting on p. 59) is thus divided into these "unintended victim" and "unintended manner of harm" categories.

Before we analyze those two broad categories, here are two special situations that raise proximate-cause issues:

a. Misdemeanor-manslaughter rule: Proximate-cause issues can arise in situations that seem to involve the ***misdemeanor-manslaughter rule*** *(infra,* p. 279). Under that doctrine, the commission of a misdemeanor can establish criminal negligence, which when combined with the fact of V's death establishes the elements of involuntary manslaughter. If what makes D's act a misdemeanor ***is not causally related*** to the bringing about of V's death, then the proximate-cause requirement will ***not*** be satisfied, and D will be acquitted.

i. Licensing requirements: This will often happen in the case of a ***licensing*** requirement: If the jurisdiction requires a license to pursue some activity, but D would be entitled to the license as a matter of right, his conducting of the activity without a license, coupled with a harm (e.g., a death) stemming from the activity, won't trigger the misdemeanor-manslaughter rule because the failure to get a license is not deemed to be the proximate cause of the harm.

Example: After D's driver's license expires, D fails to renew it, and continues driving. Driving without a currently-valid license is a misdemeanor in the jurisdiction. While D is driving non-negligently, D's car collides with V, a pedestrian, when V darts out from between two parked cars. V dies. D is not guilty of misdemeanor-manslaughter because his misdemeanor of driving without a currently-valid license was not the proximate cause of the accident.

b. Failure to intervene: Proximate-cause issues can also arise where ***D fails to act,*** under circumstances imposing on her a duty to act. Remember that although the general rule is that failure to act will not give rise to criminal liability *(supra,* p. 18), there are important exceptions (p. 19). If one of these exceptions applies, and D fails to take affirmative action to protect V, D's failure to act is quite ***likely*** to be the cause-in-fact and proximate cause of the harm to V. For this to be so, all that is required is that:

[1] had D acted, the harm ***would, beyond a reasonable doubt, have been avoided*** (satisfying ***cause-in-fact),*** and

[2] the ***causal chain*** between D's failure to do the required act and the harm is ***not too tenuous*** (satisfying ***proximate cause).***

Example: Because of the special parent-child relationship, a parent who knows that his child is seriously ill has a duty to make reasonable efforts to procure medical care. Dad fails to procure medical care for Kid, who has a dangerous infection — Dad believes that prayer alone is all that is ever required. If Kid dies from the infection, and wouldn't have died with prompt medical treatment, a court would likely conclude that Dad's failure to procure aid was the proximate cause of Kid's death — here, the failure is clearly the but-for cause, and there's nothing in the chain of causation (e.g., no bizarre intervening events) that would lead a court to the conclusion that the causal link between failure-to-get-aid and death was too tenuous for criminal liability.

IV. PROXIMATE CAUSE — UNINTENDED VICTIMS

A. Transferred intent: Generally speaking, the fact that the actual victim of the defendant's act was ***not the intended victim,*** will not prevent the defendant's act from being the proximate cause of the actual harm. Instead, courts apply the doctrine of ***"transferred intent,"*** under which the defendant's intent is ***"transferred" from the actual to the intended victim.*** Of course, this "transfer" is just a legal fiction, but the result, that there is still proximate cause between act and result, is well-established.

Example: D, intending to kill X, shoots at him, but because of his bad aim, hits and kills V. D is guilty of the murder of V, because his intent is said to be transferred from X to V.

1. Model Penal Code supports this view: The Model Penal Code expresses this rule without using the notion of "transferred intent." The defendant's act is not prevented from being the proximate cause of a result if the result differs from that intended "only in the respect

that a different person or different property is injured or affected....” M.P.C. § 2.03(2)(a).

2. **Applies only where particular result is element of crime:** The “transferred intent” rule (or, as it might be better called, the “unintended victim” rule) applies only to those crimes of which causing a particular bad result is an element. Thus it has no application to crimes of ***attempt.***
   Example: D tries to shoot X to death, and merely wounds V, rather than killing him. D may be convicted of battery against V (by combining the “unintended victim” rule with the rule discussed *supra,* p. 50, that allows the *mens rea* for a more serious crime to suffice for conviction of a less serious, related, crime.) And D may also be convicted of the attempted murder of X. But he may ***not*** be convicted of the attempted murder of V. See B&P, p. 564-69.

B. Application where different property destroyed: The “transferred intent” rule can also apply where the crime is against ***property,*** rather than against the person. For instance, suppose that D tries to burn down X’s house, but instead the fire spreads or veers due to a change of wind, and burns down V’s house. D is guilty of arson as to V’s house. (But if the fire also kills Y, the “unintended victim” rule will not make D guilty of Y’s murder. He might be guilty of murder under the felony-murder doctrine, or under a statute making “depraved indifference to life” one of the permissible mental states for murder or manslaughter, but this result would then be due to the definitional peculiarities of homicide, not the “transferred intent” rule.)

C. Actual victim not foreseeable: The “transferred intent” rule probably applies even where the danger to the actual victim was ***completely unforeseeable.*** For instance, Lafave suggests that if, when D shoots at X, the two are out in the desert, and think they are alone, but V is sleeping behind some sagebrush when he is hit by the errant bullet, D may nonetheless probably be convicted of murdering V. L, pp. 301-01.

1. **Model Penal Code might be exception:** The Model Penal Code might allow D to escape in this situation. While, as noted, the Code does not let the defendant escape merely because a different person was injured than the defendant intended, the defendant may escape

under the alternate theory that the actual result was "too remote or accidental in its occurrence to have a [just] bearing on the [defendant's] liability...." (M.P.C. § 2.03(2)(b)).

D. Defense assertable against intended victim: By and large, the defendant in a transferredintent case is entitled to raise the ***same defenses*** that he would have been able to raise had the intended victim been the one harmed.

1. Illustration: For instance, if D shoots at X out of legitimate self-defense, this will prevent him from being guilty of the murder of V if the bullet strikes the wrong target (assuming that D has acted reasonably, which might not be the case if the transaction took place in a crowded street.) Similarly, if D tries to shoot X to death in the heat of passion, after discovering X with D's wife, and the bullet actually strikes V, D would probably be able to get the charge reduced to voluntary manslaughter.

E. Mistake of identity: A related "unintended victim" problem is posed in ***"mistaken identity"***cases. If D shoots at V, mistakenly thinking that V is really X (D's enemy), D will be guilty of the murder of V just as if he had been shooting at the person who was actually X and mistakenly hit V. As was noted previously (*supra,* p. 39), a "mistake of fact" will generally be a defense only if it negates the particular mental state required for the crime. The crime of murder may require an intent to kill, but it does not require a correct belief as to the victim's identity. See L, p. 303.

F. Crimes of recklessness or negligence: Where the crime is one for which the mental state is merely ***recklessness*** or ***negligence,*** the problem of the unforeseen victim may also arise. In the case of a crime requiring recklessness, the problem would arise if the defendant was aware that his conduct posed a high degree of risk to X (or to a class of which X is a member), and instead harm occurred to V, as to whom the defendant had not been aware of a high risk. In a negligence type of crime, the problem would arise where there was an unreasonable risk of danger to X (or to a class of which X was a member), and the harm occurred to V, as to whom there was not an unreasonable danger.

1. Tighter link required: A ***tighter link*** between the defendant's act

and the actual victim's injury is probably required where the crime is defined in terms of recklessness or negligence, than where it is intentional. See L, pp. 303-04. This would parallel the ***tort rule,*** where a defendant is liable for practically all the far-reaching consequences of his intentional torts, but only for a much narrower spectrum of unusual results from his negligent conduct; see, e.g., *Palsgrqf v. L.I.R.R.,* 162 N.E. 99 (N.Y. 1928), holding that there is no liability to an "unforeseeable plaintiff" injured by the defendant's negligent act.

a. Recklessness: In ***recklessness*** crimes, this principle would probably mean that the defendant would ***not be liable*** for harm to a victim as to whom there was not a ***high risk*** of harm foreseeable from the defendant's position. (If one follows the Model Penal Code view that recklessness requires that the defendant be ***aware*** of the high risk of harm, there would be a further requirement that the defendant have been actually aware of such a high risk of harm to the actual victim.)

Example: D decides to take target practice with his rifle in his backyard. He is aware that there is substantial risk that he will hit someone in his next-door neighbor's house, but he shoots anyway. Unbeknownst to him, the neighbor has been storing explosives in the house; the bullet hits the explosives, an explosion occurs which starts a fire, and the fire kills V, who lives a block away, and to whom D's shooting did not impose a foreseeably high risk of harm. D will not be liable for recklessness-manslaughter, i.e., manslaughter defined so as to have a *mens rea* of recklessness. (See *infra,* p. 276). (He might be liable for ***misdemeanor-manslaughter,*** arising out of the unlawful act of taking target practice in a residential area; however, even as to the misdemeanor-manslaughter rule, the unusual chain of causation might be enough to absolve D; see *infra,* pp. 279-280.)

b. Negligence: If the crime were one committable through ***negligence,*** the defendant would probably not be liable for an injury to a ***victim who was not in the foreseeable zone of danger.*** That is, there would be no "transferred negligence." Suppose, for instance, that in the above example, D was charged with merely being negligent (not reckless) as to the risk of harming his next-door neighbor. D would escape liability for the injury to V if there had been no foreseeable risk of such danger to V.

c. Model Penal Code view: The Model Penal Code apparently would not allow a defendant to escape from the consequences of his

negligent or reckless conduct merely because the actual victim was not within the zone of foreseeable danger. See M.P.C. § 2.03(3)(a). However, the defendant might be able to take advantage of § 2.03(3)(b), making him not liable where the result is **"too *remote or accidental*** in its occurrence to have a [just] ***bearing*** on the [defendant's] liability...."

V. PROXIMATE CAUSE — UNINTENDED MANNER OF HARM

A. Unintended manner of harm generally: Suppose the defendant's intended victim is harmed, and the harm is of the same general kind as that intended, but it occurs in an ***unexpected manner.*** Does the unexpectedness of the way the harm occurs absolve the defendant of liability, on the theory that his act was not the proximate cause of the result? No general answer can be given; the courts have developed a number of specialized rules for different kinds of situations. Cases are generally divided into:

[1] those in which the defendant's act was a ***"direct"*** cause of the harm, and

[2] those in which there was an ***"intervening"*** cause between the defendant's act and the harm.

The discussion below follows this division, with Par. B covering "direct" causes and Par. C covering "intervening" causes.

1. **No liability for bizarre results:** The general principle common to all of the cases, however, is that the defendant should ***not be liable*** if the actual result occurs through a ***completely bizarre, unforeseeable chain of events.*** For instance, suppose D gets into a street fight with V, as a result of which V is knocked unconscious, recovers a few minutes later, drives away, and gets into an accident which would not have occurred had D not punched him (since he would have driven away earlier and not been at the place where the accident occurred when it occurred.) In this situation, all courts would agree that the harm to V from the accident was simply too fortuitous a result of the battery by D to make D liable for it.

2. **Classification not followed by Model Penal Code:** The Model Penal Code does not follow the distinction between "direct" causation cases and "intervening" causation ones. The Code recognizes that the

problem is essentially one of deciding whether the link between the defendant's act and the eventual result is so remote as to make it unfair to hold the defendant liable. Thus for an intentional crime, if the actual result is "not within the purpose or the contemplation" of the defendant, there is no liability if the actual result is "too remote or accidental in its occurrence to have a [just] bearing on the [defendant's] liability or on the gravity of his offense." M.P.C. § 2.03(2)(b).

B. Direct causation: In some cases the type of harm intended by the defendant may come about in an unintended manner, yet without the presence of any clearly-defined act by an outside person or thing. In this situation, the defendant's act is said to be the "direct cause" of the victim's injury, and it usually will be extremely difficult for the defendant to convince the court that the manner in which the harm occurred was so bizarre that the defendant was not the proximate cause of that harm.

1. **Small differences in type of injury:** Thus if the same general ***type of injury*** (e.g., serious bodily harm, death, burning) occurs as was intended by the defendant, the fact that it deviates in some small manner from that intended is irrelevant. (This problem is also discussed in the treatment of concurrence, *supra,* p. 50).

Example: D, a member of the Italian Red Brigade, shoots at V, trying to hit him in the knee-caps to cripple him. Instead, he hits V in the eye, blinding him. D will be guilty of mayhem (the intentional causing of grievous bodily injury; see *infra,* p. 287) even though the precise type of harm intended did not occur.

2. **Slightly different mechanism:** Similarly, if the general type of harm intended actually occurs, the defendant will not be absolved because the harm occurred in a ***slightly different way*** than intended. (Again, we are assuming for the moment that there is no distinct "intervening cause.")

Example: D attempts to poison her husband, V, by putting five grains of strychnine in a glass of milk she serves him for breakfast. He drinks it, and becomes so dizzy from its effect that he falls while getting up from the chair, hitting his head on the table. He dies, and the evidence indicates that he may have died from the blow to his head, rather than the poison.

Held, D is nonetheless guilty of murder. D created the condition which made the

normal routine act of standing up dangerous, and the death is therefore the direct result of her act. *People v. Cobbler*, 37 P.2d 869 (Cal. App. 1934).

3. **Pre-existing weakness:** The most common "direct causation" problem occurs when the victim has a ***pre-existing condition,*** unknown to the defendant, that makes him much more ***susceptible to injury or death*** than a normal person would be. The defendant in this situation is said to ***"take his victim as he finds him",*** and may not argue that the defendant's own act was not the proximate cause of the unusually severe result.

Example: D beats V up, with intent to kill him. V runs away before very many blows fall, and a person in ordinary health would not have been severely hurt by the blows that did fall. Unknown to D, however, V is a hemophiliac, who bleeds to death from one slight wound. D is guilty of murder, notwithstanding the fact that, from his viewpoint, V's death from the slight wounds was unforeseeable.

Note on concurrence: In dealing with proximate cause problems, it is always necessary to remember the rules of concurrence, discussed *supra*, p. 45, relating to the link between intent and result. For instance, suppose that D had only been trying to commit a minor battery on V, rather than trying to kill him. If V died as a result of his hemophilia, D would not be liable for common-law intent-to-kill murder, because he did not have the requisite mental state, the intent to kill. (But he would probably be liable for manslaughter under the misdemeanor-manslaughter rule; see *infra*, pp. 279-280.)

4. **Death caused without physical impact:** Courts today are generally willing to find that where death results ***even without physical impact,*** as the result of ***fright*** or ***stress*** caused by the defendant, the defendant's conduct can nonetheless be a proximate cause of the death. Although courts sometimes say that there can be no liability for effects on the "mind alone," there is almost always some physical effect in the victim's body (e.g., a heart attack) which is the direct cause of the death, and this physical result is enough to confer liability on the defendant even without physical impact.

Example: The Ds hold up V's business. They require V and his employees to lie down on the floor while the money is taken. V, who is an obese 60-year-old man with a history of heart disease, and who leads a generally stressful life because of his competitive business, is very frightened, and has a heart attack fifteen minutes after the robbery. The heart attack is fatal, and the Ds are prosecuted for his death under the felony-murder rule.

Held, the Ds may be convicted. Medical evidence indicated that the robbery was the "direct" cause of the heart attack, and it is irrelevant that the Ds had no reason to know of V's heart condition, and that V might have died soon anyway. *People v. Stamp*, 82 Cal. Rptr. 598 (Cal. App. 1969).

5. **"Come to rest in apparent safety":** The defendant's liability for the results of which he is the "direct" cause is sometimes limited by an ***exception*** where the dangerous force unleashed by the defendant ***"came to rest in a position of apparent safety."*** See P&B, p. 780-81.

Example: D forces his wife, V, out of the house at night in freezing weather. She walks to the nearby house of her father without ill consequences, where she would have been taken in at any hour. Not wanting to disturb him in the middle of the night, however, she lies down outside, and freezes to death.

Held, D is not guilty of manslaughter. V had reached a position of apparent safety, thus preventing D's act from being the proximate cause of her death. *State v. Preslar,* 48 N.C. 421 (1856).

Note: This case might alternatively be viewed as one in which the victim's own acts (her gross contributory negligence) acted as an intervening, superseding, act. See *infra,* pp. 67-68.

6. **Recklessness and negligence crimes:** Where the crime requires a mental state merely of ***negligence*** or ***recklessness,*** and the type of harm that made the conduct negligent or reckless occurs, but in an unexpected manner, the defendant is likely to be liable, just as where the crime involves intent.

   a. **Slightly more liberal standard:** However, courts probably have some tendency to take the defendant's mental state into account in solving proximate cause problems, and a defendant who is only negligent or reckless may be somewhat less likely to be held for harm occurring in an unforeseen manner than if he had acted intentionally. Thus if D negligently shoots V in a hunting accident, giving V a small wound, and V unforeseeably bleeds to death because he is a hemophiliac, D will have a somewhat better chance of avoiding a conviction for involuntary manslaughter or criminally negligent homicide than he would of avoiding a murder conviction had he intended to kill V. (Nonetheless, in this particular situation he would probably be convicted, due to the strength of the general principle that one takes one's victim as one finds him.) See L, p. 310.

C. **Intervening acts:** The defendant's odds of escaping liability for harm occurring in an unanticipated manner are better where an ***"intervening act"*** or event contributes to the result than where the defendant has

"directly" caused the harmful result.

1. **Dependent vs. independent intervening acts:** Courts have tended to divide intervening acts and events into two conceptually different categories:

   [1] acts and events which ***would not have occurred*** except for the defendant's act; these are ***"dependent"*** causes.

   Example: X gives V medical treatment for a wound caused by D. X's response is a "dependent" cause.

   [2] acts and events which ***would have occurred*** even had the defendant not acted, but which combined with the defendant's act to produce the harmful result; these are called ***"independent"*** causes.

   Example: V is in a car accident, which he would have been in even had D not previously beaten him up, but D dies from the combined result of the accident and his weakened condition stemming from the beating. The car accident is an "independent" cause.

   a. **Significance of distinction:** The courts have used somewhat ***different tests*** to determine whether a ***"dependent"*** intervening cause is ***superseding*** (i.e., relieves the defendant of liability) than where the intervention is ***"independent."***

      [1] An ***independent*** intervention, which is by definition merely a coincidence, will usually break the chain of causation if it was ***"unforeseeable"*** from one in the defendant's position.

      [2] A ***dependent*** intervening cause, on the other hand, since it is by definition a direct response to the defendant's conduct, will break the chain of causation only if it was not only unforeseeable, but also ***abnormal.*** See L, pp. 305-06.

   The significance of the distinction is that an act is ***less likely to be considered "abnormal"*** than it is to be considered merely "unforeseeable" — so all things considered a dependent intervening cause is somewhat less likely to be superseding than an independent cause.

   Example: D beats up V, and leaves him by the side of the road. An ambulance picks him up, and while rushing him to the hospital, gets into a collision, killing V. D might be held responsible for this death, since the ambulance's picking up of V, and travelling at a high rate of speed, was a direct response to D's act (a "dependent cause") and is probably not "abnormal" (even though the accident itself was not particularly "foreseeable").

If, on the other hand, V had gotten up from the beating, and taken a later bus to visit his girlfriend than he would have taken had he not been beaten up, and the bus got into a fatal accident, D would probably not be liable. In this case, V's bus trip and accident would be merely an independent intervening act (a coincidence), and since the accident would probably be held to have been "unforeseeable," it would be held to be a superseding cause.

2. **Four kinds of acts:** Our discussion below is organized according to the source of the intervening act: (1) intervening acts by ***third persons*** (Par. 3 below), (2) intervening acts by the ***victim*** (Par. 4); (3) intervening acts by the ***defendant*** (Par. 5); and (4) ***non-human*** intervening events (Par. 6).

3. **Intervening acts by third person:** If an intervening act is committed by a third person — someone who is neither the victim nor the defendant — that act will generally be superseding only if:

   [1] it was ***independent*** of the defendant's act (coincidental) and ***unforeseeable;*** or

   [2] it was ***dependent*** on the defendant's act (i.e., a response to it), and was ***"abnormal"*** (not merely unforeseeable).

   a. **Medical treatment:** The most common such intervening act is ***medical treatment*** performed by a doctor or nurse upon the victim, where this treatment is necessitated by the defendant's act. Such treatment is obviously a response to the defendant's act, and therefore will not be a superseding intervening cause unless the treatment is abnormal.

      i. **Negligent treatment:** The fact that the treatment is ***negligently performed*** generally will ***not,*** by itself, be enough to make it so "abnormal" that it is a superseding event.

      Example: D shoots V. V then undergoes an operation after (and because of) the shooting. V dies during the operation because she is not given sufficient blood transfusions. *Held,* for the prosecution: as long as the treatment was part of the "usual course of practice" followed by the medical profession, neither any incidental negligence, nor the fact that a different treatment might have saved V, will make the treatment a superseding cause. *State v. Clark,* 248 A.2d 559 (N.J. 1968).

      ii. **Reckless or grossly negligent treatment:** But if the medical treatment is "abnormal," which it would be if it was shown to have been performed ***recklessly*** or ***in a grossly negligent***

manner, this treatment ***will*** be a superseding intervening cause, and the defendant will not be responsible for harm (e.g., death) stemming directly from the treatment.

iii. Departure from required surgery: Similarly, if the treatment goes beyond what is necessary to care for the harm done by the defendant, and an attempt is made to ***cure*** other, ***unrelated*** problems, ill results occurring during the extended treatment will be superseding.

Example: D stabs V in the stomach. V is operated on for the stab wound, during the course of which operation the doctors discover a hernia. While they are attempting to correct the hernia, V has a heart attack and suffers fatal brain damage.

Held, for D. Since the hernia was unrelated to the stab wounds, and V would have survived had the hernia never been cured, the work on the hernia (which was going on when the heart attack occurred) is a superseding cause. (Also, there is some evidence that death may have been due solely to the anesthesiologist's failure to give adequate oxygen; this might constitute gross negligence, which would itself be a superseding cause.) *People v. Stewart*, 358 N.E.2d 487 (N.Y. 1976).

iv. Disease or infection caught in hospital: If the victim catches a ***disease or infection*** as a result of being in the hospital, the court will have to decide whether this disease or infection related directly to the wounds being treated, or was merely a coincidental by-product of the victim's presence in the hospital. If the former, this will be a superseding cause only if it was "abnormal." But if the latter, the disease or infection will supersede so long as it was not foreseeable. Thus in one wellknown case, the victim of a gunshot wound died not from the wound, but from scarlet fever which she contracted from her attending physician; the scarlet fever was held to be a superseding cause, absolving the defendant of responsibility. *Bush v. Commonwealth*, 78 Ky. 268 (1880). (But L, at p. 309-10, fn. 06, 103, suggests that if the defendant had been aware that there was a scarlet fever epidemic, the victim's getting the disease would be a foreseeable intervention, and therefore not superseding.)

v. Non-fatal wound: The rule imposing liability on the defendant even where the direct cause of death is bad medical treatment probably applies even where the wounds caused by the

defendant would definitely ***not have been fatal*** except for the medical treatment. (Of course, the defendant would be liable for murder in the case of the non-fatal wounds only if he inflicted them with intent to kill. See L, p. 307-08, fn.87.) However, if the wound was not just non-mortal, but actually ***superficial*** (e.g., a small cut), it is not so clear that the defendant will be liable for ensuing death from bad treatment.

b. Intended result never superseded: If the intervening act leads to a result that is not only of the same general type (e.g., death, bodily harm) as that intended by the defendant, but is further ***almost identical*** to the desired result in its ***manner of occurrence,*** the intervening act will not be a superseding one. This is true even though the intervention itself may have been quite unforeseeable or abnormal.

Example: D, intending to have her nine-month-old son killed, gives a bottle of poison to the boy's nurse, saying that it is medicine that he is to be given. The nurse decides that the baby doesn't need the medicine, and puts it on top of the mantel piece. Several days later, the nurse's five-year-old son gives the poison to the baby, killing him.

Held, D is guilty of murder. *Regina v. Michael,* 169 Eng. Rep. 48 (1840).

c. Negative act never supersedes: A third party's ***failure to act*** will virtually never be a superseding cause.

Example: D shoots V. There is a doctor, X, standing close by who could, with 100% certainty, prevent V from dying. Despite the fact that X refuses to render assistance (even if he does so because he hates V and wants him to die), D will still be the proximate cause of death. And this will be true even if X has an *affirmative duty* to intervene (e.g., X is not a doctor but is instead a parent with the duty to rescue his child who has been thrown into deep water by the defendant).

4. Act by victim: The ***victim himself*** may sometimes take actions which are potentially superseding intervening causes. Again, the test is generally the foreseeability and/or "normality" of the victim's act. Generally speaking, acts by victims tend to be taken in direct response to the defendant's act, so they will not be superseding unless they are "abnormal" (not merely "unforeseeable").

a. Suicide: Suppose D wounds or maims V, leading V to ***commit suicide.*** Is V's suicide a superseding event?

i. **Insanity:** If the evidence indicates that V was ***driven insane,*** or was otherwise not acting rationally, because of D's act, the suicide will not be superseding.

Example: D kidnaps V, a young woman, and commits various sexual perversions upon her, including putting mutilating bite marks all over her body. V becomes so distraught and ashamed that she takes poison. While V is in agony from the poison and screaming for a doctor, D fails to get her one. V eventually dies, of the combined effect of the poison, exhaustion, lack of medical treatment, and possibly an infection from one of the wounds.

Held, V's act of taking the poison was not a superseding act. The evidence showed that V was rendered "mentally irresponsible" by D's acts, and D's conduct was therefore a direct cause of her death. *Stephenson v. State,* 179 N.E. 633 (Ind. 1932).

ii. **Victim prefers death to life:** If the victim is not made "insane" or "mentally irresponsible" by the defendant's conduct, but is maimed in such a horrible way that he makes a decision that death is preferable to life, it is not clear whether his suicide will be an intervening cause. LaFave and Scott argue that suicide should not be a superseding act in this situation; L, p. 307.

b. Encouraging suicide: If the defendant ***encourages*** the victim to commit suicide, the former will normally be prosecuted for the crime of aiding and abetting suicide, not murder. But if a murder prosecution does take place, there is dispute about whether the defendant's act is either the cause in fact or the proximate cause of the death. See L, p. 307, fn. 86.

i. **Model Penal Code view:** The Model Penal Code, in § 210.5(1), makes it criminal homicide to cause another to commit suicide, if the defendant "purposely causes such suicide by force, duress or deception." The criminal homicide in this situation would normally be murder, though it might be voluntary manslaughter if the defendant was acting under certain types of mental or emotional disturbance. (If the suicide is caused without "force, duress or deception," the defendant is guilty under the Code of the independent offense of "aiding or soliciting suicide," a second-degree felony if it is done purposely.)

c. Victim refuses medical aid: If the victim, rather than committing suicide, simply ***refuses to avail himself of medical assistance*** which would probably have prevented the injuries or death caused by the defendant, the victim's refusal will ***not be superseding.***

Example: D stabs V four times. While she is in the hospital, V is told that if she does not have blood transfusions she will die. Because she is a Jehovah's Witness, she refuses the transfusions, and dies.

Held, V's refusal to allow the transfusions is not a superseding cause that relieves D of liability. "It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man." *Regina v. Blaue,* 3 Eng. Rep. 446 (Eng. 1975).

Note: If *Blaue* were a tort suit brought by the victim's parents for recovery against the defendant, the victim's refusal to "mitigate her damages" would probably have prevented the parents from receiving full compensation for their daughter's death. Thus the criminal law is more stringent than the civil law in this situation; this result has been criticized. See Glanville Williams, quoted in L., p. 327, note 1.

d. Victim's attempt to avoid danger: The victim may attempt to ***avoid the danger*** posed by the defendant. If this attempt at escape results in additional injury, the attempt will be a superseding cause only if it can be said to be an "abnormal" reaction. For example, suppose D locks the door of his bedroom and assaults his wife, V, with a knife, threatening to kill her. V is so frightened that she tries to escape from an upstairs window, and is killed in a fall. Since V's escape attempt would not be considered an "abnormal" reaction, D would be held to be the proximate cause of her death.

i. **Lesser crimes:** The same principle would apply if the victim's escape attempt led to injury rather than death. For instance, if D in the above example had attacked V with intent merely to injure her, rather than to kill her, and she had broken her leg jumping out of the window, he would have been guilty of battery.

ii. **Act not required to be prudent or foreseeable:** The defendant will be the cause of the victim's injury or death even if the victim's attempt to escape the danger was ***unreasonable*** and ***imprudent,*** as long as it was instinctual and not completely bizarre.

e. Victim subjects self to danger: With the defendant's urging or encouragement, the victim may sometimes ***expose himself to danger;*** if the danger materializes, the defendant will often be held to be a proximate cause of the result, despite the victim's own voluntary participation.

Example: The two Ds and V decide to play "Russian Roulette," in which each takes a turn spinning the chamber of a revolver containing one bullet, and pressing the trigger with the barrel held to the player's own head. The Ds each take a turn, and the gun does not fire. V tries it and the gun fires, causing V's death.

Held, the Ds may be convicted of manslaughter, and the fact that V voluntarily pressed the trigger is no bar to liability. Their conduct constituted reckless endangerment of V's life, insofar as they either encouraged him or at least cooperated with him in playing the dangerous game. (Cases involving drag racing, in which one competitor is sometimes held not responsible for the death of the other due to the latter's bad driving, were distinguished, on the grounds that they involved games left to the skill of the competitors. See *infra,* this page.) *Commonwealth v. Atencio,* 189 N.E.2d 223 (Mass. 1963).

i. **Drag racing:** A similar situation arises where the defendant and the victim participate in a ***drag race*** together, and the victim is killed or injured. Some cases have held that the victim's voluntary participation in the race, and/or his careless driving, are not superseding causes.

ii. **Different result:** Other cases, however, have held that, at least where the victim was a voluntary participant in the drag race, his own act ***is*** superseding. In one case, the court held that where the defendant drove one car, and the victim drove the other, the defendant was not the proximate cause of death where the victim "recklessly and suicidally" swerved his car into the path of an oncoming truck in an attempt to pass the defendant's car. The court stressed that proximate cause in criminal cases should be more narrowly defined than in civil cases. *Commonwealth v. Root,* 170 A.2d 310 (Pa. 1961).

5. **Act by defendant:** The defendant himself may commit not only the *actus reus,* but also an intervening act. In this situation, the courts are, not surprisingly, very reluctant to recognize the defendant's second act as something that supersedes the causal impact of his first act.

a. Mistake as to death: This happens most frequently in the ***mistake-***

as-to-death cases *(supra,* p. 47), in which the defendant intends to kill the victim, erroneously believes he has done so, and then ***destroys or conceals the "corpse"*** in a way that actually causes death.

i. **Not superseding:** The defendant cannot be charged with homicide based on the act that actually causes death (since, because there was no longer an intent to kill at the time of this latter act, there is no concurrence). But the court may well hold that the first act (which, by hypothesis, was accompanied by the requisite intent to kill) was the legal cause of death, and that the defendant's second act of concealment was ***not a superseding intervention.*** LaFave believes that such a holding would be justified, on the grounds that "acts by the defendant himself to dispose of the body are not abnormal and thus do not break the causal chain...." L, p. 309.

6. **Non-human event:** An intervening cause may be in the form of a ***non-human event.*** Such events will generally be coincidences, not responses to the defendant's act, and will therefore be superseding if they were not foreseeable.

a. ***Bush*** **case:** *Bush v. Commonwealth, supra,* p. 66, in which the victim of wounds inflicted by the defendant caught scarlet fever from her physician, might be viewed as falling into this class. The scarlet fever was an unforeseeable coincidental event, and therefore superseding. (Alternatively, the fact that the doctor treated the patient could be viewed as a "response" to the defendant's acts, but even here, liability would probably be denied on the theory that the result was highly abnormal.)

7. **Recklessness or negligence crime:** If the crime is defined to require merely ***recklessness*** or ***negligence,*** probably the same general rules regarding intervening causes apply as where the crime is one of intent. That is, if D has behaved recklessly with respect to the risk that V will suffer a certain kind of harm, and that general type of harm occurs, but only through an intervening act by X, the intervening act will be superseding if it was abnormal and unforeseeable, but not if it was foreseeable or usual. Similarly, if D was negligent concerning the

risk of harm to V, and an intervening act helps bring about that type of harm, the intervention will be superseding if it was not foreseeable.

a. Model Penal Code standard: The Model Penal Code appears to impose much the same standard for intervening acts in recklessness and negligence cases as in intentional crimes. Assuming that the problem is not one of "transferred intent" (i.e., a different victim) or concurrence (a completely different type of harm, such as burning where death from shooting was the principal risk of the defendant's conduct), the defendant will be relieved of liability in a recklessness or negligence case unless both: (1) "the actual result involves the ***same kind of injury or harm*** as the probable result [of the defendant's conduct]"; and (2) the actual result "is ***not too remote or accidental*** in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." M.P.C. § 2.03(3)(b).

Quiz Yourself on
CAUSATION (ENTIRE CHAPTER)

11. Jesse James is trapped at the I'm O.K. Corral. Doc Holiday fires a bullet at James, and hits him. 1/2 second later, Wyatt Earp fires a shot at James, and also hits him (while he's still standing). (Holliday and Earp are not acting in concern, they each independently have it in for James.) James dies immediately. Either bullet would have been enough to kill James. Who is the cause-in-fact of James' death, Holiday, Earp, both or neither?

12. Yosemite Sam has his heart set on rabbit stew for dinner. He sees Bugs Bunny off in the distance, aims his gun right at him, and fires. (Assume that if Sam had hit Bugs, this would have been murder, i.e., there's no defense of rabbit-hunting.) Unfortunately, Sam's aim is very bad and he instead hits and kills Daffy Duck, whom he never even saw.

(A) Is Yosemite Sam guilty of murdering Daffy Duck?

(B) Same facts as (A), except that instead of killing Daffy Duck, he merely wounds him. What crimes is Sam guilty of now?

13. Cheshire Cat is tired of being chased by Tweedle Dee all day long and decides to "off" him. He buys an AK-47 at the local convenience store and hides in the bushes, waiting for his victim to pass by. Tweedle Dum, Tweedle Dee's twin brother, happens to walk by. Thinking that he's looking at Tweedle Dee, Cheshire Cat aims right at him and fires. Tweedle Dum is killed instantly. Since Cheshire Cat only had the intention to kill Tweedle Dee, is he guilty of the murder of Tweedle Dum?

14. Antony gives Cleopatra a glass of wine tainted with arsenic, intending to kill her. However, the poison does not instantly kill Cleo.

(A) For this part only, assume that the arsenic was (unbeknownst to Antony) so weak that it would almost certainly not have killed Cleo, even if she had had no medical treatment. Cleo was rushed to the hospital. A nurse there gave her a potion that was intended to be an antidote. What the nurse didn't know was that the potion was in fact a rat poison intended to exterminate the hospital's growing rat population, which had been mislabelled due to another nurse's gross negligence. Cleo died principally from the effects of the rat poison, but had she not been weakened from the earlier arsenic poisoning, she probably would have survived. Will Antony's act be deemed a proximate cause of Cleo's death?

(B) For this part, assume that Cleo refused to go to the hospital – even though she knew she would not otherwise likely recover from the poison. She died several hours later. Will Antony's act be deemed the proximate cause of Cleo's death?

15. Bob Ford intends to kill Jesse James. He shoots at James, but misses. In an attempt to escape Ford's shots, James turns his horse and gallops off in the opposite direction. Shortly after he starts the escape gallop, he is struck and killed by a boulder from an unexpected rockfall. Is Ford's conduct a proximate cause of James' death?

Answers

11. Both Holiday and Earp are causes in fact. Although something that

is a "but for" cause will always be a cause-in-fact, the conversely is not true: something can be a cause-in-fact even though it was not a but-for cause. In particular, if two acts are each a ***"substantial factor"*** in bringing about a result, then each is a cause-in-fact even though the other act would have sufficed. That's what happened here: neither shot was a but-for cause of the death (since the death would have happened anyway without that shot), but each was undeniably a "substantial factor" in bringing about the death. (Each shot contributed significantly to the result — James' death — so that's enough to make it a "substantial factor".)

12. (A) Yes. Under the doctrine of ***"transferred intent,"***if a defendant intends to bring about a certain sort of harm and then does bring about that general type of harm, the fact that the victim is different than the intended one will not make a difference. The doctrine applies here: since Yosemite Sam intended to kill someone, the fact that the one who ended up dead was Daffy instead of Bugs won't prevent Sam from meeting the requirements for murder.

(B) Battery against Daffy, and attempted murder of Bugs. First, Yosemite Sam will be guilty of battery against Daffy Duck — Sam's intent to kill Bugs will be transferred to his act of battery against Daffy, even though the crimes are not the same. (Note that this works because battery is sort of a lesser version of murder. If the two crimes were totally unrelated, such as murder and arson, the intent could not be transferred.) Second, Yosemite Sam will also be guilty of attempted murder of Bugs, since he had the intent to kill him (the *mens rea)* and took an act in furtherance of that goal (shooting towards him). However, Yosemite Sam will *not* be guilty of the attempted murder of Daffy Duck — the doctrine of "transferred intent" does not apply to crimes of attempt.

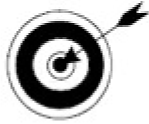
13. Yes. A case of mistaken identity does not save the defendant. As long as Cheshire Cat had the intention to kill someone, and engaged in an act designed to carry that intention out, the fact that he was mistaken regarding the identity of his victim is irrelevant. A "mistake of fact" will generally only be a defense if it negates the particular mental state required for the crime. That is not the case here, because a correct belief about the victim's identity is not part of the mental state

required for murder (or practically any other crime, for that matter).

14. **(A) No.** When the defendant causes injury or illness, resulting medical treatment will be viewed as a "dependent" intervening cause. A dependent intervening cause will be viewed as ***"superseding"*** (i.e., as preventing the defendant's action from being a proximate cause) only if that dependent cause was ***"abnormal."*** Where medical treatment is performed in a grossly-negligent way, that will usually meet the hard-to-satisfy "abnormal" standard. The treatment here was certainly gross negligence — hospitals may commit garden-variety negligence with some frequency (and that ordinary negligence won't be superseding), but giving a patient rat poison because of a labelling error goes way beyond ordinary negligence. Therefore, the rat poison will be treated as a superseding cause. (But if the hospital had acted just a bit negligently, say by not having the most-effective antidote available, or by delaying treatment for 10 minutes because of emergency-room congestion, this would not have been enough to break the chain of causation if Cleo had died, and here Antony's act *would* have the proximate cause of her death.)

    (B) No. Where a crime victim refuses to avail herself of medical assistance, most courts hold that the refusal is not a superseding cause. That's true even if the victim's conduct is irrational.

15. **No.** Ford's conduct is certainly a cause-in-fact of the death. (The death wouldn't have occurred "but for" Ford's conduct, since James wouldn't have been at the spot where the boulder occurred.) But the shooting is not a *proximate* cause. The falling of the boulder was an "independent" intervening event. (That is, the boulder didn't fall because of the shooting.) An independent intervening event will be superseding if it was ***"unforeseeable"*** (even if it wasn't "abnormal," in the sense of deeply unusual or bizarre). There's no particular reason for anyone to have foreseen a rockfall at the time James passed by (and the facts say that the rockfall was "unexpected"), so the unforeseeable rockfall will be a superseding event.



Exam Tips on
CAUSATION

Be on the lookout for causation issues, especially in fact patterns that involve homicide — the fact that V (victim) ended up dead doesn't mean that D caused the death, as a legal matter.

Cause In Fact

- First determine whether the defendant's act was the cause-in-fact of the harm. Usually, this will be because D's act was the but-for cause of the harm.
  - Analyze the situation to determine ***whether the result would have happened anyway (in exactly the same way) even had D's act not occurred.*** If it would have, then D's act won't be the but-for cause, or cause-in-fact, of the harm, and D can't be guilty.

    Example: D, A prominent heart surgeon, agrees at the request of the U.S. Government to perform a heart operation on V, an important official. Relying on his agreement, the government ceases its search for another physician. D then fails to show up to do the operation, and it's too late for the government to find another. V dies. D could plausibly contend that, even if he had performed the operation, it is uncertain that it would have been successful. If he can show this, then his wrongful act (his promising to do the operation and then not doing it) has not been proved beyond a reasonable doubt to have been the cause-in-fact of V's death.

  - Remember that for D's act to be the cause in fact of a homicide, the victim must be ***alive at the time of the act.****Example:* D shoots to kill V, whom he believes is asleep, but who actually died of a heart attack moments before. D's act of shooting is not the cause in fact of V's death. Therefore, regardless of D's culpable state of mind and wrongful act, D can't be guilty of homicide.
  - Remember that a death may have ***several causes-in-fact.*** That is, there may be several acts or events each of which is a cause in fact, because the death wouldn't have happened without all of those acts/events. When this happens, the person who does a single one of the acts can be guilty (because he's *a* cause-in-fact even though not *the sole* cause in fact).

Proximate Cause

☛ **Generally:** Proximate cause is very frequently tested. Several things to watch out for:

- ☞ **Year-and-a-Day-Rule:** Remember that at common law (and still in most states), if a death occurs ***at least a year-and-a-day after D's act,*** D can't be the proximate cause of the death.

- ☞ **Unintended victim:** Profs will try to sidetrack you by presenting a fact pattern where there is an inadvertent killing of a person who was not the original target. Remember that, as long as the defendant shows the requisite mental state, ***it is inconsequential that the victim is different than the one D was focusing on*** (assuming the victim suffers a harm similar to what was intended). Distinguish between the two similar situations of transferred intent and mistaken identity (D will be on the hook in both):

  - ☞ **Transferred intent:** In a fact pattern involving ***transferred intent,*** the defendant aims at his targeted party (X) but because of bad aim, a ricocheting bullet, or something of that sort, another person (V) is hit. If D had the requisite mental state vis a vis X, D is guilty of the same crime against V as D would have been had the harm that befell V really befallen X.

    Example: D returns home and catches B climbing out the window of his home. He pursues B down the street. D fires a shot at B with a hunting rifle, attempting to shoot him in the leg. The bullet misses B, but hits V, who is driving a car down the street. V later dies. D's intent to cause serious bodily harm to B (a mental state sufficient for murder) would be transferred to V. Therefore, D is the proximate cause of V's death, and can be found guilty of murder, assuming that no defense applies.

  - ☞ **Mistaken identity:** In a fact pattern involving ***mistaken identity,*** the defendant injures or kills the party at which he aimed; but the victim is not who the defendant thought he was. Here, too, the mistake doesn't prevent D from being guilty.

    Example: V, who has just robbed a casino, encounters D on the steps of the casino. D is not aware of V's criminal activity. In fact, D is waiting on the

steps of the casino so that he can shoot its owner because D has just lost all his savings there. When D sees V, he mistakenly believes that V is the casino owner. He shouts, “Death to gamblers,” and shoots at V, killing him. Knowledge of the victim’s identity is not an essential element of the crime. Because D yelled, “Death to gamblers,” and fired at V, he showed the necessary intent to kill or cause serious bodily harm. Therefore, D is guilty of murdering X notwithstanding his mistake about X’s identity.

- ☞ **Intervening causes:** Determine whether the intervening act is ***“independent”*** or ***“dependent.”*** Remember that an independent act will break the causation chain if it’s ***“unforeseeable”*** but a dependent act will only break the chain if it’s ***“abnormal”*** *(plus* unforeseeable). “Abnormal” is rarer, so an independent act is more likely to break the chain than a dependent one.

  - ☞ **Medical aid:** Most common scenario for dependent intervening cause: the victim is given ***medical aid,*** and something goes wrong during the aid-giving process.

Example: D attacks V, a basketball player, with a baseball bat, inflicting serious injuries. V is admitted to the hospital and is injected with a pain reliever to which he has a fatal allergic reaction. Because the drug was given to relieve pain which resulted from the beating, the administration of the pain reliever and the reaction to it are dependent acts. Therefore, as long as these events are not abnormal (and mere negligence, as opposed to gross negligence, is probably not an “abnormal” response to a need for medical assistance), the chain of causation has not been broken.

  - ☞ **Victim’s intervening act:** Look for a situation where, after the initial harm caused by D, the victim ***exposes himself to additional danger.*** If the exposure is brought about by D’s act, the exposure is a dependent event, and won’t be superseding unless abnormal.

Example: D sets fire to X’s home. X flees the burning home, then reenters to rescue his baby trapped inside. He later dies of burns. Since it is not uncommon for someone to risk his life to save his child, the act would be foreseeable (and certainly not “abnormal”), so even if it was in some sense a bad move for X from a risk-reward perspective, it won’t be deemed superseding.

  - ☞ **Third party’s failure to act won’t supersede:** Also, look for a situation in which a third party has the opportunity (maybe even the obligation) to avoid the bad result, but doesn’t do so. This ***failure to act*** will virtually ***never*** act as a superseding cause, and thus will never let the original

wrongdoer (who created the peril) off the hook.

Example: D sets a bomb in V's car (parked at V's office) because he is angry at V. He then has a change of heart, and calls X, the security officer at V's office, to tell him to have the bomb defused. X says that he'll take care of the problem. X examines the car, negligently fails to find any indication of a bomb, and stupidly fails to call the police bomb squad. V starts the car, and the bomb explodes, killing V. D is guilty of murder — the fact that X undertook to undo the danger and failed to keep that promise won't supersede, and thus won't prevent D's setting of the bomb from being a proximate cause of V's death. That's because a third party's failure to act (even when the third party has an obligation to act) will virtually never supersede.

☞ **Defendant's intervening act:** Look for a situation where D has the intent to kill, erroneously believes his victim is dead, and attempts to destroy or conceal the "corpse." Usually, this second act by D won't be superseding.

Example: D beats V to the point of unconsciousness. Then, thinking that V is dead, D takes the "corpse" to a secluded spot. V ultimately dies of exposure. D's intervening act of moving V's body (and not checking to see that V was dead) was a dependent act. The act was not unforeseeable or abnormal, and was therefore not superseding. Therefore, the death will be deemed to have been proximately caused by the original beating, so D can be prosecuted for some version of homicide. *(Which* type would depend on his mental state during the beating.)

☞ **Licensing requirements and misdemeanor-manslaughter:** In cases where the ***misdemeanor-manslaughter*** rule might apply (D commits a misdemeanor and a resulting death is proposed to be treated as manslaughter), be alert for a proximate-cause issue — often the misdemeanor *won't* be sufficiently tied to the death to trigger the rule. This is especially likely where D violates a ***licensing*** rule.

Example: D fails to timely renew his driver's license (but would have been entitled to do so). He obeys all other rules while driving, but strikes and kills V, a pedestrian. The license-nonrenewal probably won't trigger the misdemeanor-manslaughter rule, because the nonrenewal won't be viewed as a proximate cause (or for that matter a cause-in-fact) of the death.

CHAPTER 4
RESPONSIBILITY

Introductory Note: This chapter considers several defenses which the defendant may raise regarding his ***lack of mental responsibility*** for the alleged offense. These include: (1) the ***insanity*** defense (including the "XYY chromosome" defense); (2) the defense of ***diminished responsibility*** (which can negate the existence of the required *mens rea);* (3) ***automatism*** (the doing of acts while in an unconscious state); (4) the defense of ***intoxication;*** and (5) ***infancy.***

I. THE INSANITY DEFENSE

A. General purpose: If the defendant can show that he was ***insane*** at the time he committed a criminal act, he may be entitled to the verdict "not guilty by reason of insanity." This defense has been recognized in Anglo-American law for several hundred years. Its principal justification is that where the defendant's mental disease has prevented him from distinguishing between "right" and "wrong," or from controlling his conduct (depending on the test employed in the particular jurisdiction) the ***punishment*** and ***deterrence*** objects of the criminal law would not be served by convicting. It is felt that it would be inappropriate and unfair to punish the defendant for something that he could not help, and futile to attempt to deter him from similar misconduct by convicting him.

1. **Incarceration as objective:** But another significant reason for the defense has also been noted. Most serious crimes are defined in terms of intent; thus in most states, first-degree murder may be committed only by causing the death of another with intent to do so. If no insanity defense existed, an insane defendant might very well be able to show that his insanity prevented him from forming the intent to kill; this would be the case, for instance, in the frequently-cited hypothetical of the man who strangles his wife believing that he is squeezing a lemon. (See M.P.C., Comment 2 to § 4.01). The strangler might therefore go free.

   a. **Limits use of mental disease:** But in many (perhaps most) states, the insanity defense is coupled with a rule that ***no evidence relating to mental disease or defect*** may be introduced except as part of an insanity defense. This means that the strangler must either plead insanity, or not be allowed to show that his mental disease prevented him from forming an intent to kill. Coupled with the fact

that in virtually every state, an insanity acquittal leads almost inevitably to the defendant's involuntary commitment to a mental institution (see *infra,* p. 86), this means that the insanity defense serves as a means of ***avoiding the outright release*** of certain defendants who would otherwise be acquitted for lack of the necessary *mens rea.* See L, p. 324-25.

2. **Not constitutionally required:** Virtually every state recognizes some form of the insanity defense. Johnson, p. 280. However, probably the federal Constitution does ***not require*** the states to recognize insanity as a complete defense. *Id.*

B. Tests for insanity: Several different formulations exist for determining whether a defendant was insane, in a way entitling him to acquittal. The principal ones are as follows:

C. *M'Naghten* "right-wrong" rule: At least half of the states apply, as their sole criterion for application of the insanity defense, a rule first set forth in *M'Naghten's case,* 8 Eng. Rep. 718 (1843). In that case, the defendant shot and killed Edward Drummond, private secretary to Sir Robert Peel, Prime Minister of England. The defendant believed that Peel had been conspiring to murder him, and shot Drummond thinking him to be Peel. A jury found him not guilty by reason of insanity.

1. **Ruling:** The House of Lords then asked the Justices of the Queen's Bench what the proper test for insanity should be. They responded, in what has come to be known as the ***"M'Naghten rule,"*** as follows: the defendant should be presumed to be sane unless he proves that, at the time he acted, he was "labouring under such a defect of reason, from disease of the mind, as ***not to know the nature and quality of the act he was doing;*** or, if he did know it, that he ***did not know he was doing what was wrong."***

2. **Reformulation:** Thus for the defendant to establish his insanity under the *M'Naghten* rule, he must show:

   a. **Mental defect or disease:** That he suffered a mental disease causing a defect in his reasoning powers; and

   b. **Result:** That as a result, either (1) he did not understand the "nature and quality" of his act; or (2) he did not know that his act

was wrong.

3. **What constitutes "mental disease":** Courts applying the *M'Naghten* test have generally not agreed on exactly what constitutes a "disease of the mind."

   a. **"Psychopathic" or "sociopathic" personality:** One thing that seems to be agreed upon is that the fact that the defendant is a ***"psychopath"*** or ***"sociopath"*** does not mean that he has the requisite mental disease. These terms refer solely to the fact that the defendant has a ***long history of criminal behavior,*** and do not mean that he necessarily has different mental functions than a normal person. For obvious reasons, courts have refused to allow a mere history of repetitious criminal acts to be considered as a kind of mental disease; otherwise the insanity defense might swallow up most of the criminal justice system.

   b. **"Know":** When the *M'Naghten* court said that the defendant must not "know" the nature and quality of his act, or that it was wrong, it did not make clear whether "know" was used solely in the ***cognitive*** sense (i.e., rational understanding), or in the ***emotive*** sense as well. For instance, if the defendant knew that he was killing his victim, and knew that it was against the law to kill, but thought that killing was morally required in this situation (e.g., because ***"God told me to do it"),*** is he insane under the *M'Naghten* test?

      i. **Includes emotive test:** A number of courts that have considered the issue have concluded that the defendant ***can*** be insane if he lacks such an emotional understanding of the wrongfulness of his conduct, even though he may have a rational awareness that society condemns it. In such a court, the murder who could show that he believed that God told him to kill would presumably be found to be insane.

   c. **"Nature and quality of his act":** Most courts have not similarly broadened their interpretation of the requirement that the defendant have known the "nature and quality of his act." In general, this refers merely to knowledge of the physical consequences; thus if the defendant has shot his victim to death, he will meet the "nature

and quality" requirement if he knew that pressing a trigger would discharge a bullet which might cause death. One or two courts have gone further, and have required a knowledge of the moral consequences. L, p. 333-34.

d. **Knowledge that the act is "wrong":** A similar question is raised by the requirement that the defendant know that his act was ***"wrong."*** Does "wrong" mean merely knowledge that the act is legally forbidden, or is there a further requirement of knowledge that the act is morally wrong? The previously-mentioned hypothetical murderer who believes that God has commanded the murder, for instance, might very well understand that murder is legally wrong, but believe that it is morally acceptable in this case. In most cases, if the defendant realizes that the conduct is legally prohibited, he will also realize that ***society*** would regard it as morally wrong, so the question is really whether the ***defendant's own belief*** that the conduct is morally acceptable meets the *M'Naghten* test.

   i. **Not resolved:** Few courts have explicitly confronted this question. To the extent that some courts have held *(supra)* that the defendant "knows" his conduct to be wrong only where he has an emotional understanding that it violates another's rights, his belief that the act is morally acceptable would probably be enough to meet the *M'Naghten* test.

   ii. **"Right and wrong" apply to particular case:** In any event, the defendant is not required to have a ***general*** inability to differentiate between right and wrong. The issue is whether, ***as to the act charged,*** he was able to distinguish right from wrong. If he couldn't do so, he will be insane even though in general he may be capable of making the distinction.

e. **Delusions:** In many cases the defendant will try to show that he lacked the requisite knowledge or understanding by showing that he had ***delusions*** (e.g., that God spoke to him and demanded that he commit a murder). No special rule applies to such cases; the question is simply whether, because of the delusions or anything else, the defendant lacked the ability to appreciate the nature and

quality of his act or its wrongfulness. See L, pp. 336-37.

4. **Criticism of *M'Naghten* test:** The *M'Naghten* test has been criticized, principally in academic circles, for decades, and a number of American courts have abandoned it. The main criticism has been that the test is ***too narrow,*** and that the law should regard as insane not only those defendants who do not "know right from wrong," but also those who might have such knowledge, but who are ***incapable of obeying the law*** anyway. This criticism has led nearly half of American jurisdictions to accept the insanity defense for the latter group of people, usually under the heading of "irresistible impulse" (discussed *infra).*

D. "Irresistible impulse": As noted, a principal objection to the *M'Naghten* rule is that it does not allow a finding of insanity if the defendant understood the difference between right and wrong, but was ***unable to control his conduct.*** To remedy this effect, almost half of those states that follow *M'Naghten* (which are in a majority) have added such an inability to control one's act as a separate ground for an insanity finding.

1. **"Irresistible impulse" is misnomer:** This additional ground has sometimes colloquially been called the ***"irresistible impulse"*** defense, but this is a misnomer. It is not required that the defendant's inability to control himself be an "impulse," in the sense of a sudden desire to commit the act in question; even if the defendant broods upon and plans his act, he may still avail himself of the defense.

2. **Complete "irresistibility" not required:** Nor have most courts required that a defendant's need to commit the act be ***totally*** "irresistible," in the sense that he would have committed the offense even if there had been a ***"policeman at his elbow."*** Rather, it has generally been sufficient that the defendant's ability to control himself was ***"substantially"*** impaired. (The Model Penal Code, in its reformulation of the lack-of-control test, explicitly uses the requirement of "substantial" impairment; see *infra).*

E. The *Durham* "product" test: In 1954, the U.S. Court of Appeals for the District of Columbia announced a new test, which would in theory encompass all cases meeting either the *M'Naghten* or "irresistible

impulse” standards, and perhaps other situations as well. In *Durham v. U.S.*, 214 F.2d 862 (D.C. Cir. 1954), the court stated that the defendant would be entitled to an insanity acquittal “if his unlawful act was the ***product of mental disease or defect.”*** One objective of this rule was to permit psychiatrists, testifying as expert witnesses, to give a broader range of information to the jury than they could under the *M’Naghten* test (under which they were forced to restrict their opinion to whether the defendant “knew right from wrong”).

1. **Not accepted:** No state courts, and only one state legislature (Maine) enacted the *Durham* test. Furthermore, the *Durham* court itself later more or less abandoned that test, in favor of the Model Penal Code formulation (discussed *infra).*

2. **Difficult to define “product”:** One of the principal reasons for this lack of success has been the difficulty of formulating a standard for deciding whether the act was a “product” of the disease or defect. A “but for” test, under which the act is a product of the disease if it would not have occurred but for that disease, seems to be much too broad and would include virtually every mental disease, regardless of whether there was a close connection with the ensuing act. No other definition of the term “product” has proven any more acceptable, however.

F. **Model Penal Code standard:** The Model Penal Code, like *Durham*, attempts to broaden the *M’Naghten* and “irresistible impulse” tests. M.P.C. § 4.01(1) provides that “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”

1. **Similarity to older tests:** The Model Penal Code test thus focuses on roughly the same two elements as the *M’Naghten* and “irresistible impulse” tests: (1) the defendant’s lack of understanding of the wrongfulness of his conduct (the “cognitive” prong); and (2) his inability to control his conduct (the “volitional” prong). If the defendant can show either of these two things, he is entitled to an insanity verdict.

2. **Only "substantial capacity" might be lacking:** While the "irresistible impulse" test is open to the interpretation that the defendant must be totally lacking in the ability to control himself (e.g., so that he would have committed the crime even with a "policeman at his elbow"), the Model Penal Code explicitly provides that merely ***"substantial capacity,"*** not total capacity, to exercise control must be lacking.

   a. **No "impulse" required:** Nor does the Model Penal Code test require, where the defense is based upon the defendant's inability to control his acts, that the act be the product of a sudden ***"impulse."*** Under the Model Penal Code, even acts that are the product of ***brooding and deliberation*** may qualify.

3. **Emotional awareness of wrongful conduct:** And it is sufficient for meeting the cognitive portion of the Model Penal Code test (i.e., that the defendant lacks substantial capacity to "appreciate the criminality" of his conduct) that the defendant is unable to have an emotional, "affective," understanding of the ***wrongfulness*** of his conduct. The word "appreciate," as opposed to "know," is used for this reason. See LS, p. 349.

   a. **Unclear standard:** But observe that this formulation does not answer the question whether it is the defendant's own moral sense, or his perception of the community's moral sense, that is relevant. If the defendant "appreciates" that the community considers it wrong to kill, but he himself believes that it is not only right but required by God, has he met the Model Penal Code test? This is not clear.

4. **Psychopaths and sociopaths:** The Model Penal Code explicitly provides, in § 4.01(2), that for purposes of the Code's insanity defense, the terms "mental disease or defect" do not include "an abnormality manifested only by repeated criminal or otherwise anti-social conduct." A commentary explains that this provision is intended to exclude the case of so-called ***"psychopathic*** personality"; the psychopath "differs from a normal person only quantitatively or in degree, not qualitatively, and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the

abnormality." (Comment 6 to §4.01, Tent. Dr. No. 4.)

5. **Criticisms:** The Model Penal Code formulation has been subject to much criticism. Most has centered on the "volitional" prong, i.e., the requirement that the defendant lack "substantial capacity...to conform his conduct to the requirements of the law." See, e.g., *U.S. v. Lyons*, 731 F.2d 243 (5th Cir. 1984), rejecting the volitional prong and thus holding that "a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct." Some of the criticisms of the volitional prong are:

   a. **Limits of psychiatry:** That even most psychiatrists "now believe that they do not possess sufficient accurate scientific bases for ***measuring*** a person's capacity for self-control or for calibrating the impairment of that capacity." *Lyons, supra.* As one writer has put it, there is "no objective basis for distinguishing between offenders who are undeterrable and those who are merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment." 69 A.B.A.J. 194, at 196 (1983).

   b. **Fabrication:** That the volitional prong increases the ***risks of fabrication,*** since it is easier to feign an inability to "help oneself" than it is for one to feign an inability to tell right from wrong.

   c. **Reasonable doubt:** That in those jurisdictions requiring proof of insanity beyond a reasonable doubt (originally including all federal courts, but since changed by statute; see *infra)*, proof beyond a reasonable doubt that the defendant lacked substantial capacity to conform his conduct to the requirements of the law is virtually impossible.

6. **Limited adoption:** The Model Penal Code has been adopted in a significant minority of jurisdictions, including Massachusetts, Rhode Island, Tennessee, and West Virginia. (See L, p. 350, fn. 68.)

   a. **Federal:** Virtually all of the U.S. Courts of Appeals at one time adopted the M.P.C. standard. However, in 1984, Congress passed a statute (18 U.S.C.A. § 20(a)) to replace the M.P.C. rule with what

is essentially the *M'Naghten* rule. The federal insanity standard is discussed extensively, *infra*.

b. California: California has made a similar round-trip.

i. Judicial adoption: In 1978, the California Supreme Court adopted the M.P.C. standard.

ii. Statute overturns: But in 1982, the voters of California approved a new statute that repudiates the M.P.C. formulation, and that is in fact even more restrictive than the *M'Naghten* rule. § 25 of the California Penal Code now limits the insanity defense to a defendant who "was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense." (The "and" replaces the *M'Naghten* rule's "or.")

G. The federal standard: In ***federal*** trials, the insanity defense is now governed by a statute passed by Congress in 1984, in the wake of John Hinckley's insanity acquittal for the attempted assassination of President Reagan. Because the federal standard has undergone several major changes over the last forty years, a brief review of the development of federal insanity defense law is worthwhile.

1. The Durham "product" test: The *Durham* "product" test, discussed *supra*, p. 80, was never accepted anywhere in the federal system except in the District of Columbia Circuit that originated it. L, p. 345.

2. Model Penal Code: Virtually all of the United States Courts of Appeals eventually adopted the Model Penal Code Test. L, p. 350. Even the D.C. Court of Appeals, which created *Durham*, eventually rejected its own creation in favor of the M.P.C. approach. See *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

3. Federal statute: The federal jury in the Hinckley trial was instructed that it must acquit Hinckley if there was a reasonable doubt about whether he could either appreciate the wrongfulness of his conduct or conform his conduct to the law (the Model Penal Code standard). To the surprise and chagrin of many observers, the jury took its instructions seriously and delivered a verdict of not guilty by reason

of insanity. The resulting public outcry, when added to a number of scholarly and professional expressions of unhappiness with the Model Penal Code standard (e.g., the repudiation of the M.P.C. standard by the American Psychiatric Association, the American Bar Association, and the American Medical Association all in the same year, 1983) led Congress to respond with a new statute.

a. **Terms of federal statute:** The new federal insanity statute, 18 U.S.C. § 17 et seq. (the Insanity Defense Reform Act of 1984), ***drastically narrows*** the insanity defense in federal criminal cases to essentially *M'Naghten* proportions.

   i. **General standard:** The defense is allowed only if the defendant "as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts" at the time of the offense. This is essentially the *M'Naghten* standard. Most importantly, the fact that the defendant may have been unable to "conform his conduct to the requirements of the law" (the "volitional" branch of the Model Penal Code standard) is ***not*** a basis for assertion of the defense under the new federal statute.

   ii. **Burden:** Whereas the burden of proof on insanity was previously on the prosecution, the new statute places ***upon the defendant*** the burden of proving his insanity by ***clear and convincing evidence.***

   iii. **Commitment and release:** After a federal insanity acquittal, the defendant is given a commitment hearing. If the crime charged was one of violence, the defendant has the burden of proving by clear and convincing evidence that his release would not be dangerous. If he cannot meet this burden, he is subjected to involuntary civil commitment, and can be released only upon findings by both the director of the mental institution then housing him and a judge that he is no longer dangerous. 18 U.S.C. §4243.

See generally Johnson, pp. 311-19.

H. Raising and establishing the defense: We examine now a number of procedural issues regarding the raising and establishing of the insanity

defense.

1. **Who raises defense:** Virtually all states have statutes making the insanity defense an ***affirmative defense;*** that is, the defendant is required to ***come forward with evidence*** showing that he is insane, before insanity will become part of the case. States vary as to how much evidence is necessary to meet this "burden of production"; in general, even the testimony of lay witnesses as to the defendant's bizarre conduct will be enough to place the defense into issue.

2. **Burden of persuasion:** Once the defendant has come forward with some evidence of insanity, he has met his burden of production. The issue then becomes who has the ***"burden of persuasion,"*** i.e., the burden of convincing the fact-finder on the insanity issue. In about half the states, the prosecution must prove ***beyond a reasonable doubt*** that the defendant is not insane. In the remaining states, the defendant bears the burden of persuasion, but only has to prove by a ***"preponderance of the evidence"*** that he is insane. The federal system requires the defendant to prove insanity by "clear and convincing evidence." See L, 375-76.

   a. **Constitutionality:** The Supreme Court has held that ***placing this burden upon the defendant is not unconstitutional.*** It is true that the Constitution requires that every "element of the offense" must be proved by the prosecution beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). But the Court has taken the position that the sanity of the defendant is not an "element of the offense." See *Patterson v. New York*, 432 U.S. 197 (1977), stating that "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence."

3. **When defense must be raised:** If the prosecution did not become aware of the defendant's intention to rely upon an insanity defense until the start of the trial itself, the prosecution's ability to rebut the defense effectively might be hurt. Therefore, nearly half the states have provisions which require the defense to ***notify*** the prosecution of

its intention to rely upon the insanity defense prior to the trial; sometimes this is done by making a special plea of "not guilty by reason of insanity."

a. **Model Penal Code:** The Model Penal Code, in § 4.03(2), requires that a written notice of intent to rely on the defense be filed at the time the "not guilty" plea is entered, or within ten days thereafter, unless the court gives a longer period "for good cause."

4. **Role of the jury:** If the case is tried before a jury, the jury will have the task of deciding the merits of the defendant's insanity defense, just as it will decide the other factual issues in the case. In most jurisdictions, the judge will instruct the jury that it is not to consider the insanity defense unless it finds that all material elements of the offense have been proved beyond a reasonable doubt by the prosecution, so that the choice is between conviction or an insanity acquittal.

   a. **Decision left to jury:** The courts have tried hard to ensure that the ultimate decision is in fact made by the jury, ***not by the psychiatric expert witnesses.*** The jury is always free to disregard or disbelieve the witnesses' evaluation of the defendant's condition. Also, it is always free to conclude that even though the defendant may have the requisite mental disease or defect, this did not prevent him from knowing "right from wrong," from controlling his actions, or whatever the relevant test in that jurisdiction is.

      i. **Federal law:** The federal insanity statute (the Insanity Defense Reform Act of 1984, see *supra*, p. 83) in fact ***prevents*** either side's expert from even ***testifying*** as to the ultimate issue of the defendant's sanity. The Act amends Federal Rule of Evidence 704 so as to read, "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." FRE 704(b). (This provision was found constitutional, as applied to the insanity defense, in *U.S. v. Freeman*, 804

F.2d 1574 (11th Cir. 1986).)

b. Telling jury about mandatory commitment: In nearly all jurisdictions, a defendant who successfully raises the insanity defense will be subject either to mandatory commitment or to procedures that are extremely likely to lead to commitment. The question has therefore arisen, should the jury be told that this is the likely result of an insanity verdict?

i. Traditionally jury not told: The traditional view has been that no mention should be made of the likely consequences of an insanity acquittal, on the grounds that the jury should not be distracted from their function.

ii. Jury told: But some modern cases have held otherwise. Thus in *Commonwealth v. Mutina*, 323 N.E.2d 294 (Mass. 1975), a case in which the jury was not told that commitment would almost certainly follow from an insanity acquittal, the appellate court held that the guilty verdict was in the face of overwhelming evidence of insanity, and that this verdict was probably "designed to ensure the confinement of the defendant for his own safety and that of the community."

5. Bifurcated trial: In a few jurisdictions, principally California, the issue of the defendant's guilt is tried in a ***different trial*** from that of his insanity. The first trial is on the guilt issue; if the verdict is "guilty," a second trial is held, with the same or a different jury, on the insanity issue. This approach supposedly has the merit of not distracting or misleading the jury with extensive testimony about the defendant's mental state, until guilt has already been decided. But this advantage has generally not materialized, since during the trial on the issue of guilt, often there will be extensive psychiatric testimony on the issue of whether the defendant had the requisite *mens rea* (e.g., the capacity to premeditate and deliberate). See L, p. 379.

6. Insanity defense as "all or nothing": Some states take the view that the defendant will be allowed to present evidence showing that he suffers from a mental disease or defect ***only if this is done pursuant to an insanity defense.*** See L, p. 391. This means for instance, that the defendant is not free to show that his extreme irrationality

prevented him from doing the requisite "deliberation" or "premeditation" required in most states for first-degree murder.

a. **Partial responsibility:** But most courts now accept the defense of "diminished responsibility," discussed *infra*, p. 89, by which evidence of mental disease or other mental condition may be accepted as showing that the defendant may not have the requisite *mens rea*, or that he should be subjected to a less severe punishment.

I. **XYY chromosome defense:** Studies done in the last few decades have shown that men whose chromosomes contain a certain abnormality (three sex chromosomes, one X and two Y's, rather than the usual X and Y) are much more likely to commit certain kinds of crimes than men whose chromosomes are normal. In particular, they commit crimes against property in extremely high proportions, and share other characteristics, including some degree of retardation, extreme height, and acne. A number of defendants have sought to introduce their chromosomal abnormality at trial, in support of an insanity defense. This is the so-called ***"XYY chromosome defense."*** See L, pp. 401-05.

1. **Sometimes accepted:** The XYY abnormality has been accepted in several countries other than the U.S. (including Australia and France) as evidence of insanity. In this country, however, only a very small number of cases have allowed such evidence to go to the jury. Most American cases that have considered the issue have held that the relation between XYY and criminal conduct are not sufficiently well-documented that the condition is probative evidence of the sort that a jury should hear.

2. **Relevance of insanity tests used:** The likelihood that a court will accept evidence of the XYY condition will be influenced by which test for insanity is in use in that jurisdiction. A jurisdiction following the *M'Naghten* rule, without an "irresistible impulse" addition to it, for instance, is very unlikely to accept evidence of the defect, since there is little reason to believe that the defect prevents the defendant from "knowing right from wrong." But where the "irresistible impulse" or "lack of substantial capacity to conform conduct to the law" tests are in use, the XYY defense will have a greater possibility

of success. See generally L, pp. 404-05.

J. Commitment following insanity acquittal: If the defendant is acquitted by reason of insanity, he almost never walks free out of the courtroom. In a minority of states and in the federal courts the judge is ***required by law*** to commit him to a mental institution (L, pp. 382-83), without even a hearing as to whether he is still insane. In other states, the trial judge or the jury must conduct a hearing to decide whether the defendant is still insane and in need of commitment. In a few states, the decision whether to seek commitment is left to the prosecutor.

1. **Constitutionality of mandatory commitment:** It is ***not unconstitutional*** for the state to impose ***mandatory commitment*** on an insanity acquittee, without any hearing as to whether he is still insane and in need of commitment. An insanity acquittal establishes that the defendant committed an act constituting a criminal offense, and that he did so because of mental illness. From these two facts, it is not unconstitutional for the state to ***infer*** that at the time of the verdict, the defendant is still mentally ill and dangerous, and thus may be committed. *Jones v. U.S.*, 463 U.S. 354 (1983).

2. **Release:** Since the substantial majority of insanity-acquitted defendants will be committed following their trial, either with or without a hearing, the main issue regarding commitment is the ***standard for release.*** The two factors usually considered are: (1) Does the defendant's insanity continue? and (2) Is the defendant dangerous to society? If the answer to both questions is "yes," the state will obviously keep the defendant committed; if the answer to both is "no," the state will obviously release the defendant. The interesting questions arise where the answer to one question is "yes" but the answer to the other is "no."

   a. **Sane but still dangerous:** Where the defendant is ***now sane,*** but ***still dangerous,*** a Supreme Court decision apparently means that the defendant must be ***released.*** In ***Foucha v. Louisiana,*** 112 S.Ct. 1780 (1992), the Court found unconstitutional (by a 5-4 vote) a Louisiana law that allowed an insanity acquittee to be kept in a mental hospital indefinitely, until he bore the burden of proving that he was no longer dangerous.

i. **Rationale:** The majority relied on several reasons for striking down the law, including the theory that since the insanity acquittee is not being punished (the insanity acquittal absolves him of criminal responsibility for his act), only reasons independent of punishment may justify commitment. Since D could not be ***civilly*** committed (the Court has held that this requires both a showing of dangerousness and of mental illness), and since no other rationale would justify depriving D of his liberty interest protected by the Due Process clause, he must be released despite his dangerousness.

ii. **Dissent:** The four dissenters in *Foucha* argued that where the defendant has been found to have committed the act in question, this fact justifies treating him differently from a person who has been civilly committed. In their judgment, this difference was great enough to justify holding the defendant while sane but dangerous, at least as long as the total period during which he was detained was not longer than the maximum sentence which he could have been given had he been convicted.

b. **Insane but not dangerous:** Similarly, it appears to be the case that the state may not continue to incarcerate a defendant who continues to be ***insane,*** but is ***not dangerous.*** *Foucha v. Louisiana, supra* (dictum by the majority).

c. **Summary:** In other words, it now seems to be the case that the state may automatically commit an insanity acquittee, but must then periodically offer him the opportunity to be released. The state must release D if he bears the burden of proving that he is ***either*** no longer insane or no longer dangerous. (Probably the state may not impose on the defendant any burden more difficult that the “preponderance of the evidence” standard.)

K. **Fitness to stand trial:** The insanity defense is actually asserted at trial much less frequently than it is asserted as a grounds for ***not trying the defendant*** on the grounds that he is ***incompetent to stand trial.*** In general, the defendant will be held to be incompetent to stand trial if he is unable to do both of the following: (1) understand the proceedings

against him; and (2) assist counsel in his defense. L, p. 353.

1. **Burden of proof:** Many jurisdictions place the ***burden of proof*** on incompetence upon the ***defendant,*** particularly where he is the one who raises the issue. The U.S. Supreme Court has held that it is ***not unconstitutional*** for the state to place upon the defendant the burden of proving by a preponderance of the evidence that he is incompetent to stand trial. See *Medina v. California*, 505 U.S. 437 (1992).

2. **Procedures following commitment:** If the defendant is found incompetent to stand trial, he is invariably committed, generally to a state mental institution. In the past, such commitment has tended to be ***indefinite*** in length, and frequently longer than the maximum sentence that could have been imposed had the defendant been convicted of the offense charged. However, in recent years, many courts, including the Supreme Court, have imposed various limits on the length and nature of the commitment, based on due process and equal protection grounds.

   a. **Must have some prospect of recovery:** The theoretical purpose of committing the incompetent defendant is to permit him to regain his ability to stand trial. Where there is no real prospect that the ability to stand trial will ever be regained, the Supreme Court has held that the defendant must either be ***released,*** or ***recommitted*** under the same ***civil commitment procedures*** as a defendant not charged with a crime. *Jackson v. Indiana*, 406 U.S. 715 (1972).

L. **Insanity at time set for execution:** If the defendant is insane ***at the time set for his execution,*** he may ***not*** be executed. (Obviously, this can only occur where the defendant has ***become*** insane since his trial; otherwise, he would have been entitled to an insanity acquittal.) The Supreme Court has held that execution of a prisoner who is currently insane violates the Eighth Amendment's ban on ***cruel and unusual punishment.*** *Ford v. Wainwright*, 477 U.S. 399 (1986).

Quiz Yourself on
THE INSANITY DEFENSE

16. Jack T. Ripper knows that killing a person is legally wrong.

Nevertheless, he slashes the throats of several prostitutes for the purpose of killing them. He does this because he believes that has been instructed by God to “kill all prostitutes — they are evil.” Jack tries to resist God’s instructions (because he really doesn’t enjoy the killing), but is powerless to prevent himself from obeying what he believes are God’s orders.

(A) Is Jack insane under the *M’Naghten* Rule?

(B) Is Jack insane under the federal insanity statute?

(C) Is Jack insane under the Model Penal Code?

(D) Under the federal insanity statute, which party (Jack or the prosecution) will bear the burden of (1) raising the issue of sanity; and (2) proving sanity/insanity?

Answer

16. (A) Probably not. Under the *M’Naghten* test, a defendant must show that on account of his mental disease, either: (1) he did not understand the “nature and quality” of his act; or (2) he did not know that his act was wrong. Ripper clearly does not qualify under (1), since he knows that he’s killing humans when he slashes throats. The interesting question is whether Ripper qualifies under (2). A court might hold that even though Ripper knew that what he did was legally wrong, his belief that God was commanding him to do the act prevented him from “knowing” that the act was “wrong” in the moral sense. However, it’s more likely — in view of the strongly law-and-order approach to insanity followed by most *M’Naghten* jurisdictions today — that a court would say that Ripper’s knowledge that the act was legally forbidden prevents him from qualifying under (2).

(B) **Probably not.** The federal insanity statute essentially follows the *M’Naghten* standard: D prevails only if he shows that “as a result of a several mental disease or defect, [he] was unable to appreciate the nature and quality or the wrongfulness of his acts.” Since D would probably lose under M’Naghten, he’d probably lose under the federal rule.

(C) **Yes.** M.P.C. § 4.01(1) provides that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to ***conform his conduct to the requirements of the law."*** Thus the M.P.C. incorporates both the *M'Naghten* test and a variant of the "irresistible impulse" test — D wins if he satisfies *either* test. Here, the facts make it clear that Ripper is powerless to avoid killing, and that he therefore "lacks substantial capacity ... to conform his conduct to the requirements of the law."

(D) **Jack as to both.** That is, Jack must first come forward with some evidence of his insanity even to make sanity part of the case. (This is true in nearly all states courts as well, by the way.) Then, Jack must prove, by ***"clear and convincing evidence,"*** that he is insane. (This is one of the ways in which the federal statute makes it much tougher for defendants to win on insanity than in state courts — nearly all states either put the burden of persuasion on the prosecution, or make the defendant prove insanity but only by a "preponderance of the evidence.")

II. DIMINISHED RESPONSIBILITY

A. Meaning of diminished responsibility: Many crimes are loosely said to be "specific intent" crimes; see *supra* p. 24. This is, they are defined in such a way that the defendant does not have the appropriate *mens rea* unless he has something more than a general wrongful intent. In most states, for instance, first-degree murder is defined so as to require the "willful, deliberate, and premeditated taking of another's life." If a defendant who is not insane nonetheless suffers from such a mental impairment that he is ***unable to formulate the requisite intent,*** in a substantial ***minority*** of states he may prove this, and thus avoid conviction of that particular offense. A defense made on these grounds is generally called the defense of ***"diminished responsibility"*** or ***"partial responsibility."*** L, p. 391.

Example: D is charged with first-degree murder, which is defined in the particular jurisdiction as a "willful, deliberate and premeditated killing." He seeks to prove that he has had a surgical lobotomy, as a result of which he does not have the mental capacity to form the required intent.

Held, D may be allowed to present psychiatric expert testimony to this effect. Psychiatric testimony is admissible on such questions as whether D was insane at the time of the crime. There is no good reason not to accept such testimony when it would tend to show that the accused lacked the ability to form the requisite intent. *Commonwealth v. Walzack,* 360 A.2d 914 (Pa. 1976).

1. **Effect is to reduce to lesser offense:** The vast majority of those cases allowing the defense of diminished responsibility have been in homicide cases, usually ones in which the defendant is charged with first-degree murder and attempts to reduce it to seconddegree by showing that he was incapable of the requisite premeditation. Accordingly, when the defense has been successful, it has resulted merely in the diminution of the offense from first-degree murder to second-degree, or from murder to manslaughter. This is because the lesser offense is usually a "lesser included offense," the elements of which are the same as the graver one except for the *mens rea.*

   a. **Defendant seldom goes free:** It is quite rare that successful use of the diminished responsibility defense allows the defendant to walk away free; where this would be the result of successful use of the defense, courts have sometimes refused to allow it, for this very reason.

2. **Special statutory provisions:** The term "diminished responsibility" or "partial responsibility" usually is used to refer to the judge-made doctrine whereby the defendant can use his mental impairment to establish that he did not have the requisite specific intent. But the same effect is sometimes given by express ***statutory provisions*** which allow or require the judge to take into account the defendant's mental impairment in deciding upon the severity of his offense. For instance, in New York the defendant may get a murder charge reduced to manslaughter if he acts "under the influence of extreme emotional disturbance." N.Y. Penal L. § 125.20(2).

B. **Insanity defense sometimes held to be superseding:** At least half of all American jurisdictions ***reject*** the doctrine of diminished responsibility. Usually, they do so by holding that ***no evidence*** that the defendant suffers from a mental disease or defect may be introduced, except pursuant to a ***formal insanity defense.*** L, p. 391.

1. **Practical consequence:** That is, in this large group of states, either

the defendant attempts to show that he is entitled to an insanity acquittal, or he will be held to be capable of formulating whatever specific intent is required for the crime, at least insofar as mental disease or defects are concerned. So in these states, the insanity defense ***"supersedes"*** the defense of diminished responsibility.

2. **State may constitutionally curtail expert evidence:** Other states let the defendant prove that his mental disease or defect prevented him from having the required specific intent, but forbid him from using ***expert psychiatric testimony*** to make that proof. The Supreme Court has held that it is ***not*** a violation of the defendant's ***due process rights*** for the state to prohibit the defendant from using expert testimony in this way. ***Clark v. Arizona,*** 548 U.S. 735 (2006).

   a. **Facts:** In *Clark,* D, a 17-year-old schizophrenic, drove his pickup truck, with loud music blaring, in a residential area of Flagstaff, Arizona. V, a Flagstaff police officer wearing a uniform and driving a marked patrol car, pulled D to a stop. D shot V to death. D was charged with first-degree murder, defined as intentionally or knowingly killing a law enforcement officer who is in the line of duty.

   b. **The proferred evidence:** At a bench trial, D admitted to shooting, but denied that he had the required specific intent to shoot a law enforcement officer or the knowledge that he was doing so. The prosecution offered various pieces of circumstantial evidence tending to prove that D intended to lure a police officer, and that D knew that V was one (e.g., that V was in uniform and driving a marked police car with emergency lights and siren, and that D stopped his car in response to these symbols of authority).

      i. **D's evidence:** D defended by means of both lay and expert psychiatric testimony tending to show that he thought Flagstaff was ***populated with aliens,*** including some who were ***impersonating government agents.*** D's psychiatric expert testified that D's paranoid schizophrenia made him incapable of luring V, or of understanding right from wrong.

      ii. **Rationale for not using evidence on mental state:** Although the trial judge allowed D to present the expert psychiatric

testimony described above, the judge ruled that D could *not* use this evidence for the purpose of disproving the *mens rea* for the crime, including the element that D knew V was a police officer. The judge seems to have correctly interpreted Arizona law as permitting psychiatric evidence to be used only for a full-fledged insanity defense, not as a method of disproving any specific mental state.

iii. **Due process claim:** On appeal, D claimed that Arizona's refusal to allow psychiatric testimony of mental disease to negate the specific intent for the crime violated his federal constitutional due process rights.

c. **Supreme Court agrees with prosecution:** The Supreme Court, by a 6-3 vote, agreed with the prosecution that there was ***no constitutional problem*** with Arizona's decision not to allow expert psychiatric testimony to be used for the purpose of disproving *mens rea.*

i. **Rationale:** The majority asserted that despite a defendant's general due process right to present favorable evidence, "the right to introduce relevant evidence can be ***curtailed*** if there is a ***good reason*** for doing that." Alternatively, a state may say that evidence of mental disease may be ***"channeled or restricted to one issue"*** (here, full-fledged insanity), if the reason for doing so is good enough. In the Court's view, the state had sufficiently good reasons for disallowing expert psychiatric testimony on *mens rea.*

(1) **Problems:** For example, the majority said, if expert psychiatric testimony were admitted on the issue of a defendant's capacity for forming a particular intent, that testimony would "require[] a leap from the ***concepts of psychology,*** which are devised for thinking about ***treatment,*** to the concepts of ***legal sanity,*** which are devised for thinking about ***criminal responsibility."*** So there is a "real risk that an expert's judgment in giving capacity evidence will come up with an apparent authority that psychologists and psychiatrists do not

claim to have." Therefore, Arizona had "sensible reasons" for limiting psychiatric mental-disease testimony to the issue of insanity, and those sensible reasons were enough to negate any constitutional problem.

d. Dissent: Three Justices dissented in *Clark.* They argued that the prosecution was constitutionally required to ***prove all elements*** of the offense beyond a reasonable doubt, and that Arizona's rule excluding psychiatric testimony on the issue of whether D had the capacity to lure a police officer, or the knowledge that V was a police officer, unconstitutionally ***relieved the state of its duty*** to carry that burden of proof.

C. Specific applications: As noted, the principal use of the diminished responsibility defense has been to reduce first-degree murder to second-degree, by a showing that the defendant was not capable of premeditation. But the defense has also been used in some other situations:

1. Murder reduced to manslaughter: The defendant may be allowed to show that he did not have the mental capacity to entertain ***"malice aforethought,"*** and thus cannot be convicted of even second-degree murder, so that his crime must be ***reduced to manslaughter.***

2. "Heat of passion" manslaughter: In nearly all states, the defendant may get a murder charge reduced to manslaughter on the grounds that he acted ***"in the heat of passion"*** under extreme provocation; the defendant may be allowed to present testimony of his impaired mental condition to show that he did indeed act in the heat of passion.

III. AUTOMATISM

A. Nature of automatism defense: We saw previously (*supra,* pp. 16-18) that the defendant has not committed a crime unless he has committed a ***voluntary act.*** There are certain mental or physical conditions which may, at least in the opinion of a doctor, if not a judge, be considered to prevent a defendant's act from being considered voluntary. An ***epileptic seizure*** is the most frequent example of such a condition. When the defendant argues that such a seizure or other condition has prevented his

act from being voluntary, he is asserting what is frequently called the defense of ***"automatism"*** (discussed briefly *supra*, p. 17).

B. Defense sometimes superseded by insanity: Just as some courts have refused to allow the defense of "diminished responsibility," on the grounds that this defense is superseded by the insanity defense (see *supra*, p. 90), so some jurisdictions have refused to allow the defense of automatism, on the grounds that any condition which affects the defendant's mind so as to render his conduct involuntary constitutes a mental disease or defect, which may be asserted only by use of the insanity defense.

C. Generally allowed in America: American courts have, in general, allowed the automatism defense as distinct from the insanity defense. This would seem to be the position of the Model Penal Code, which in § 2.01(1) and (2) prevents liability from existing where the defendant does not commit a "voluntary act," and defines "voluntary act" to exclude, *inter alia*, a "reflex or convulsion" and movement during "unconsciousness."

1. ***People v. Grant:*** A case from Illinois, which has enacted provisions substantially similar to those of the Model Penal Code with respect to both insanity and involuntary acts, upheld the automatism defense. In *People v. Grant*, 360 N.E.2d 809 (1977), the defendant claimed that prior to the aggravated assault with which he was charged, he suffered a "blackout," and that this was due to "psychomotor epilepsy." The appellate court held that he was entitled to have the jury instructed that he could not be convicted if his act was not "voluntary," and that his defense could be asserted apart from the insanity defense (which he also asserted).

2. **Sleep disorder:** Some courts have allowed the automatism defense where the defendant shows that his act was involuntary due to a ***sleep disorder,*** such as sleep deprivation or sleepwalking. See, e.g., *McClain v. State*, 678 N.E.2d 104 (Ind. 1997) (D is entitled to present expert testimony that his assault on a police officer was involuntary due to his sleep disorder and consequent dissociative state).

3. **Premenstrual Syndrome defense:** It has been argued that the automatism defense should be allowed to women defendants who can

show that they were unable to control their actions at the time of the crime because of ***Premenstrual Syndrome,*** or PMS. L, p. 407. Apparently no American court has allowed the defense.

4. Post-traumatic stress disorder: Similarly, a defendant suffering from ***post-traumatic stress disorder,*** or PTSD, might be able to use this disorder to support an automatism defense. L, p. 407. A Vietnam veteran suffering from PTSD as the result of combat trauma might, for instance, argue that the resulting nightmares, reduction in emotional response, memory loss, loss of sleep, etc., entitle him to an acquittal on grounds of automatism.

D. Not necessarily subsumed within insanity defense: Just as many states bar the separate defense of diminished responsibility and subsume it within insanity, so some courts have done with automatism. But most allow automatism to be asserted as a ***separate non-insanity defense,*** at least where the automatism does not seem to be due to some sort of mental illness or deficiency.

> **Example:** D claims that his assault on a police officer was involuntary, because he was suffering from a dissociative state caused by extreme sleep deprivation. The prosecution argues that such a defense is a species of the insanity defense, and is therefore barred in this case because D has not given the required pre-trial notice of an intent to raise an insanity defense.
>
> *Held,* for D. While automatistic behavior *could* be caused by insanity, unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind. Here, D is claiming automatism manifested in a person of sound mind. An important aspect of the insanity defense is to ensure that mentally-ill criminal defendants receive treatment (by commitment to a mental institution) for their condition, a purpose not applicable to automatism. Therefore, "[M]erging the automatism and insanity defenses could result in confinement, at least temporarily, not of the insane but of the sane." Consequently, D may proceed with his automatism defense without conforming to the rules on the insanity defense. *McClain v. State,* 678 N.E.2d 104 (Ind. 1997).

IV. INTOXICATION

A. The problem generally: A defendant who at the time of a criminal act was ***intoxicated,***either from alcohol or drugs, may make several different kinds of arguments as to why his intoxication should constitute a defense.

1. Voluntarily induced: If the intoxication was ***"self-induced,"*** he may argue: (1) that he would not have committed the crime if he had not

been intoxicated, and therefore that he should not be punished merely because he was drunk; (2) that his intoxication prevented him from having the requisite *mens rea* for the crime; or (3) that as a result of his intoxication, he did not "know right from wrong," and should therefore be treated like an insane person.

2. **Involuntary:** If, on the other hand, the intoxication was ***"involuntary"*** (a term of art including not only cases of duress, but also cases in which the intoxication was not foreseeable even though the ingestion of alcohol or drugs was intended), the defendant may argue that this fact alone prevents him from having committed a voluntary act, and that he is therefore not liable for any crime.

3. **Balancing of interests:** All of these arguments are frowned on by the courts, but the defendant's chances are significantly better in the case of involuntary intoxication. The courts have strived to reach a balancing between society's interest in not having intoxicated defendants commit antisocial acts, and the fundamental principle of the criminal law that a person should not be convicted for conduct unless he had the appropriate mental state *(mens rea).*

B. Voluntary intoxication: ***Voluntary self-induced intoxication*** does ***not "excuse"*** criminal conduct, in the same way that, say, self-defense or duress might constitute excuses. To take the clearest example, if the defendant decides to rob a bank, and voluntarily takes several drinks to increase his courage, the fact that he may be legally intoxicated when he actually commits the robbery will have absolutely no mitigating effect.

1. **Effect upon mental state:** However, the defendant's intoxication may, rather than constituting an "excuse," ***negative the required mental state,*** and therefore prevent an element of the crime from existing at all.

   a. **States free to "opt out" of allowing this type of evidence:** Although evidence of voluntary intoxication could prove that the defendant did not possess the required mental state, states are free to legislate that such evidence shall be excluded. The Supreme Court has held that this type of statute ***does not violate*** the 14th Amendment's Due Process clause. *Montana v. Egelhoff,* 518 U.S. 37 (1996).

b. "Specific intent" crimes: The mental state required in many of the common-law crimes is somewhat ill-defined, so that it has often been hard to identify the precise mental state required, and therefore to evaluate the defendant's contention that intoxication prevented him from having that mental state. Accordingly, courts have tended to divide crimes into those requiring ***"specific intent,"*** usually defined to mean an intent to do an act other than the *actus reus* (e.g., in burglary, the intent to commit a felony) and those requiring only ***"general intent."*** (See *supra*, p. 24, for more about this distinction.) As to specific-intent crimes (but *not* general-intent ones), courts have generally held that intoxication is ***admissible to show that the defendant lacked the specific intent in question.***

Example: D gets into a car accident in a National Park, and is arrested by two federal Park Rangers, who conclude that he is drunk. D resists the arrest, attacks the Rangers, and threatens to shoot them sometime in the future. D is charged with (1) a violation of 18 U.S.C. § 111 (making it a crime to attack or resist a federal employee who is performing his duties, essentially a form of simple assault); and (2) a violation of 18 U.S.C. § 115 (threatening to assault a U.S. employee for the purpose of impeding or retaliating for the employee's performance of his duties). The trial judge prevents D from putting on a defense of voluntary intoxication to either charge. D is convicted on both charges.

Held, D was improperly convicted on the § 115 charge, but not the § 111 charge. The § 111 charge was for a *general*-intent crime: the only intent by D that the prosecution was required to prove was that D intended to assault or intimidate someone who was in fact a U.S. employee. Therefore, voluntary intoxication would not have been a valid defense to the § 111 charge, and the trial court did not err in refusing to allow D to put on that defense. But the § 115 charge was for a *specific-intent* crime: for this charge the prosecution was required to prove not only that D threatened to assault the Rangers, but that he made this threat for the specific purpose of interfering with or retaliating for the Rangers' performance of their official duties. D was entitled to show that even though his intoxication was voluntary, he was too drunk to form the requisite specific intent to interfere or retaliate. Therefore, he is entitled to a new trial on the § 115 charge. *U.S. v. Veach,* 455 F.3d 628 (6th Cir. 2006).

i. Categories abandoned: Many modern courts have come increasingly to feel that the broad labels "specific intent" and "general intent" are really *conclusions,* and that the decision whether to recognize intoxication as a defense is better made on a crime-by-crime basis. Courts now usually do this by looking at the ***precise mental state*** required in the definition of the crime, and determining whether this has been negated by

intoxication.

(1) Model Penal Code approach: Thus the Model Penal Code, in § 2.08(1), provides that self-induced intoxication "is not a defense unless it ***negatives an element of the offense."***

ii. ***People v. Hood:*** Similarly, the Supreme Court of California has rejected the significance of the labels "specific intent" and "general intent," at least as these concern the crime of "assault with a deadly weapon." In *People v. Hood,* 462 P.2d 370 (Cal. 1969), the court held that intoxication should not be allowed as a defense to a charge of assault with a deadly weapon; this conclusion was reached not by characterizing such assaults as being crimes of "specific intent" or "general intent," but rather because it would be "anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are ***so frequently committed in just such a manner.***"

2. **Recklessness:** With respect to those crimes that have traditionally been called crimes of "general intent," the defendant's ***recklessness*** has usually been enough to ***meet*** the *mens rea* requirement, and a purposeful or knowing act has not usually been required. For instance, the crime of battery is defined so as to require merely the reckless disregard of the risk of inflicting bodily harm on another. In cases of intoxication, courts have further decided, generally, that ***intoxication will never be considered to negate the existence of recklessness.*** The consequence of this is that intoxication ***will not negate the mens rea*** of crimes that may be committed through recklessness.

a. **Model Penal Code agrees:** The Model Penal Code agrees that drunkenness may not negate recklessness. M.P.C. § 2.08(2). Since acting "recklessly" is defined in § 2.02(2)(c) of the Code as occurring when a person "consciously disregards" a high risk of harm, the rule on drunkenness is clearly a special exception to the definition of recklessness, because the drunk defendant will often simply not be aware of the high risk that his conduct poses.

i. **Rationale:** The Code draftsmen decided that such a special

rule was not only well-recognized, but justified: "awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that it is not unfair to postulate a general ***equivalence*** between the ***risks created by the conduct*** of the drunken actor and the risks created by his conduct in ***becoming drunk."*** Furthermore, a contrary rule would force the prosecution to show that the defendant consciously disregarded the high risk of danger at the time he became drunk, and this would frequently be extremely difficult to prove. Comment 1(d) to M.P.C. § 2.08.

ii. **Relation to crimes of "general intent":** The Code provision concerning intoxication and recklessness is quite significant, because under Code § 2.02(3), if a crime defined in the Code or elsewhere contains no provision as to the requisite mental state, that mental state may be established by showing that the defendant acted "purposely, knowingly or recklessly" with respect to the element in question. For instance, the Code definition of "rape," in § 213.1(1), does not mention any requisite mental state with respect to either the act of intercourse, or the woman's lack of consent. Thus if a rape defendant drunkenly believes that the woman is consenting, when she is not, intoxication would not be a defense, at least in those situations where he would have realized the lack of consent had he been sober.

3. **Murder:** For garden-variety ***murder,*** D's intoxication will ***rarely*** negate an element, because murder is a crime that can be supported by a ***variety of mental states,*** and some of these are unlikely to be negated by intoxication. Thus if D, despite his drunknenness, either (1) acted with reckless indifference to the possibility of V's death ("depraved-heart" murder; see *infra*, p. 252), or (2) desired to cause V serious bodily injury (see *infra*, p. 251), the fact that the drunkenness prevented D from desiring V's death won't negate his guilt of murder.

Example: D has enough drinks to raise his blood-alcohol level to twice the legal limit. He then drives his car through Times Square at rush hour, knowing that his coordination is badly impaired. He runs over V, killing him. A trier of fact could quite plausibly conclude that D has displayed reckless indifference to the value of human

life, notwithstanding his lack of intent to kill. If so, D's voluntary intoxication would not prevent his guilt of the reckless-indifference form of murder.

a. **Attendant circumstances:** Intoxication might cause D to be confused about the ***"attendant circumstances,"*** but not prevent D from intending to kill what D knows is a person. Such an intoxication-induced ***mistake*** about the surrounding circumstances will typically ***not negate*** any element of the crime of murder.

i. **D falsely believes he's being attacked:** For instance, D's intoxication may cause him to believe that he's being ***attacked*** when he's not. D's intoxication will not help him in this situation, because an unreasonable belief in the need for self-defense does not negate any element of any common-law crime. (See *infra*, p. 122.)

Example: D is walking down the street, very drunk. V, a police officer, approaches him. D unreasonably, because of hallucinations brought on by his intoxication, believes that V is about to try to kill him with a knife. Therefore, D shoots V to death to prevent being killed himself.

D can be convicted of murder. D's intoxication will not negate the mental state required for murder. D had an intent to kill the person who was approaching him, and the fact that he was wrong about the need for self-defense won't change that. (Indeed, because self-intoxication is viewed as being reckless, D's mistaken belief in the need for self-defense won't even qualify him for the lesser charge of voluntary manslaughter on an "imperfect self-defense" theory; see *infra,* p. 128.)

4. **Negligence:** Not surprisingly, intoxication is also not accepted to negate ***criminal negligence.*** The usual definition of criminal negligence does not include a requirement that the actor be aware of the risk that he has created (so long as he ***should*** be aware of that risk), so no special rule or exception is required to prevent drunkenness from negating negligence.

C. **Involuntary intoxication:** If the defendant is fortunate enough to be able to show that his intoxication was not "self-induced" and "voluntary" but rather, ***"involuntary,"*** he is much more likely to be able to make good use of it in defending a criminal charge. The principal benefit to him is that not only may the intoxication negate a specific mental element of the crime, but it may also amount to an ***insanity defense,*** if it prevented him from "knowing right from wrong," "being substantially able to conform his conduct to the requirements of the

law," or whatever formulation of the insanity defense is in use in the particular jurisdiction.

1. **Several kinds of involuntary intoxication:** Courts have recognized several kinds of situations in which the defendant's intoxication will be held to have been "involuntary."

   a. **Duress:** The defendant's intoxication is involuntary if he ingested the drugs or alcohol only ***under duress.***

      i. **Narrow definition:** Courts have traditionally taken a quite restricted view of what constitutes duress. The Model Penal Code, for instance, would allow the defense only where the defendant was subjected to the actual or threatened use of force "which a person of ***reasonable firmness*** in his situation would have been unable to resist." (M.P.C., § 2.09(1)). Thus if the defendant goes out with friends, who insist that he take a drink, and who threaten to ostracize him if he doesn't, his intoxication would almost certainly not be "involuntary."

   b. **Mistake as to nature of substance:** If the defendant intentionally ingests a substance, but ***mistakenly believes that it is not intoxicating,*** he may be able to have this considered "involuntary" intoxication. But his mistake must be a ***reasonable*** one.

      i. **Strict definition of "mistake":** Also, the defendant will not generally be entitled to use the "mistake" doctrine merely because he did not know the *precise* qualities of the substance he was taking, if he did know that the substance had *some* kind of intoxicating nature.

   c. **Pathological response:** A final kind of involuntary intoxication occurs when the defendant knowingly takes a relatively small amount of intoxicant, but because of an ***abnormal sensitivity*** that he was not aware of, his reaction is much ***more severe*** than it would be for a normal person. Such intoxication is often called ***"pathological intoxication"*** See M.P.C. § 2.08(5)(c). Thus if the defendant knows that one can get drunk on alcohol, but has never taken a drink, and upon taking his first drink is driven into a murderous frenzy due to his unknown and abnormal sensitivity to

it, he will be treated as involuntarily intoxicated, and therefore eligible for the insanity defense.

D. Alcoholism and narcotics addiction: If the defendant is a ***chronic alcoholic,*** or a ***narcotics addict,*** he may make the argument that he had reached a point where even taking the first drink of the day, or the first "fix," is no longer a matter of choice but of physical compulsion stemming from disease. If he were able to succeed with this argument, he would then presumably be entitled to be treated as "involuntarily" intoxicated, and therefore eligible for the insanity defense.

1. **Defense not well-accepted:** But courts have not been sympathetic to this approach. For one thing, it is very hard to convince a court that the defendant has literally no free choice whether to take that first fix or drink of the day. For another, the anti-social behavior engaged in by such defendants, particularly narcotics addicts, is so great that there is great judicial fear of opening the door to such claims. See L, p. 423.

2. **Crimes committed to gain funds:** Some defendants have gone even farther, and have claimed not that their addiction or alcoholism rendered them insane, but that they committed crimes ***to gain funds to avoid withdrawal symptoms.*** Such a defense has apparently never succeeded, and is not likely to. Courts are all too aware of the large number of crimes that are committed under precisely these circumstances.

   a. **The *Moore* case:** Thus in *U.S. v. Moore,* 486 F.2d 1139 (D.C. Cir. 1973), D, charged with possession of heroin, argued that he had "lost the power of self-control with regard to his addiction," and therefore should not be responsible for possession. The court rejected his contention, stating that if absence of free will would excuse possession of the addicting drugs, "the more desperate bank robber for drug money has an even more demonstrable lack of free will" derived from the same factors that, according to D, should absolve the mere possessor. Accordingly, the court decided, D's addiction, and loss of control, was a self-induced disease, and therefore not exculpating.

3. **Constitutional arguments:** Addicts and alcoholics have also made

constitutional arguments stemming from the alleged compulsory nature of their intoxications. These arguments have received some, but not much, sympathy from the Supreme Court. The two principal cases governing the constitutionality of punishing behavior related to alcoholism and addiction are *Robinson v. California* and *Powell v. Texas.*

a. ***Robinson:*** In *Robinson v. California,* 370 U.S. 660 (1962), the Supreme Court held that it was an unconstitutional cruel and unusual punishment to make it a crime for a person to "be addicted to the use of narcotics." The Court made a number of arguments in support of this holding, but, at least according to later decisions by the Court, the principal basis was that this statute punished "status" as opposed to "conduct." (See *supra,* p. 16.)

b. ***Powell:*** The Court subsequently refused to extend the rationale of *Robinson* to situations involving crimes requiring some affirmative conduct, not mere "status" as addict or alcoholic. In *Powell v. Texas,* 392 U.S. 514 (1968), the defendant was convicted of being found in a state of intoxication in a public place. The Supreme Court held (by a 5-4 vote) that the defendant had not been punished for "status," but for the act of appearing drunk in public, and that *Robinson* therefore did not control. The Court rejected the defendant's contention that his conduct consisted merely of the natural result of his "compulsion" to drink; the Court relied first on the absence of any evidence showing that the defendant was powerless to resist taking the first drink, and also on the principle that there should be no constitutional doctrine of *mens rea* or *actus reus* (i.e., that such matters are better left to the individual states).

Quiz Yourself on
INTOXICATION

17. Hansel goes to the local tavern one night and ties one on. He stumbles out, and drives away. Hansel then forcibly opens the door to Witch Hazel's house, believing it's his own (which is really one block over in their development of nearly-identical tract homes). When Witch

Hazel walks into the room Hansel thinks she's a burglar and beats her up. Hansel is criminally charged with both burglary and battery. Burglary is defined in the jurisdiction as an intentional entry into the dwelling of another at night, with an intent to commit a felony therein. Battery is defined as intentionally or recklessly causing a harmful or offensive contact with the body of another. To which (if either) of these two charges — burglary and battery — will Hansel's intoxication be a defense?

18. Popeye spends the afternoon drinking in a bar and gets plastered. As he is leaving to go home, he encounters Brutus, who approaches him while waving his arms wildly to swat away a fly. Popeye, believing that Brutus is going to attack him, picks up a bar stool and hits Brutus over the head with it. (A sober man in Popeye's position would not have believed that Brutus was attacking him.) Can Popeye successfully plead self-defense?

19. Othello has for some time suspected that his beloved wife Desdemona may have been unfaithful to him. One evening he gets quite drunk at a neighboring tavern, and then comes home to discover that his wife's favorite handkerchief is missing. As the result of Othello's drunken logic (plus a little help from his evil friend Iago, who has planted the idea of Desdemona's infidelity in Othello's head), Othello incorrectly believes that the missing handkerchief is proof that Desdemona has cheated on him. He kills Desdemona in a jealous rage. Assume that a sober man in Othello's position would not have believed that the missing handkerchief suggested anything about Dedemona's fidelity. Assume further that where a man reasonably believes that his spouse has been unfaithful, his killing of the spouse in a fit of jealous rage may be reduced from murder to manslaughter. May Othello successfully plead manslaughter on these facts?

Answers

17. It will be a defense to burglary but not to battery. First, let's consider burglary. Voluntary intoxication can be a defense to crimes requiring intent or knowledge (beyond the intent to do the *actus reus*

itself), if the intoxication prevented defendant from forming the mental state necessary. Burglary requires an intent to enter another's dwelling plus an intent to "commit a felony therein." Hansel did not have the intent to enter another's dwelling, and he certainly didn't have any intent (at the time of entry) to commit a felony inside the dwelling. So his intoxication, although voluntary, prevented him from having the mental state needed for burglary.

Battery, on the other hand, is defined quite differently with respect to the required mental state. As the question stipulates (and in this, the stipulation matches the law of most states), battery can be committed either by intending to commit a harmful/offensive contact, or by recklessly committing such a contact. Virtually all states (and the M.P.C.) agree that voluntary intoxication will never negate the existence of recklessness. In a sense, Hansel's recklessness in getting drunk will "carry over" and be deemed recklessness existing at the time of the attack on Witch. Therefore, Hansel meets the mental-state requirement for battery (reckless infliction of a harmful or offensive contact) even though his mistake about whether Witch was a burglar was caused by his intoxication.

18. **No.** The test for self-defense is an objective one: whether a reasonable, *sober* person would have believed that self-defense was necessary. It is irrelevant that Popeye's intoxication made him believe self-defense was necessary.

19. **No.** The lesser crime of manslaughter is defined so as to include an *objective* component: the provocation must have been such as would cause an ordinary "reasonable" person in the defendant's position to lose control. The ordinary reasonable person is presumed to be a *sober* one. Therefore, the fact that Othello's intoxication made him unable to rationally process the information won't help him.

V. INFANCY

A. Common-law treatment: An extensive discussion of the law governing ***minors*** accused of crimes is beyond the scope of this outline. In general, it may be said that the common-law view of the criminal capacity of children is as follows:

1. **Under seven:** Children under seven are conclusively presumed to have no criminal capacities;

2. **Between seven and fourteen:** Children between seven and fourteen are presumed to have no criminal capacity, but this presumption may be rebutted by a showing of malice or awareness of the wrongfulness of the conduct (e.g., attempting to conceal a crime);

3. **Over fourteen:** Children over the age of fourteen are treated the same as adults for purposes of criminal capacity.

B. Effect of legislation: But legislation in almost every state has made the importance of these common-law rules much less great. First, many states have raised the minimum age of responsibility, which in some states is now as high as sixteen. Even more significantly, almost all states have enacted ***juvenile court legislation,*** in which youths who have committed acts that would be crimes if committed by adults are handled in juvenile court, and may be sent to reformatories.

1. **Constitutional issues:** The use of juvenile court proceedings has raised a number of constitutional questions on which the Supreme Court has spoken.

   a. **Due process rights:** The juvenile offender, if charged with an act that would be a crime if it were committed by an adult, has the right to ***adequate written notice*** of the charge, the right of representation by ***counsel,*** the privilege against ***self-incrimination,*** and the right to ***confront witnesses.*** *In Re Gault,* 387 U.S. 1 (1967). The state must meet the "beyond a reasonable doubt" standard of proof. *In Re Winship,* 397 U.S. 358 (1971).

Exam Tips** on* ***RESPONSIBILITY

Many exam questions involve issues of insanity or intoxication. So always be attuned to the possibility of a defendant raising these defenses.

Insanity

- Don't come to a quick conclusion that a defendant is legally insane just because the fact pattern depicts outlandish behavior by her. Always check the jurisdiction's definition of insanity and analyze carefully the behavior against the required elements.
  - ***M'Naghten* test:** *M'Naghten* is the test most frequently used on exams. Remember, D meets the test if *either* he (1) didn't ***know the nature and quality of the act*** he was doing; or (2) he didn't know that what he was doing was ***wrong.***Key things to look for:
    - **When the insanity occurs:** Make sure the elements of the test were present ***at the time of the offense*** in question. *Trap:* Don't be fooled by a fact pattern that tells you that D has already been declared insane in another case or at another time — this doesn't matter. Nor is it enough that D has been diagnosed with "mental illness."
    - **"Understood that act was wrong" prong:** Look in the fact pattern for information indicating that this prong was satisfied, such as that D knew his conduct to be "unlawful" or knew that he could be imprisoned for it. Conversely, look for objective signs that D was ***unaware*** of the wrongfulness of the act.

    Example: D, who has been previously diagnosed with schizophrenia, strangles his fiancee, Marie. Just before he does that, he says to his psychiatrist, "I'm being stalked by a robot who's hidden Marie and impersonated her. I've got to disable the robot by strangling it, and then I'll work on finding Marie." You should say that if D was telling the truth to his psychiatrist, this is a strong indication that he didn't understand that he was killing Marie, and that he thought instead that he was disabling a robot. In that case, he'd qualify under the "didn't know that what he was doing was wrong" prong (and also the "didn't know the nature and quality of the act" prong) of *M'Naghten.*

    - **"Understood the nature and quality of the act" prong:** This prong is usually held to be satisfied if D merely understood the physical consequences of his act — the fact that D had some crazy motive for doing the act won't help him.
      - **Delusions:** This principle is often shown by fact patterns

involving ***delusions.*** If the delusion just relates to D's motive for the act, and doesn't prevent D from understanding both that his act is illegal and that it will have certain physical consequences, then D can't take advantage of *M'Naghten,* in most states.

Example: D is mentally ill, and, as a result, believes that his wife W is building a bomb in the basement of their house and that she plans to blow up the world. Although he knows that he could be punished for murder, he pushes W down a flight of stairs in order to save the world by killing her. D's delusion probably won't help him under *M'Naghten*, because D understood that pushing W down the stairs was illegal and would probably kill her. The fact that D had what he thought was a good motive (save the world) won't make a difference.

☞ **"Irresistible impulse" test:** If the fact pattern doesn't specify what insanity test applies in the jurisdiction, consider whether ***irresistible impulse*** might produce a different result on your facts than *M'Naghten.* Generally, for irresistible-impulse to apply, the fact pattern will have to signal to you that D feels powerless to stop even though he realizes what he's doing is wrong. *(Example:* D, who's very religious, hears God telling him to kill his wife — if the trier believes this, irresistible-impulse probably applies.)

☞ **Diminished capacity:** If an insanity defense is likely to fail, consider the defense of ***diminished capacity.*** A defendant in a specific intent crime may negate the specific intent element by claiming that he had a mental defect that prevented him from forming the required *mens rea.* This defense is usually used to reduce a charge from murder to voluntary manslaughter.

Intoxication

☛ Often a fact pattern will indicate that a defendant has been drinking or taking drugs. In the usual case, the intoxication will be ***"voluntary,"*** and the basic discussion below assumes that this is so.

☞ **Specific mental state:** Most important, figure out whether the intoxication ***blocked the defendant from forming the requisite mental state.*** If it did, the intoxication will require a finding of not guilty. In deciding this issue, the classic general-

intent/specific-intent distinction isn't dispositive, but it still has some value.

- ☞ **General intent:** Where the crime is a so-called ***"general intent"*** crime — i.e., the only intent needed is the intent is to do the *actus reus* — voluntary intoxication usually ***won't*** prevent the requisite intent from being formed. (But this is just a generalization, and isn't always accurate.)

Example 1 — Sexual assault: D rapes V — the only intent needed is the intent to have intercourse, and intoxication probably won't negate that intent. (Intoxication that prevents D from *noticing that V isn't consenting* won't negate the requisite intent).

Example 2 — Battery: D physically attacks V — the only intent needed for battery is intent to make harmful contact, and intoxication that makes D belligerent (or that causes him to be insulted where a sober person wouldn't be) isn't inconsistent with that intent.

- ☞ **Specific intent:** Where the crime is a so-called ***"specific intent"*** crime (i.e., the intent needed is something beyond the mere intent to do the *actus reus),* voluntary intoxication is ***more likely to block*** the requisite intent. So analyze D's state of mind closely against *all* mental elements.

Example 1 — Pre-meditated murder: If D is very drunk, his intoxication may have prevented him from doing the requisite pre-meditation. (But check to make sure he didn't do the pre-meditating before he got drunk, in which case he meets the requirement even if he was incapable of still pre-meditating just before the killing.)

Example 2 — Attempted murder: If D is very drunk, his intoxication may have prevented him from being able to form the intent to kill. So for instance, if D shoots towards V and misses, his drunkenness may establish that he couldn't have formed the intent to kill V.

Example 3 — Larceny: If D is so drunk that he didn't know the property he was taking belonged to another, the requisite intent (to wrongfully take property of another) will be missing.

- ☞ **Murder:** In a ***murder*** case, for two reasons you should start from the assumption that intoxication will ***not negate*** the required mental state.
  - □ First, remember that in states following the general-/specific-intent distinction, murder is classified as a *general*-intent crime, where voluntary intoxication never

supplies a defense.

□ Second, even where the state *doesn't* make the general/specific distinction, murder can be committed with a ***variety of mental states*** (e.g., intent to kill, depraved indifference to the value of human life, intent to commit serious injury), and intoxication usually won't prevent all of these mental states from existing.

Example: D, who's very drunk, nonetheless forms the intent to kill V. Even in a state rejecting the general/specific-intent distinction, D will be guilty of murder despite the fact that his drunkenness prevented his usual internal psychological controls from operating — he formed the intent to kill, and that's enough. (This assumes that the requirements for a downgrade to involuntary-manslaughter aren't met.)

☞ **Involuntary intoxication:** Look out for facts suggesting ***"involuntary"*** intoxication. This occurs most often where either: (1) D is mistaken about the nature of what he's taking (e.g., he doesn't realize there's LSD in the fruit punch); or (2) D knowingly takes a small quantity of a psychoactive substance, but has a grossly excessive, unpredictable reaction to it (e.g., D gets totally drunk and enraged the first time he has a single drink). Here, if D was not reckless in ingesting the substance, he may be able to avoid meeting the mental state for any crime requiring recklessness or intent.

☞ **Wanton or reckless:** But in any involuntary-intoxication case, analyze the facts to determine whether the defendant's actions in ingesting the substance may be considered reckless or wanton. If they are, the wanton or reckless state of mind may be enough for the crime.

Example: D suffers from paranoid schizophrenia that becomes acute whenever he drinks an excessive quantity of alcohol. D drinks five glasses of beer while having lunch with his friend, F, at a bar/restaurant. F insults D and D shouts that he will kill him. D leaves the bar, comes back with a gun, and shoots F. D may well be deemed to have been intoxicated and unable to form the requisite *mens rea* for premeditation-style murder. But if he knows that his paranoia spikes whenever he drinks and often causes him to attack others, you could argue that by the mere act of drinking heavily, D acted with wanton indifference to the safety of others. Therefore, he might be guilty of wanton-indifference-to-the-value-of-human-life murder.

On the other hand, if D had no history of violent behavior as a

consequence of his condition, his conduct would probably rise at most to the level of recklessness, in which case he couldn’t be convicted of any crime more serious than involuntary manslaughter (for which recklessness meets the mental-state requirement).

CHAPTER 5
JUSTIFICATION AND EXCUSE

Introductory note: Grouped within this chapter are a number of affirmative defenses (that is, defenses as to which, generally, the defendant must bear the burden of proof) that will allow the defendant to escape conviction, even though the prosecution may be able to prove all the elements of the crime. These defenses are: (1) ***duress;*** (2) ***necessity;*** (3) ***self-defense;*** (4) ***defense of others;*** (5) defense of ***property;*** (6) ***law enforcement*** (arrest, prevention of crime and escape); (7) ***consent;*** (8) ***maintenance of authority;*** and (9) ***entrapment.*** While the underlying rationale varies somewhat from defense to defense, there are two recurring reasons for exculpating the defendant: (1) because his conduct was a choice of the lesser of two evils; and (2) because his conduct, even if not a choice of the lesser of two evils, was all that a person of ordinary firmness or courage would do in the situation.

I. GENERAL PRINCIPLES

A. Justification vs. excuse: Courts occasionally denominate some of the defenses discussed in this chapter as being "justifications," or, on the contrary, "excuses." Thus the defense of "necessity" *(infra,* p. 111) is usually thought to be a justification, whereas duress is generally thought of as an excuse. The theory behind the two labels is that "justification" applies where the defendant took the better, more socially useful, and morally defensible of two actions; "excuse" applies where he did not necessarily do so, but did all that he could have been expected to do. For instance, if the defendant is forced by terrorists to join in a bank robbery or else be killed, his doing so would be "excused," not "justified," under the doctrine of duress.

1. **Significance of distinction:** Generally, there is no great significance to the distinction. However, it has been suggested that a claim of justification is transferable to a third party, whereas a claim of excuse is not. Suppose that a starving woman steals bread to feed herself and her child; if her claim of necessity is a justification, then a third person ought to be able to take the bread on her behalf. But if her conduct is merely excused, then the defense would be personal to her, and a third person could not commit the act for her and claim the defense. See Fletcher, pp. 761-62. It is not clear that courts would recognize this distinction, however.

B. Effect of mistake of fact: One problem that arises with respect to almost all of the defenses in this chapter is the ***effect of a mistake of fact***

by the defendant. That is, if the defendant is mistaken about the need for, say, self-defense, does he lose his right to assert that defense? The courts have frequently divided the problem into two categories: (1) the effect of a reasonable mistake; and (2) the effect of an unreasonable one.

1. **Common-law approach has no unified rule:** In general (but not always), the common-law approach has been that a reasonable mistake will not negate the privilege. (But see the privilege of arrest, and that of prevention of crime by private citizens, both of which are voided by a reasonable mistake; *infra,* p. 136). An ***unreasonable*** mistake, however, will negate virtually all of these defenses, under the common law.

   a. **Criticism of rule:** Requiring the defendant not to make an unreasonable mistake has often been criticized, on the grounds that it may allow the defendant to be convicted of a crime requiring intent (e.g., first-degree murder) when his only relevant mental state was negligence. For instance, suppose the defendant is somewhat stupid and somewhat paranoid, and he reasonably believes that X, his acknowledged enemy, who has reached into his pocket, is about to shoot him. If in reality, X is merely reaching for a handkerchief, and D fatally shoots him in "self defense," under the common-law rule his negligent mistake is wiped out — the case is treated as if D behaved maliciously. This result has seemed to many to be unjust.

      i. **Model Penal Code view:** Accordingly, the Model Penal Code requires, as to all the defenses discussed here, merely that the defendant really believe ***(whether reasonably or not)*** that the facts are such that the defense is merited. The only exception to this rule is that, if the defendant is prosecuted for an act that may be committed "recklessly" or "negligently," he will lose the defense if his mistake was "reckless" or "negligent," as the case may be. M.P.C. § 3.09(2).

Example: Consider the hypothetical given above, in which D fatally shoots X, in the unreasonable and mistaken belief that X was about to kill him. Under the Model Penal Code approach, D will be able to assert the defense of self-defense to a charge of first-degree murder, since the definition of that crime provides that the killing must be committed "purposely or knowingly," or with "extreme indifference to the value of human life." (See M.P.C. § 210.2(1)). But if the charge against D is

manslaughter, he will not be able to assert self-defense if it is shown that his mistake was "reckless," since manslaughter, under the Code, may be committed recklessly. (See M.P.C. § 210.3(1)(a)). Similarly, self-defense would be no defense against a charge of negligent homicide (M.P.C. § 210.4) if the mistake were shown to have been a negligent one.

C. Overlapping of defenses: In some situations, more than one of the defenses in this chapter might be applicable. For instance, a homeowner who shoots a burglar might assert self-defense, defense of others (his family), prevention of crime (larceny), and arrest. Since, particularly under the common-law approach, there may be significant disparities in the requirements for these defenses (e.g., the consequences of a reasonable mistake), it can be important to pick the correct defense to assert.

1. Model Penal Code attempts unified rules: For this reason, the Model Penal Code draftsmen have attempted to reduce the disparities in the rules governing the various defenses. For instance, as noted, an unreasonable but genuine belief in the need to assert any of these defenses will not negate the defense under the Code, unless the offense charged is one which may be committed recklessly or negligently.

II. DURESS

A. Nature of duress: A defendant can be said to have committed a crime under duress if he performed it because of a ***threat*** of, or ***use*** of, ***force*** by a ***third person*** sufficiently strong that the defendant's will was ***overborne.*** The term applies to force placed upon the defendant's ***mind,*** not his body.

Example: Suppose X forces D to rob Y, by threatening D with immediate death if he does not. This is duress, since the force from X operates on D's mind. But if X had given D an epilepsy-producing drug, so that D went into convulsions and attacked someone, D would not raise the defense of duress; instead, he would assert that he had not committed any voluntary act, and therefore had no liability (see *supra*, p. 16).

B. Elements of the defense: In most jurisdictions, the defendant must establish the following elements in order to claim the duress defense:

1. Threat: A ***threat*** by a third person,

2. Fear: which produces a ***reasonable fear*** in the defendant

3. Imminent danger: that he will suffer ***immediate,*** or ***imminent***

4. Bodily harm: ***death*** or ***serious bodily injury.***

C. Rationale for defense: The rationale that is sometimes expressed for the defense is that, generally speaking, the harm that is likely to befall the defendant (death or serious bodily injury) is greater than the harm he will cause by doing crime. If the defendant is threatened with death unless he helps carry out a robbery, for instance, his acquiescence represents a choice of the lesser harm (the robbery) over the greater harm (death). Accordingly, some courts would probably refuse to allow the defense where the harm feared by the defendant is not as great as that which he commits. (This theory probably explains the generally-accepted rule that duress is no defense to intentional homicide; see *infra.)*

1. Model Penal Code view: But the Model Penal Code does not contain such a requirement that the harm avoided be greater than the harm brought about. Instead, the Code's test is whether the threat was sufficiently great that "a person of ***reasonable firmness*** in [the defendant's] situation would have been unable to resist." M.P.C. § 2.09(1). Presumably, however, the enormity of the harm which the defendant will be committing is one of the factors which a reasonable person would evaluate in reaching a decision whether to resist. A reasonable person confronted with a choice between losing a finger and killing an innocent victim, for instance, might be "able" to resist, where he would not resist the choice between his own death and cutting off the victim's finger.

D. Homicide cases: Courts have traditionally held that the defense of duress is ***not available*** where the defendant is charged with the ***intentional killing of another*** (i.e., murder or voluntary manslaughter). This is true even though the defendant is threatened with his own death if he refuses and, in theory, true if the defendant is asked to sacrifice the life of one innocent person, in order to save those of several. Some states have changed this rule by statute — by not imposing an automatic ban on the duress defense in homicide cases — but most states appear still to ***follow it.*** L, pp. 468-69, 472.

Example: D is charged with kidnapping and murdering V. D and others had

suspected V of having molested two small girls, one of whom was the daughter of X. D defends on the grounds that X threatened to "beat the shit out of D if D didn't kill V. A California statute grants the defense of duress except where the crime charged is one that is "punishable with death." At the time the statute was enacted (in 1850), all first-degree murder was punishable by death, so duress was never available in a first-degree murder case. Today, the version of murder with which D is charged could not be punished with death, so D argues that the defense of duress must therefore be available to him.

Held, the defense of duress is not available in any murder prosecution today, even in cases where the death penalty no longer applies. There is no evidence that the legislature ever "intended the substantive law of duress to fluctuate with every change in death penalty law." (But one member of the court, concurring and dissenting, argued that the legislature had indeed intended to allow the duress defense in non-capital murder cases, though that judge believed that D had not presented substantial evidence that he acted under duress here.) *People v. Anderson,* 50 P.3d 368 (Cal. 2002).

1. **Justifications:** Two principal justifications for the "no duress in murder cases" rule have been articulated:

   a. **Greater good required:** At least where the choice is between the defendant's life and that of an innocent victim, morality demands that the defendant sacrifice his own life. (Presumably, this would not apply where the threat is that more than one person, say, the defendant's entire family, will be killed if the defendant does not kill one victim.)

   b. **Immunization of terrorists:** More forcefully, allowing the duress defense to murder charges would permit the leader of a ***terrorist gang,*** or of a gang of kidnappers, to immunize his entire gang against all murder charges. Each member of the gang could say, perhaps truthfully, "I would have been killed had I not obeyed."

      i. ***Anderson* case agrees:** The California Supreme Court in *Anderson, supra,* made this point: "California today is tormented by gang violence. If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be ***more likely to follow a gang order to kill*** instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense for any form of murder would thus ***encourage***

killing.”

2. **Model Penal Code allows:** But the Model Penal Code ***allows duress*** to be a defense to ***all*** criminal charges, even murder. See M.P.C. § 2.09(1), granting the defense of duress to one whose conduct “was coerced ... by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been on able to resist.” The section makes no exception for murder cases, and the Official Comment says “that even homicide may sometimes be the product of coercion that is truly irresistible[.]”

3. **Felony-murder:** Duress has always been accepted as a defense to a charge of ***felony-murder.*** For instance, suppose D is coerced into driving X to a robbery site, and during the robbery, X accidentally or intentionally kills a bystander. Under the felony-murder doctrine, D would ordinarily be liable for murder. But since D would be allowed to assert the duress defense to the underlying accomplice-to-robbery charge, he would not be liable of any underlying felony, and therefore could not be convicted of felony-murder. See L, p. 470.

4. **Reduction of murder to manslaughter:** If duress cannot be a complete defense to murder, can it be used to ***reduce murder to voluntary manslaughter?*** At least one court has said ***“no.”*** In *People v. Anderson, supra,* the California Supreme Court said that allowing duress to be used to mitigate murder to manslaughter might encourage gang violence, and that allowing such mitigation should therefore be left to the legislature.

E. Imminence of threatened harm: The harm with which the defendant is threatened must, according to most courts, be ***immediate*** or ***imminent.*** That is, threat of a ***future harm*** is generally not sufficient. The theory behind this requirement is probably that where harm is threatened for the future, the defendant almost always has some other, non-criminal, alternative available to him (e.g., calling the police and asking for protection).

1. **Rule breaking down:** But there has been a mild tendency towards abandonment of this requirement of imminence. The Model Penal Code, in § 2.09, does not require that the threatened harm be

imminent, but merely that the threat be such that a person of "reasonable firmness" would be "unable to resist" it.

a. **Telephone threats:** Similarly, see *State v. Toscano,* 378 A.2d 755 (N.J. 1977), where the defendant asserted that a third person had ***threatened him over the telephone*** several times, to induce him to prepare a fraudulent insurance claim. The court held that no *per se* rule requiring imminence of harm should be applied, provided that the Model Penal Code's "person of reasonable firmness" test is met.

F. **Death or serious bodily injury:** Traditionally, the defendant must be threatened with ***death or serious bodily injury.*** L, pp. 470-71. But this rule, too, may be breaking down. The Model Penal Code in § 2.09(1), requires only a threat of "bodily harm," not serious bodily harm. Furthermore, there seems to be no reason why a threat of extreme ***property damage*** or ***economic sanction*** (e.g., that the defendant will be bankrupted) should not suffice to excuse at least a relatively minor crime against property (e.g., cooperation in filing a false insurance claim, as in *Toscano, supra).* Under the Model Penal Code, such a threat might give rise to the justification, or "lesser of two evils," defense of § 3.02.

G. **Threat directed at person other than defendant:** Some states require that the threatened harm be directed ***at the defendant.*** But the vast majority of states today are more liberal, recognizing the defense where the threat is made against a third party, including a member of the defendant's ***family.*** L, p. 472.

1. **Model Penal Code's liberal view:** The Model Penal Code, in § 2.09(1), follows the modern liberal trend of allowing harm to third persons to suffice: The threat may be against "[the defendant's] person or the person of another... " But the Code's "person of reasonable firmness" test must, of course, be met, so that the threat of, say, minor harm to an absolute stranger may not be enough where the defendant is induced to commit a serious crime.

H. **Effect of mistake:** The defendant normally has no way of knowing whether or not the threat will be carried out if he fails to comply. If it is subsequently shown that the threat definitely would not or could not have been carried out, does the defendant lose his duress defense? All

courts apparently agree that, as long as the defendant's mistake was ***reasonable,*** he does not forfeit the defense. But if his belief that the harm will occur is ***unreasonable,*** in most states he will lose the defense.

1. **Model Penal Code view:** The Model Penal Code does not require that the defendant's belief that the threat will be made good be reasonable. But this requirement may be implied by the requirement that the threat be such that a "person of reasonable firmness" would be unable to resist it; if it would be clear to such a person that the threat will not be carried out, he would presumably be able to resist.

I. Defendant who voluntarily subjects himself to danger: Virtually all courts deny the defense to a defendant who has ***voluntarily*** placed himself in a situation where there is a substantial probability that he will be subjected to duress. Thus one who voluntarily joins a terrorist group that is rumored to kill any member who attempts to defect, might be held to have waived the duress defense as to any act which the group coerces him into taking.

1. **Model Penal Code view:** The Model Penal Code would similarly deny the defense if the defendant "recklessly placed himself in a situation in which it was probable that he would be subjected to duress." Furthermore, if he was merely negligent, not reckless, in doing so, he could be convicted of a crime as to which negligence meets the required *mens rea* (e.g., negligent homicide), but not of a crime requiring intent or recklessness. M.P.C. § 2.09(2).

J. Wife coerced by husband: At common law, a wife who could show that her husband commanded her to perform a criminal act had a good chance of successfully asserting the duress defense, just by that fact alone. But the more modern view, and that of the Model Penal Code, is that pressure by a husband against his wife is to be treated the same as any other kind of coercion, with no special presumption of duress. See M.P.C. § 2.09(3); see also L, pp. 475-76.

K. Military orders: Closely related to the defense of duress is the defense that one was ***obeying military orders*** issued by a superior. It is generally agreed that if the defendant ***neither knows nor has reason to know*** that the act ordered is unlawful, he cannot be convicted if the act is a crime. Conversely, it is agreed that if the defendant *does* know that the act

ordered is unlawful, he may be convicted if he performs it. Thus the most common form of the Nuremberg Defense ("I was only following orders....") is unavailing.

L. Guilt of coercer: Even though the person subjected to duress may have a valid defense on that ground, this will not absolve the person who did the coercing. The latter is likely to be convicted based on general principles of principal-and-agent liability, just as one may be convicted of murder if one induces a child or mental incompetent to carry out the killing. See L, p. 475.

M. Relation to "choice of evils" or "necessity" defense: The defense of "necessity," discussed in the next section, is similar to that of duress, except that the source of pressure comes not from a human being, but from circumstances or events (e.g., a shipwreck). The basis of the necessity doctrine is that the defendant may, in some circumstances, choose the "lesser of two evils," even if that evil is a crime. If the defendant is pressured by a human being, but is unable to make out a traditional duress defense (e.g., the threat is to destroy the defendant's property, rather than harm her person), may the defendant employ a "choice of evils" defense?

1. **Model Penal Code allows:** Most courts have been reluctant to allow the defense of necessity where the coercion comes from a human source. But the Model Penal Code explicitly provides, in § 2.09(4), that the defendant may employ the "choice of evils" defense of § 3.02 even where the motivating force is another human being, and the duress defense would not be available.

III. NECESSITY

A. The necessity defense generally: The defense of ***"necessity"*** may be raised when the defendant has been compelled to commit a criminal act, not by coercion from another human being, but by ***non-human events.*** For instance, a husband who needs to get his seriously ill wife to the hospital could claim the necessity defense, if he violated the speed limit.

1. **Choice of evils:** The essence of the defense is that the defendant has chosen the ***lesser of two evils.*** Thus in the case of the man with the sick wife, it is presumably a lesser evil to violate the speed limit

(assuming that one is otherwise careful) than to leave a person in danger of sickness or death.

a. **Model Penal Code formulation:** The Model Penal Code explicitly recognizes that the balancing of evils is the basis of the defense. The Code defense is called that of ***"justification,"*** and it is available where "the harm or evil sought to be avoided...is greater than that sought to be prevented by the law defining the offense charged.. " M.P.C. § 3.02(1)(a). (Unlike the common-law defense of necessity, the Code defense is also available where the source of the emergency is coercion by another person rather than an event.)

b. **Harm must be greater, not merely equal:** The harm sought to be avoided by the defendant must be ***greater than,*** not merely equal to, the harm caused by the defendant's conduct. The most tangible demonstration of this principle is the rule that one may not take another's life to save one's own (the presumption being that all lives are of equal value). See the discussion of the defense in homicide cases, *infra,* p. 112.

c. **Test is objective, not subjective:** It is up to the court, not the defendant, to make the final determination of whether the harm sought to be avoided was indeed greater than that committed by the defendant's criminal act. There is also a requirement that the defendant have ***believed*** that he was making a choice of the lesser of two evils, (i.e., if he did not have this belief, and merely discovered the necessity after the fact, he will not have the defense), but the ultimate balancing of interests is done by the court. See L, pp. 482-83.

   i. **Innocent mistake:** But if a reasonable ordinary person in the defendant's situation would have agreed that the harm sought to be avoided was greater than the harm caused, the defendant will not lose the benefit of his defense merely because it later turns out that the choice of evils was unnecessary. For instance, if D speeds to the hospital to bring his wife there, and it later turns out that there was nothing seriously wrong with her, he will not lose his defense so long as a reasonable man would have agreed with his belief that speeding seemed

necessary.

B. Requirements for defense: The principal requirements which the defendant must meet to be entitled to the necessity defense are, according to most courts:

1. Greater harm: The harm sought to be avoided is greater than the harm committed (or, in any event, the harm which the defendant thinks he is committing);

2. No alternative: There is no ***alternative*** that would also avoid the harm, and would be non-criminal or a less serious crime;

3. Imminence: The harm is ***imminent,*** not merely future;

4. Situation not caused by defendant: The situation has not been brought about by D's carelessly or recklessly putting himself in a position where the emergency would arise;

5. Nature of harm: The harm sought to be avoided is not usually required to be serious bodily harm (as it generally must be for duress; see *supra*, p. 109), but may be non-serious bodily harm, or even ***property damage.***

C. Illustrative examples: Following are some situations in which the necessity defense has been accepted or, under the Model Penal Code, would be accepted:

1. A druggist may dispense a drug without the required prescription to alleviate distress in an emergency;

2. An ambulance may pass a traffic light;

3. Property may be destroyed to stop the spread of fire;

4. A mountain climber, roped to a companion who has fallen over a cliff, may cut the rope, if the only alternative is that both will die. (But many courts, as discussed below, refuse to allow the necessity of defense in any intentional homicide case.)

5. A prisoner threatened with homosexual rape by other prisoners may escape (providing other alternatives, such as reporting the threat to the authorities, are unavailable or futile). *People v. Unger*, 362 N.E.2d 319 (111. 1977).

6. A professional "deprogrammer" may kidnap a twenty-year-old man to "save" him from "indoctrination and domination" by a religious group which he had joined. (A case involving Ted Patrick, not officially reported but reported in the *New York Times*, August 7, 1973, p. 24, col. 5.)

For situations 1 to 3 above, see Model Penal Code, Comment 2 to M.P.C. § 3.02.

D. Homicide: Courts have traditionally been extremely reluctant to permit the necessity defense where the defendant is charged with an ***intentional killing.***

1. ***Dudley & Stephens:*** The best known case on the subject is *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (Eng. 1884). The two Ds had been shipwrecked, along with a 17-year-old boy, and were compelled to spend more than three weeks on a lifeboat, without food or fresh water. After 18 days, the Ds killed the boy, and ate his flesh and drank his blood. They were picked up four days later. They argued that had they not killed the boy, they would have died within the four days, and that the boy would certainly have died first. Nonetheless, the court refused to accept their necessity defense. The court gave the following reasons:

   a. Morality: Morality demands that one die rather than take the life of an innocent person;

   b. Rescue: A rescue might have occurred before any of the three had died (or not until they had all died), so that it was not at all certain that a greater evil would be avoided by the killing;

   c. Unfairness: Any means for deciding who is to die is fraught with a danger of unfairness; here, for instance, the weakest and youngest was chosen;

   d. Abuse: If the defense is allowed, it may be abused, and "made the legal cloak for unbridled passion and atrocious crime."

2. Model Penal Code view: The Model Penal Code, however, does ***not*** rule out the necessity defense in intentional homicide cases. Even under the Code, one may not sacrifice one life to save another, since the Code requires the choice of the lesser of two evils, not merely the

equal of two evils, and all lives are presumed to be of equal value. But if a life can be sacrificed to save two or more lives, the Code would allow the defense. See Comment 3 to M.P.C. § 3.02.

a. **Mountaineer:** Thus the Code would grant the necessity defense to a mountaineer who, roped to a companion who has fallen over a precipice, cuts the rope so that instead of the inevitable death of both of them, one will survive. *Id.*

3. **Combatting terrorism with torture:** In the wake of 9/11 and America's widening battle against terrorism, the necessity defense is likely to become important when government officials take coercive action — perhaps including ***torture*** — against ***suspected terrorists.*** The paradigmatic example is the ***"ticking time bomb"*** — the authorities know that a particular terrorist action is planned for some time in the near future, and have a suspect in hand, but they have been unable to discover enough details to disarm the plot and are now deciding whether to use torture. If they do so, and are prosecuted, can they defend on the grounds of necessity? There is no reason why the answer shouldn't be "yes" in appropriate circumstances.

Example: Suppose that on Sept. 10, 2001, the FBI somehow gets X, the "20th hijacker," into custody, and learns from him that some sort of attack involving air travel is contemplated for the 11th. After hours of interrogation, the FBI is unable to learn enough details to disarm the plot. D, an agent, then tortures X by administering electric shocks to his genitals. X furnishes details of the plot (though, alas, not ones that are precise enough to avoid the attacks). Now, D is put on trial for aggravated assault. Can he use the defense of necessity?

The result would depend, of course, on whether the requirements stated *supra,* p. 111 (avoidance of greater harm; lack of an alternative; imminence; situation not caused by D) were satisfied. Therefore, it is likely that the defense would be accepted if the trier of fact believed that D's suspicions were reasonable, that the ancipated harm from failing to disarm the plot was in fact extremely great, that the danger was imminent, and that no other means seemed likely to work.

Note: As of this writing, no major American case seems to have posed the issue of whether a prosecution for official torture in the name of anti-terrorism may be defended by use of the necessity defense. But a case decided by the Supreme Court of Israel has done so, at least in dictum. In *Public Committee against Torture v. State of Israel,* H.C. 5100 (Isr. Supr. Ct., Sept. 9, 1999), the Court analyzed the legality of official anti-terrorism interrogation techniques such as "shaking," sleep deprivation, and forcing the suspect to wait in painful positions. The Court said that "the 'necessity' defense [might] be available to ... investigators ... if criminal charges are brought against them." (But the Court refused to validate in advance the Security Service's blanket directives authorizing such interrogation techniques — the Court

held that the availability of the necessity defense would have to be adjudicated on a case-by-case basis when and if prosecutions occurred.)

E. Economic necessity not sufficient: The harm that confronts the defendant, may, as noted, be of a non-bodily nature (e.g., damage to his property). But the courts have not accepted the defense of ***"economic necessity."*** Thus an unemployed worker will not be excused if he steals food. (But if he is actually starving to death, then the defense may be allowed.) See L, p. 480.

F. Civil disobedience: The necessity defense has frequently been asserted in cases of ***civil disobedience,*** in which the defendant has committed an act of protest to manifest his disapproval of government policies. The defense has seldom, if ever, been allowed in such a situation. The courts' refusal is often based in part on the theory that there is a non-criminal alternative way of expressing protest.

Example: The Ds want to protest the U.S.'s involvement in El Salvador. They therefore enter their local IRS office, chant, "keep America's tax dollars out of El Salvador," splash simulated blood on the counters, walls and carpeting, and obstruct the office's operation. After several warnings by police to leave or face arrest, Ds are arrested. At trial, they assert the defense of necessity, contending that their acts of protest were necessary to prevent further bloodshed in El Salvador.

Held, the defense of necessity can never apply to cases involving indirect civil disobedience. Cases of *direct* civil disobedience must be distinguished from those of *indirect* civil disobedience. In the former, protestors seek to challenge the very laws under which they are charged (e.g., an African American sit-in at a lunch counter at a time when African Americans were prevented from sitting at lunch counters); direct civil disobedience might satisfy the requirements for necessity. In contrast, *indirect* civil disobedience involves breaking one law (e.g., trespass) to call attention to another (e.g., our statutes authorizing U.S. involvement in El Salvador). Cases of indirect civil disobedience fail to meet several of the prerequisites for the necessity defense. For example, the disobedience cannot be considered the "lesser of two harms," since the policy being questioned (here, U.S. involvement in El Salvador) is by hypothesis one that was validly enacted by the legislature and therefore cannot constitute a cognizable harm at all. Similarly, the necessity defense requires the absence of any legal alternative that could abate the evil, and in the case of indirect civil disobedience there is always a legal alternative — working to change government policy. *United States v. Schoon,* 971 F.2d 193 (9th Cir. 1991).

G. Prevention of "possible future harm" not sufficient: If D's actions were undertaken with the object of preventing a non-imminent ***future harm*** that is ***speculative*** rather than nearly certain to occur, the necessity defense will fail.

Example: D operates a free needle-exchange program for drug addicts in an effort to

stop the spread of AIDS in his neighborhood. He is charged with violating a state law that prohibits the distribution of hypodermic needles without a prescription. *Held,* D may not use the necessity defense, since the harm he sought to prevent was "debatable or speculative" rather than imminent. *Commonwealth v. Leno,* 616 N.E.2d 453 (Mass., 1993). (The court also held that the defense should fail because D had a legal alternative to abate the danger: to try to change the law through the initiative process.)

IV. SELF-DEFENSE

A. Self-defense generally: There is a general right to ***defend oneself*** against the use of unlawful force. In some circumstances, the defense may be by means of ***deadly force;*** at other times, it is limited to non-deadly force. When successfully asserted, the defense is a complete one, and can result in an acquittal not only on homicide charges, but on other charges, such as aggravated assault, attempted murder, assault and battery, etc.

B. Requirements: The following requirements must generally be met for use of the defense:

1. **Resist unlawful force:** The defendant must have been resisting the ***present or imminent use*** of ***unlawful force;***

2. **Force must not be excessive:** The degree of force used by the defendant must not be ***more than is reasonably necessary*** to defend against the threatened harm;

3. **Deadly force:** The force used by the defendant may not be ***deadly*** (i.e., likely to cause death or serious bodily injury) unless the danger being resisted was also deadly force;

4. **Aggressor:** The defendant must not have been the ***aggressor*** (unless (1) he was a non-deadly aggressor confronted with the unexpected use of deadly force, or (2) he withdrew after his initial aggression, and the other party continued to attack);

5. **Retreat:** The defendant must not have been in a position from which he could ***retreat*** with complete safety, unless (1) the attack takes place in the defendant's dwelling, or, by the modern view, his place of work or (2) the defendant uses only non-deadly force.

C. What constitutes unlawful force: Self-defense applies only where the defendant is resisting force that is ***unlawful.*** In general, this means that the other party must be committing a ***crime*** or ***tort.*** If the other party,

even though he is using force, is entitled to do so (e.g., a property owner using non-deadly force to defend his property against attempted theft by the defendant), the force is not unlawful and the defendant may not use force to defend against it.

1. **Excessive force:** However, if the other party is entitled to use some degree of force, but uses ***more than is lawfully allowed,*** the excess will probably be treated as unlawful, and the defendant may resist it by using force himself. Thus if the property owner uses deadly force to defend his property (which is more force than the law allows in most situations; see *infra,* pp. 131-132), the defendant may presumably use deadly force to protect himself. (In this situation, the defendant is the aggressor, but under the rules discussed *infra*, pp. 120, an aggressor who uses non-deadly force may resist when the other party answers with deadly force.)

2. **Force which would be excused:** If the other party's use of force is not justifiable, but merely "excusable," it may be treated the same as if it were unlawful, for purposes of the defendant's right to defend himself against it.

   Example: D is a policeman who is trying to check whether a store belonging to S has been broken into. D tries the door, and S, reasonably believing that D is a thief who intends not only to rob him, but to harm him, starts shooting at D. S's use of force is not, strictly speaking, unlawful, since he may claim self-defense (because, even though he is mistaken, his belief is reasonable; see *infra,* p. 122). Nonetheless, it would probably be held that D is entitled to resist, even by using deadly force if non-deadly force would not suffice. See Fletcher, pp. 763-66.

3. **Effect of mistake:** If the defendant makes a ***reasonable mistake*** about the unlawful status of the force being used against him, he will nonetheless be protected. This is in keeping with the general rule in self-defense cases that reasonable errors as to factual matters do not void the defense. See *infra,* pp. 122-124.

4. **Consent:** If the defendant has ***consented*** to the other party's use of force, the defendant may not use force in self-defense. Thus if a woman has consented to sexual intercourse, she may not suddenly change her mind and stab her partner in the back. (But she would have the right to withdraw her consent at any time, and if the partner failed to stop, she would then be allowed to resist.)

D. Degree of force: The defendant may not use more force than is ***reasonably necessary*** to protect himself.

1. Use of non-deadly force: D may use ***non-deadly force*** to resist virtually any kind of unlawful force (assuming that the level of non-deadly force D uses is not more than is necessary to meet the threat).

a. No need to retreat: D may use non-deadly force without ***retreating*** even if retreat could be safely done.

b. Prevention of theft: D may use non-deadly force to resist the other person's attempted theft of ***property.***

2. Deadly force: By contrast, D may defend himself with ***deadly force*** *only* if the attack threatens D with ***death*** or ***serious bodily harm.***

Example: D gets into a shouting match with X. X, who as D knows is not a particularly effective street fighter, starts swinging his fists at D. D has the right to use non-deadly force (e.g., his own fists) to protect himself. But D may not use deadly force, such as a gun or a knife, because he is not being threatened with death or serious bodily harm. (If D does so, he himself will be behaving unlawfully, and X will have the right to counter with deadly force of his own: see *infra*, p. 120.)

a. Definition of "deadly force": The defendant will generally be deemed to have used "deadly force" in self-defense only if the defendant used force that was ***intended or likely*** to cause ***death or serious bodily harm.***Notice that this is the same type of force which, if used by the *victim*, will normally entitle the *defendant* to use deadly force in self-defense. So as a practical matter a defendant ***can only use "deadly force" to defend against force from the victim that is also "deadly."***

i. **Kidnapping and rape:** When the victim's conduct is being analyzed, most courts expand the concept of "serious bodily harm" to cover ***kidnapping*** and forcible ***rape*** — so if V threatens D with kidnapping or forcible rape, D may use deadly force to resist if lesser force would not suffice.

ii. Firing a firearm (M.P.C.): What if the victim ***fires*** a ***weapon at the defendant?***The Model Penal Code, in § 3.11(2), defines deadly force to ***include*** "purposely ***firing a firearm*** in the ***direction of another person*** or at a vehicle in which another person is believed to be...."

iii. Slap (no serious threat): A ***"slap"*** of D by V normally does ***not*** pose the risk of present serious bodily harm to D (or foreshadow serious bodily harm in the imminent future), so D may ***not*** respond with deadly force.

Example: D and V, drinking in a bar, get into a verbal argument about politics. D insults V's mother. V slaps D. D whips out a knife and stabs V in the stomach. V bleeds to death. D is charged with murder of the intent-to-do-serious-bodily-harm variety (see *infra,* p. 251).

D does not have the defense of self-defense. V's slap did not pose the risk of serious bodily harm, and there was nothing to indicate that the slap was a prelude to the danger of worse harm from V. Therefore, D's use of the knife was the use of deadly force in response to non-deadly force, and was not privileged. (However, D will probably be entitled to get the murder charge reduced to voluntary manslaughter, under an "imperfect self-defense" theory; see *infra,* p. 128.)

b. Result irrelevant: Whether or not death or serious bodily harm ***actually occurs*** is theoretically ***irrelevant*** to determining whether a particular force is deadly. Thus, if V is attacking D and D shoots at V and either misses him entirely, or just gives him a superficial flesh wound, D has used deadly force, and may be liable for assault and/or battery if one in D's position was not entitled to use deadly force in the circumstances.

i. Death or serious bodily harm unexpectedly occurring: Conversely, if a particular kind of force is ***not*** used for the purpose of causing death or serious bodily harm, and is not likely to cause it, the force will be treated as non-deadly even if death or serious bodily harm ***unexpectedly results.***

c. Threats: A ***threat*** to use deadly force does ***not*** itself constitute use of deadly force, provided that the threatener does not intend to carry out the threat. See M.P.C. §3.11(2).

Example: V attacks D with his fists. (Assume that in the circumstances, V has not used deadly force, and also assume that D is not in fact afraid of death or serious bodily injury.) D, humiliated, says, "Back off, or I'll shoot you," and pulls out a pistol, but does not intend to shoot. V suffers a massive heart attack out of fear of being shot, and dies on the spot.

D's threat will not be deemed to constitute the use of deadly force, so he hasn't violated the rule against using deadly force to repel a non-deadly attack. (If brandishing the gun and making the threat together constituted more force than reasonably appeared necessary to D in the circumstances, then D will *still* likely forfeit the defense of self-defense and be guilty of involuntary manslaughter, because

of the “proportionality” rule discussed immediately below — but D will not have violated the *per se* rule against using deadly force to repel non-deadly force.)

3. No more force than reasonably necessary (the “proportionality” rule): Keep in mind that whether D uses deadly or non-deadly force, D ***may not use more force than seems reasonably necessary in the circumstances.*** This is the so-called ***“proportionality” rule.***Thus even if V uses deadly force against D, D may still not use deadly force in return if the use of non-deadly force would seem sufficient to one in D’s position.

Example: V takes out a knife and approaches D menacingly, with an intent to kill D. D is a martial arts specialist, and knows that he could easily take the knife away from D. Instead, D takes out his own knife and stabs V in the stomach, intending to put him in the hospital to teach him a lesson. V bleeds to death.

D cannot claim self-defense — he used more force than a person in his position would conclude was reasonably necessary to deal with the threat. Therefore, D is guilty of “intent to do serious bodily harm” murder.

a. Effect of mistake: As with other sorts of mistakes, if D is ***reasonably mistaken*** in the belief that he is threatened with serious bodily harm, he will not lose the right to reply with deadly force. See *infra*, p. 122.

E. Imminence of harm: The harm being defended against must be reasonably ***imminent.*** The danger that one may be attacked tomorrow (even if the attack is virtually certain) will not suffice; this rule derives principally from the desire of courts to encourage non-violent disputeresolution, particularly where there is time to take other measures (e.g., asking for police protection.)

1. Not unduly strict standard: But the courts have not required that the defendant wait until the very last second before the attack prior to defending himself.

a. Model Penal Code requirement: The Model Penal Code is even more liberal with respect to the degree of immediacy of the threat. A person may use force in self-defense if he is protecting himself against unlawful force that will be used ***“on the present occasion.”*** M.P.C. §3.04(1). Commentary to the Code explains that this would permit the defendant to use defensive force to “prevent an assailant from going to summon reinforcements....” Comment 2(c) to M.P.C.

§ 3.04.

2. **Withdrawal by aggressor:** One consequence of the requirement that the danger be imminent is that if the ***aggressor withdraws*** from the conflict, the victim ***loses his right to use force,*** at least where the withdrawal should reasonably be interpreted as indicating that the danger is over. (But as the M.P.C. notes in the quotation above, if the assailant seems to be getting reinforcements, that's not a "withdrawal," and the victim can keep using force.)

Example: V and D are friends. They get into a verbal dispute, and V takes a swing at D. D starts to swing back. V stops swinging and says, "Wait a minute, we've always been friends, let's stop fighting." D (who has no reason to believe that V's offer to stop the fight is phony) continues to beat V up. D will not be able to use the defense of self-defense if he is charged with battery occurring after V's offer to stop — once V withdrew from the conflict, the occasion requiring self-defense was over.

F. **Aggressor may not defend himself:** One who is the ***initial aggressor*** (i.e., one who strikes the first blow or otherwise precipitates the conflict) may ***not claim self-defense.*** This principle follows from the general rule that one may use self-defense only against unlawful force; since the aggressor has, by hypothesis, used force, the other party is justified in resisting it, so that resistance is not unlawful.

1. **Aggression without use of actual force:** D can be an aggressor, and thus lose the right of self-defense, even if D ***did not actually strike the first blow.*** It is enough if D does an unlawful (i.e., tortious or criminal) act which intentionally and directly ***"provokes"*** the physical conflict.

Example: V and two friends drive up to the rear of D's house, and attempt to take the windshield wipers from D's wrecked car. D comes out of the house and starts yelling at V. According to D's later testimony, V picks up a lug wrench, so D goes into the house to get his pistol. When he comes out, V is back in the car, ready to depart. D walks up to the car and says "If you move, I will shoot." V gets out of the car and walks towards D, exclaiming, "What the hell do you think you are going to do with that?" (Apparently, V has the lug wrench in a raised position.) D shoots V when they are ten feet apart, and kills him. A jury finds D guilty of manslaughter, thus implicitly rejecting D's claim of self-defense.

Held, the jury could properly find that D was the aggressor, and thus forfeited his right of self-defense. It is true that V provoked the first quarrel, by trying to steal the wipers, but this was only a misdemeanor against D's property; in any event, the initial quarrel had ended when V went back to his car prepared to drive away. D was therefore the actual provoker of the second round of hostilities. "The fact that the deceased struck

the first blow, fired the first shot or made the first menacing gesture does not legalize the self-defense claim if in fact the claimant was the actual provoker.. An affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullified the right of homicidal self-defense." D's walking towards V with a loaded pistol, and threatening to shoot, was such an act. *U.S. v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973).

2. **"Aggressor" is narrowly defined:** But in deciding whether D was an aggressor and thus forfeited his right of self-defense, the term "aggressor" is relatively ***narrowly defined:*** only if D ***intentionally provoked the violent encounter*** will he be deemed the aggressor (though as *Peterson, supra*, shows, a person can provoke a violent encounter without actually striking the first blow). Here are some scenarios in which D is *not* an aggressor:

   a. **Trespass:** The mere fact that D ***trespassed*** will generally not be enough to make D an aggressor, and D will therefore be permitted to use force to repel an attack by the owner.

   Example: D, planning to walk his dog, trespasses onto rangeland owned by V. V shouts at D, "You filthy trespasser," and without giving D a chance to leave starts striking at D with a cane. D blocks the cane and twists it, breaking V's wrist. D is prosecuted for battery, and claims self-defense. The prosecution claims that D, by trespassing, was the aggressor and thus lost the right to use force in his self-defense.

   The prosecution is wrong. The fact that D was a trespasser was not by itself enough to make D an aggressor — nothing that D did, initially, posed a risk of bodily harm to V, which is what is required for a person to be an aggressor. Therefore, D had the right to defend himself with reasonable force when V began to strike him.

   b. **Larceny:** The mere fact that D was committing ***larceny,*** in a way that did not pose a danger of physical harm to anyone, typically won't make D an aggressor.

   Example: D, shopping at Store, picks up a small item and puts it in her pocket, intending to shoplift it. V, a store detective, sees D do this, grabs D, and starts to put a dangerous chokehold on her. D, to avoid the chokehold, kicks V hard in the shin, causing V to fall and break his leg. D is prosecuted for assault, and claims self-defense.

   The fact that D committed larceny did not make D the aggressor. Therefore, D was entitled to use self-defense against V's unlawful use of force (the chokehold).

   c. **Verbal provocation:** Similarly, the fact that D acts in a ***verbally provocative way*** toward V (while not threatening physical harm) won't make D an aggressor.

   Example: D and V get into a verbal altercation in a bar, while each is a bit tipsy. D

shouts at V, "You are a drunk and a thief, and you're too yellow-bellied to even try to stop me from saying it." V, enraged, starts hitting D in the face. D, a far better fist-fighter, hits back, breaking V's jaw.

D was not the aggressor, because verbal taunts not amounting to threats of imminent harm won't be considered aggression for self-defense purposes. Therefore, D had the right to use reasonable force in self-defense once V attacked him.

3. **Two exceptions:** There are two ***exceptions*** to the general rule that one who is the aggressor may not claim self-defense.

   a. **Non-deadly force met with deadly force:** First, if the defendant provoked the exchange but used no actual force or only ***non-deadly force,*** and the other party ***responds with deadly force,*** the defendant may then defend himself (even with deadly force, if necessary). In this situation, the victim's use of force is unlawful, since it is excessive, so there is no strong reason to prevent the defendant from countering it.

Example: D attacks X with his fists. X defends himself by knocking D down; he then starts to smash D's head against the wall, so that D is in danger of being killed or badly hurt. D manages to pull a knife, and kills X. Most present-day courts would hold that D is entitled to a claim of self-defense. X, insofar as he met non-deadly force with deadly force, was acting unlawfully, thereby entitling D to use even deadly force to save his life. Comment 4(b) to M.P.C. § 3.04.

Note: The above analysis assumes that D did not have the opportunity to ***retreat safely,*** and that his choices were either to use the knife or be killed or maimed. If D had had the chance to retreat, and the jurisdiction was one which requires retreat before the use of deadly force (see *infra),* D would have lost the right to rely on the defense if he did not retreat.

   b. **Withdrawal:** The second exception to the aggressor rule is that if the defendantaggressor ***withdraws from the conflict,*** and the other party initiates a second conflict, the defendant may use non-deadly force, and may use deadly force if he is threatened with death or serious bodily harm. This is true even if the defendant started the initial conflict with the use of deadly force, and an intent to kill or maim.

Example: D starts a knife fight with V, finds himself getting the worst of the encounter, tries unsuccessfully to escape, and finally stabs V to death. *Held,* D was entitled to claim self-defense because he first attempted to withdraw. *State v. Mayberry,* 226 S.W.2d 725 (Mo. 1950).

      i. **Rationale:** This result stems from the rule, discussed earlier, that if the aggressor withdraws, the victim may no longer use

force. If the aggressor withdraws and the victim continues to use force, the aggressor is now the one in the right, and is himself entitled to use force in his own defense.

ii. **Must be brought home to other party:** However, the defendant-aggressor's act of withdrawal must be such that the other party ***realizes,*** or ***should realize,*** that the defendant has tried to end the hostilities.

G. Retreat: Courts have been understandably reluctant to encourage the use of deadly force when there is an alternative means available for ending an encounter. Therefore, a number of states (still a minority, but probably close to half now) require that if one could ***safely retreat,*** he must do so rather than use deadly force. The majority that has rejected this requirement has generally done so on the ground that a person should not be required to do an act that is commonly regarded as a sign of cowardice.

1. **No retreat required before non-deadly force:** Even jurisdictions imposing the retreat requirement will hold that, assuming one had the right to use self-defense, it is never necessary to retreat before the use of ***non-deadly force.*** Thus if X attacks D in either a deadly or non-deadly manner, and D could withdraw from the encounter with complete safety (e.g., by getting into his car and driving away), D is nonetheless privileged everywhere to stand his ground and fight back with his fists.

2. **Only required where it can be safely done:** The retreat rule, in those states adopting it, only applies where the defendant could retreat with ***complete safety*** to himself and to others. Furthermore, a defendant who reasonably but mistakenly believes that retreat cannot be safely done will be protected; "...the issue is not whether in retrospect it can be found [that] the defendant could have retreated unharmed. Rather the question is whether he knew the opportunity was there, and of course in that inquiry the total circumstances including the attendant excitement can be considered." *State v. Abbott,* 174 A.2d 881 (N.J. 1961).

   a. **Safety depends on circumstances:** Obviously the nature of the weapon, if any, possessed by the other party will be relevant in

determining whether the defendant believed or should have believed that retreat with safety was possible. If the other party had a high-powered rifle, the court is exceptionally unlikely to find a duty to retreat. On the other hand, if the weapon is a knife, and the assailant is obviously less quick on his feet than the defendant, a duty to retreat is likely to be found.

b. Unreasonable but genuine mistake: If the defendant genuinely believes that retreat could not be done safely, but this mistake is ***unreasonable,*** the court would presumably treat the situation just as it would treat other unreasonable mistakes. The various treatments of such mistakes are discussed *infra,* pp. 122-124.

i. Model Penal Code: The Model Penal Code, in § 3.04(b)(ii), requires retreat only where the defendant ***"knows*** that he can avoid the necessity of using such force with complete safety by retreating...." But if his mistaken belief that he cannot safely retreat amounts to recklessness or negligence, he may be convicted of a crime requiring only recklessness or negligence, as the case may be; see M.P.C. § 3.09(2).

3. Retreat in defendant's dwelling: Those states requiring retreat ***do not require it*** where the attack takes place in the ***defendant's dwelling.*** This stems from the deep-rooted historical belief that "a man's home is his castle." See M.P.C. § 3.04(2)(b)(ii)(1).

a. Not applicable if defendant was aggressor: But the exception for a dwelling does not apply if the defendant was the ***aggressor;*** this stems from the overall position that the aggressor has, in general, no right of self-defense at all (see *supra,* p. 118). Thus in *U.S. v. Peterson,* 483 F.2d 1222 (D.C. Cir. 1973) (discussed more fully *supra,* p. 119), the court held that since the jury could properly have found that D was the aggressor, he had a duty to retreat if that was possible, even though the encounter took place on his property.

b. Assailant also resident of dwelling: A few courts have held that the dwelling exception to the retreat requirement does not apply where the ***assailant is also a resident*** of the dwelling (e.g., husband attacked by wife in their house). These courts apparently rely upon the theory that where the dwelling is also the "castle" of the

assailant, the reasons for the exception (that the defendant's home is his castle) are nullified.

i. **Modern view:** But the modern view ***does not remove the exception*** in this situation. See, e.g., M.P.C. § 3.04(2)(b)(ii)(1).

H. Effect of mistake: It may happen that the defendant is mistaken about one of several aspects of the situation confronting him. He may be mistaken in his belief that he is about to be attacked, mistaken in his belief that the force used against him is unlawful, mistaken in his belief that only deadly force will suffice to repel the threat, or mistaken in his belief that retreat could not be accomplished with safety. But so long as his mistaken belief as to any of these points is ***reasonable,*** he will still be able to claim self-defense.

Example: X, D's sworn enemy, comes up to D and points a pistol at him, saying "Your time has come." D shoots X to death before X can pull the trigger. It later turns out that X's gun was not loaded, and his motive was simply to frighten D. Nonetheless, D will be able to successfully claim self-defense.

1. **"Detached reflection" not required:** The reason for this rule is that in a typical situation the defendant is confronted with the need for immediate action, and should not be penalized for an innocent mistake. As Justice Holmes said, "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. U.S.,* 256 U.S. 335 (1921).

2. **Unreasonable belief:** But if the defendant's mistake is ***unreasonable,*** most states hold that he ***loses*** the right to claim self-defense.

Example: D boards a New York City subway, while carrying an unlicensed loaded pistol. Four youths approach D, and one states, "Give me $5." D pulls out the gun and shoots at each of the four, wounding them all (and permanently paralyzing one). After an initial round of shots, which is enough to wound or scare each of the four, D fires a final shot at one of them, who is sitting on a bench at the time (and apparently posing no imminent threat to D). D later tells the police that he was certain that none of the youths had a gun, but he had a fear, based on prior occasions on which he had been mugged, that he might be "maimed." The prosecutor charges the grand jury that D was entitled to act as he did only if a reasonable person in D's situation would have done so. The grand jury indicts D (for attempted murder, assault and weapons possession), but a lower court dismisses the indictment on the grounds that all that is required is that D's beliefs and reactions have been "reasonable to him."

Held (on appeal), for the prosecution. New York's statute on self-defense allows a

person to use physical force against another “when and to the extent he *reasonably believes* such to be necessary to defend himself.from what he reasonably believes to be the use or imminent use of unlawful physical force[.]” The lower court’s interpretation of this statute (that “reasonably believes” requires only that D’s belief have been “reasonable to him”) would make “reasonably believes” the equivalent of “genuinely believes,” and thus strip the word “reasonably” of all of its meaning. Such an interpretation would also “allow citizens to set their own standards for the permissible use of force....” Instead, the correct interpretation of “reasonably believes” is that it imposes an *objective standard,* i.e., the defendant’s conduct must be that of a reasonable person in the defendant’s situation. *People v. Goetz,* 497 N.E.2d 41 (N.Y. 1986).

Note: *People v. Goetz* involved the celebrated case of Bernhard Goetz. When Goetz was eventually tried on the charges, the jury convicted him on the weapons charge, but acquitted him on all other counts. It appears that the jury simply disregarded the judge’s instructions that Goetz, in deciding whether and how to use deadly force, must have behaved as a reasonable person would have behaved in the circumstances.

a. **Defendant’s physical disadvantages:** Courts generally take the defendant’s ***physical disadvantages*** into account in determining the reasonableness of his mistake. Thus in *State v. Wanrow,* 559 P.2d 548 (Wash. 1977), D was a 5’4” woman with a cast on her leg, and V was a 6’2” intoxicated man suspected (reasonably) of being a child molester. The court held that these facts should be considered by the jury in determining whether D’s frightened, reflexive shooting of V was a reasonable mistake (in which case self-defense would still apply).

b. **Defendant’s knowledge and past experiences:** Courts generally hold that the defendant’s ***past experiences*** and ***knowledge*** are to be taken into consideration in deciding whether defendant’s mistake was a “reasonable” one.

Example: In *People v. Goetz, supra,* the court said that D could present evidence as to “any prior experiences he had which could provide a reasonable basis for a belief that another person’s intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.” At the trial, D was allowed to put on evidence that he had previously been mugged. (By the way, the evidence in *Goetz* showed that although none of the four youths was carrying a conventional weapon, two of the four had screwdrivers inside their coats, which they admitted were to be used to break into the coin boxes of video machines. So Goetz’s perception that these youths were prospective robbers was indeed a correct one.)

c. **Belief must be *bona fide:*** The defendant’s belief must be an honest, ***genuine*** one. If the defendant’s purpose in killing is not to defend himself, but to get rid of the other party, the claim of self-defense is not available even if it later turns out that the other party

was indeed, unknown to the defendant, about to kill the defendant.

d. Model Penal Code view: A few courts have held that even an ***unreasonable*** (but genuine) belief as to the need for self-defense will protect the defendant. This view is more or less shared by the Model Penal Code, which requires merely that the defendant "believe" that force is necessary for self-defense, with no requirement of reasonableness. However, M.P.C. § 3.09(2) provides that if the defendant's mistaken belief as to the need for force is "reckless" or "negligent," the claim of self-defense is unavailable if the crime charged is one which may be committed recklessly or negligently, as the case may be. (The M.P.C.'s approach has attracted little support from state legislators, however. See K&S, p. 851.)

e. Intoxication: Frequently, the cause of the defendant's unreasonable mistake as to the need for self-defense will be his ***intoxication.*** In this situation, virtually all courts agree that the intoxication ***does not excuse the mistake,*** and the defendant will not be entitled to a claim of self-defense. See L, p. 494.

3. Imperfect defense: While an unreasonable mistake will, as noted, generally block a claim of self-defense, such a mistake may entitle the defendant to conviction of a ***lesser offense,*** particularly a reduction of a murder charge to manslaughter. See the discussion of "imperfect self-defense" *infra,* p. 128.

I. Battered women and self-defense: One context in which a claim of self-defense is often raised is that of a woman who ***kills her spouse*** because, she says, this is the only way she could protect herself against ongoing ***battering*** or other abuse. Courts have usually not changed the generally-applicable rules of self-defense to deal with this "battered woman" situation, but they have increasingly attempted to give women defendants a fair chance to assert the defense.

1. The "battered woman's syndrome": Psychologists have identified a ***"battered woman's syndrome,"*** ("BWS") a series of common characteristics that appear in women who have been abused physically and psychologically over a long time by their mate or other dominant male in their lives. Experts who have studied BWS say that

most domestic violence occurs in a series of three-phase cycles: phase 1 is the "tension-building stage," during which the male engages in minor battering incidents and verbal abuse, while the woman tries to placate him; phase 2 is the "acute battering incident," during which the more serious violence occurs; and in phase 3, the male becomes extremely contrite and loving. Proponents of the BWS say that women often stay in the abusive relationship because the male's loving behavior during phase 3 leads the woman to believe that the male will reform. The woman also frequently sinks into a state of psychological paralysis, believing that she cannot prevent or escape from the violence; this reaction is sometimes called "learned helplessness." Also, she may come to believe, with good reason, that if she attempts to escape, the male will find her and beat her even worse.

2. **Admissibility of expert testimony about BWS:** Women who kill their abusing spouse or lover frequently seek to introduce ***expert testimony*** about BWS. Such testimony is now ***admitted*** by the vast majority of American jurisdictions, provided that the defendant comes forward with some evidence that she was in fact repeatedly beaten by the victim. Under the law of evidence, expert testimony may generally be admitted only where it would help the jury understand a matter better than they would understand it without the testimony. Courts typically allow BWS testimony to be admitted in self-defense cases to shed light on two issues:

   a. **"Why didn't you leave?":** First, if the defendant puts on extensive evidence of her history of being abused by the victim (as nearly all courts let her do to show that she had reason to fear for her safety), the jury is likely to say to itself, *"If the abuse was really as bad as you say, why didn't you simply leave the victim?"* Expert testimony about BWS tends to answer this question, by showing that many women in the defendant's situation have the "learned helplessness" reaction, and do not believe that they can successfully escape (and, in fact, are often correct in assuming that if they leave, the male is likely to find them and to beat them even worse). So the BWS testimony provides a general buttressing of the woman's credibility on the self-defense claim.

b. Did D reasonably fear imminent danger?: Second, the BWS testimony helps establish that D had a ***genuine and reasonable fear*** of ***imminent danger*** to herself. In particular, the expert will frequently testify that a battered woman, through her long experience with abuse at the hands of the male in question, will frequently know his behavioral patterns better than anyone else possibly could, and will realize that something the male has just done or said, which might seem innocuous to an outsider, strongly predicts that the violence will escalate imminently. On this point, the BWS testimony has both a ***subjective*** dimension (it tends to establish that because D reacted the way other women who really *were* in fear behaved, probably D ***genuinely felt*** the fear) and an ***objective*** component (because the woman knows her abuser best, probably D was ***right*** in predicting that the danger was especially great this time, so her fear and her consequent behavior were ***"reasonable").***

See generally *State v. Kelly*, 478 A.2d 364 (N.J. 1984), the first major state supreme court case allowing BWS testimony to buttress the woman's claim of self-defense, and *People v. Humphrey*, 921 P.2d 1 (Cal. 1996), in which the court held that evidence of BWS was relevant to the reasonableness of D's belief that she needed to act in self-defense.

Note: Most courts that have considered the issue have not limited the use of BWS testimony to ***wives*** — a woman who can show that her ***lover*** or other dominant male figure has repeatedly abused her will generally be allowed to present BWS testimony, even though the defendant and victim were not married.

3. Standard for "reasonableness": Most cases in which the woman kills her abusing mate turn on the "reasonableness" of the woman's conduct — assuming that her belief in the danger was genuine, was that belief reasonable? And was the level of force used also "reasonable"? Recall that in most courts, the reasonableness of the defendant's self-defense is to be determined by a basically ***objective*** "reasonable person" standard (see *supra*, p. 122), but that some of the personal characteristics of the defendant (e.g., physical characteristics like small stature) may be taken into account. How subjective should the determination of "reasonableness" be in the case of a battered woman?

a. **Not too subjective:** In general, the courts have tried ***not*** to allow too much subjectivity into the analysis of reasonableness in the BWS situation. Commonly, the test is articulated as being, what would a reasonable woman do in the defendant's situation, taking into account the prior history of abuse, but not taking into account the particular psychology of the woman herself (e.g., that she is unusually depressed, or aggressive, or otherwise different)? See, e.g., *State v. Stewart*, 763 P.2d 572 (Kansas 1988), holding that "[I]n cases involving battered spouses 'the objective test is how a ***reasonably prudent battered wife*** would perceive [the aggressor's] demeanor."

4. **Imminence of danger:** Many battered-woman homicide cases turn on whether the danger to the woman was ***imminent.*** Recall that as a general rule of self-defense, the danger must be imminent — D cannot, for example, kill today to avoid even an extremely great likelihood of serious bodily harm or death tomorrow. (See *supra*, p. 118.) Courts have struggled with whether to change the requirement of imminence for battered-woman self-defense cases.

   a. **Use of BWS testimony:** As noted *supra*, courts have taken the limited step of allowing the use of BWS testimony to bear on the reasonableness of D's belief that the danger to her was imminent.

   b. **Non-confrontational situation:** The harder question is whether to modify the traditional requirement of imminent danger to cover situations where the defendant's counter-strike ***does not occur during a physical confrontation.*** There are several nonconfrontational fact patterns where the lack of imminent danger is a big problem for the defense: (1) Most commonly, the victim, after abusing the defendant, has ***gone to sleep,*** and the defendant shoots him in the head while he sleeps; or (2) the defendant ***waits*** for the victim to return home, and kills him immediately, before any kind of argument has arisen; or (3) the defendant ***arranges with someone else*** (at the most extreme, a hired killer) to kill the victim.

      i. **Defendant usually loses:** In these clearly non-confrontational situations, the defendant generally ***loses.*** The trial judge typically does not even give the jury a self-defense instruction.

(Or, the judge gives an instruction that makes it clear that self-defense applies only if physical danger was imminent, with imminence defined to mean "immediate.") Typically, the appellate court refuses to reverse for the trial court's refusal to give a broad self-defense instruction requested by the defendant.

Example: D shoots her husband to death while he is asleep. She shows at trial that he had tormented, physically abused and humiliated her for years.

Held, D was not entitled to a self-defense instruction. "The imminence requirement ensures that deadly force will be used only where it is necessary as a last resort in the exercise of the inherent right of self preservation.. The evidence in this case did not tend to show that the defendant reasonably believed she was confronted by a threat of imminent death or great bodily harm.. The uncontroverted evidence was that her husband had been asleep for some time when she walked to her mother's house, returned with the pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head. The defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured. Instead, all of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband." *State v. Norman,* 378 S.E.2d 8 (N.C. 1989).

(1) Rationale: It is not hard to see why courts have resisted relaxing the imminence requirement, even in cases involving horrible abuse. As the Kansas Supreme Court put it in *State v. Stewart (supra* p. 125), to abandon the imminence requirement "would in effect allow the ***execution of the abuser*** for past or future acts and conduct." As another court said, "It is difficult enough to justify capital punishment as an appropriate response of society to criminal acts even after the circumstances have been carefully evaluated by a number of people. To permit capital punishment to be imposed upon the subjective conclusion of the individual that prior acts and conduct of the deceased justify the killing would amount to a leap into the abyss of anarchy." *Jahnke v. State,* 682 P.2d 991 (Wyo. 1984).

ii. Momentary lull: But if the absence of confrontation is merely a ***momentary lull*** in the attack — e.g., the victim's back is temporarily turned, but D reasonably believes that the attack will resume any moment — then the requirement of

imminence is typically found to be satisfied.

5. **Battered child:** There are also an increasing number of cases in which a ***battered child*** kills the abusive parent or step-parent, typically the father. Some psychologists have reported a “battered child’s syndrome” (“BCS”) analogous to BWS. Courts have occasionally allowed BCS expert testimony. However, in general, courts have been slower to allow such testimony than in the battered-woman situation, probably because there has been less scientific study of the battered-child situation. And, as you would expect, courts have applied the imminence requirement in the case of killings by children, just as in the case of killings by the wife.

J. Resisting arrest: Related to garden-variety self-defense is the use of force to ***resist an unlawful arrest.*** Here, the courts have been much less willing to encourage the use of force, since society has a strong interest in discouraging resistance to police officers. Accordingly, virtually no jurisdictions permit a suspect to use deadly force to resist an unlawful arrest.

1. **Non-deadly force:** Furthermore, a substantial number of states (though probably still a minority) now bar even the use of ***non-deadly force*** against an unlawful arrest (e.g., one made without probable cause, or without a warrant in a situation where a warrant is required).

   a. **Model Penal Code view:** The Model Penal Code similarly refuses to allow the use of force to resist an unlawful arrest, assuming that the defendant knows that the person doing the arresting is a policeman. M.P.C. § 3.04(2)(a)(i).

2. **May resist excessive force:** But even those states denying the right to resist an unlawful arrest generally allow the use of force to resist an arrest made with ***excessive force,*** or in any situation in which the defendant reasonably believes that he will be injured (probably even where he fears that he will be injured in jail). Comment 3(a) to M.P.C. § 3.04.

3. **Courts allowing resistance:** In those courts which do allow resistance, deadly force may not be used, as noted. If the defendant does use deadly force, and the arresting officer dies, some of these

states permit an almost automatic reduction of the charge from murder to manslaughter.

K. Injury to third person: It may happen that while the defendant is using force to protect himself against his assailant, he ***injures a bystander.*** Assuming that the defendant's conduct was not reckless or negligent with respect to this bystander, he will not be liable, assuming that self-defense as to the assailant was proper.

Example: D is being repeatedly fired upon by X, who is in a slow-moving car with Y and several others. D shoots back, attempting to hit X. However, the bullet misses X and strikes Y, killing her. Assuming that D's use of deadly force was not reckless or negligent (taking into account what D knew about the proximity of others), and would have been justified vis a vis X, D will not be guilty of homicide in the death of Y.

1. **Recklessness or negligence:** Conversely, if the defendant ***is*** reckless or negligent with respect to the risk of injuring a bystander, the common approach, and the one followed by M.P.C. § 3.09(3), is that the defendant may not claim self-defense if the charge is one that requires only recklessness or negligence (as the case may be). Thus if the bystander is killed, the charge will typically be one of manslaughter (death arising from recklessness), and the defendant will not be able to claim self-defense if he was reckless as to the risk of injuring the bystander. For instance, in the above example, if it was reckless of D not to realize that there was a large risk he'd hit a non-participant, he'd be guilty of manslaughter in Y's death.

L. "Imperfect" self-defense: Suppose that the defendant kills in self-defense, but has made an ***unreasonable mistake*** as to the need for force, the unlawfulness of the other party's force, etc. Or, suppose that the defendant was the initial aggressor, and has therefore lost the right to claim self-defense. In any of these situations, the defendant would normally be guilty of murder, since the justification of self-defense is not available to him, and the death itself is purposely caused. But most states grant the defendant what might be called a claim of ***"imperfect"*** self-defense, sufficient to reduce his crime from murder to ***manslaughter.***

Example: D gets into a verbal dispute with V while both are drinking at a bar. At one point in the dispute, V reaches into his pocket. D, because he is slightly intoxicated, genuinely but unreasonably believes that V is reaching for a knife with which to stab D. D therefore stabs V first, reluctantly concluding that D must kill V before V can

kill D. (Assume that if D's belief that V was reaching for a knife had been reasonable, the way in which D used his own knife would have been a reasonable response.) V bleeds to death. D is prosecuted for murder.

D will be entitled to have murder reduced to voluntary manslaughter, because D honestly (though unreasonably) believed that he needed to use deadly force in self-defense. D is said to have a claim of "imperfect self-defense."

1. **Model Penal Code view:** The Model Penal Code agrees, taking the position that an unreasonable belief in the need for deadly force will give rise to manslaughter if the defendant was reckless in his mistake. See § 3.09(2), and Comment 12 to § 2.02 (Tent. Dr. No. 4). The Code is unusually liberal, in the sense that if the defendant's unreasonable belief was merely negligent, he cannot be charged with anything higher than criminally negligent homicide. M.P.C. § 3.09(2).

M. Burden of proof: Virtually all states make a claim of self-defense an ***affirmative defense,*** i.e., one which must be raised, at least in the first instance, by the defendant. Many states also place the ***burden of persuasion*** upon him, requiring him to ***prove by a preponderance of the evidence*** that all the requirements for the defense are met.

1. **Constitutionally permissible:** It is ***constitutional*** for the state to put the burden of persuasion upon the defendant as to self-defense. In *Martin v. Ohio,* 480 U.S. 228 (1987), the Supreme Court upheld a state law requiring the defendant to prove self-defense by a preponderance of the evidence. The Court reasoned that D was not being forced to prove any of the elements of the crime (murder, in this case), but was merely allowed to establish the "justification" of self-defense, a justification whose elements did not overlap with the elements of the crime charged. (But the Court noted that defendants must be allowed to introduce self-defense *evidence* that does not rise to the level of preponderance-of-the-evidence, because such evidence still may help the defendant establish reasonable doubt about whether he is guilty of the substantive crime.)

V. DEFENSE OF OTHERS

A. Right to defend others in general: A person may use force to ***defend another*** in roughly the same circumstances in which he would be justified in using force in his own defense.

B. Relation between defendant and aided person: The common law

traditionally limited the right to come to the assistance of others; many courts refused to permit a person to assist anyone except his relatives.

1. **Modern rule:** Today, however, most courts and statutes permit one to use force to defend a friend, or even a total stranger, from threat of harm from another. For instance, the court in *Commonwealth v. Martin,* 341 N.E.2d 885 (Mass. 1976), went so far as to permit one prisoner to raise the claim of defense of another when he attacked a prison guard who was apparently beating up the other prisoner. See also M.P.C. § 3.05(1), allowing defense of others without regard to the relation between the defendant and the person aided.

C. Requirements for defense: The defendant must generally meet the following requirements, in order to assert a claim of defense of others:

1. **Danger to other:** He reasonably believes that the other person is in ***imminent danger*** of ***unlawful bodily harm;***

2. **Degree of force:** The ***degree of force*** used by the defendant is no greater than that which seems reasonably ***necessary*** to prevent the harm; and

3. **Belief in another person's right to use force:** The defendant reasonably believes that the party being assisted would have the right to use in his own defense the force that the defendant proposes to use in his assistance.

D. Retreat: Most courts would probably hold that the defendant may not use deadly force if he has reason to believe that the person being aided could ***retreat with safety.*** Thus Model Penal Code § 3.05(2)(b) requires that the defendant at least "try to cause" the person aided to retreat if retreat with safety is possible (although the defendant may use deadly force if his attempt at encouraging retreat fails).

1. **Home of either party:** The Model Penal Code does not require that either the defendant or the party assisted retreat if the place where the encounter takes place is the dwelling or place of business of either of them. Thus if the attack occurred in the defendant's home, he would not be required to encourage the party aided to retreat even if that party did not live there. M.P.C. § 3.05(2)(c).

E. Mistake as to who is aggressor: Courts have been sharply in dispute

about the effect of one particular kind of mistake. This mistake arises when the defendant happens upon a struggle, and reasonably but erroneously believes that the force being used against one party is unlawful. The belief might be mistaken because ***that party was really the aggressor*** (and thus lost the right to use force in his own self-defense; see *supra*, p. 118), or because he is being arrested by, say, plainclothes policemen. Does the defendant lose his claim of defense of others by going to such a person's defense?

1. **Traditional view:** The traditional view, sometimes called the ***"alter ego"*** rule, is that the defendant ***"stands in the shoes"*** of the person he aids. Under this view, if the person aided would not have had the right to use that degree of force in his own defense, the defendant's claim fails.

Example: D, a forty-year-old man with a virtually clean police record, observes two middle-aged men beating and struggling with an 18-year-old youth in the middle of Manhattan. The youth is crying and trying to pull away, and one of the older men has almost pulled his pants off. D attempts to go to the youth's rescue, and during the struggle with one of the older men, the latter falls and breaks his leg. It turns out that the two older men were plainclothes policemen who were arresting the youth, and that D had no way of knowing this. D is convicted of criminal assault.

Held, "[O]ne who goes to the aid of a third person does so at his own peril.... The right of a person to defend another ordinarily should not be greater than such person's right to defend himself." A contrary policy "would not be conducive to an orderly society." Because the youth would not have been entitled to use force in his own defense (since the arrest was lawful), D could not use force on his behalf. *People v. Young*, 183 N.E.2d 319 (N.Y. 1962).

Note: Several years after the decision in *Young,* the New York legislature changed the law. N.Y Penal Law § 35.15(1) now provides that one may use physical force to defend another from what one "reasonably believes" to be the use or imminent use of unlawful force against that person.

   a. **Modern view allows defense:** But the more modern view is that so long as the defendant's belief that unlawful force is being used against the person to be aided is ***reasonable,*** the defendant may assert a claim of defense of others even if his evaluation turns out in retrospect to have been ***wrong.*** This is the rule imposed by Model Penal Code § 3.05(1)(b), which refers to "the circumstances as the actor believes them to be..."

VI. DEFENSE OF PROPERTY, INCLUDING HABITATION

A. Right to defend property generally: One has a limited right to use force to ***defend one's property*** against a wrongful taking.

1. Non-deadly force: ***Non-deadly force*** may be used to prevent a ***wrongful entry on one's real property,*** and the ***wrongful taking of one's personal property.***

2. Limited to reasonable degree: The degree of force used must not be ***more than appears reasonably necessary*** to prevent the taking. For instance, if there is reason to believe that a ***request to desist*** would be sufficient, force may not be used. See M.P.C. § 3.06(3)(a).

3. Subsequent use of deadly force: If one begins by using a reasonable degree of non-deadly force, and the wrongdoer responds with a personal attack, then the rules governing self-defense *(supra,* p. 115) come into play. Thus it may be permissible to use deadly force to protect oneself.

B. Deadly force not generally allowed: Generally speaking, one may ***not use deadly force*** to defend personal property or real estate. The law regards human life as more valuable than property rights, and therefore refuses to allow the former to be endangered to protect the latter.

1. Defense of dwelling: However, a number of courts allow a person to use deadly force to defend one particular type of property: the defender's ***dwelling.*** This right, when it exists, is referred to as the right of ***"defense of habitation."***

a. Broad right: A few courts hold that one may use deadly force ***whenever*** any forcible entry of one's dwelling is occurring, provided that a warning does not suffice. L, p. 505. In these courts, the occupant does ***not*** have to reasonably fear that the intruder will commit either serious bodily harm or a felony. So in such a state, a homeowner could ***shoot an unarmed intruder*** even if (1) the intruder would not be committing the felony of burglary (e.g., because it was in the daytime, in a jurisdiction adhering to the common-law rule that burglary must be at night), and (2) the owner had no reason to expect violence from the intruder.

b. Must be felony or pose serious danger: Other courts follow a somewhat stricter view, that deadly force may be used only where

the intrusion appears to be ***either*** done for purposes of committing a ***felony*** or of doing harm to someone inside the dwelling. L, *id.* Even under this stricter standard, a homeowner would have the automatic right to ***shoot a burglar*** (since, by the definition of burglary, the intruder intends to commit a felony), even if there were no reason to believe that the burglar was armed or dangerous.

c. Must be dangerous felony: But the ***modern*** view is even more limited. Under this view, deadly force may be used ***only where the intrusion appears to pose a danger of a violent felony.*** Under this view, there is not an automatic right to shoot a suspected burglar (even though burglary is a felony) unless he is believed to be ***armed*** or to pose a ***danger to the safety of the inhabitants.***

i. Model Penal Code view: The Model Penal Code follows an even stricter variant of this modern approach: deadly force may be used only where the user believes that the intruder is trying to commit a felony, ***and also*** believes either (a) that the intruder has employed or threatened the use of ***deadly force,*** or (b) that the dwelling's inhabitants will be exposed to ***"substantial danger of serious bodily harm."*** M.P.C. § 3.06(3)(d)(ii). Thus where a homeowner has no reason to believe that a burglar is armed, and no reason to believe that the intruder poses a threat of serious bodily harm to the inhabitants, the owner is ***not allowed to shoot.***

C. Use of mechanical devices: Property owners are sometimes tempted to use various ***mechanical devices*** to protect their property. These devices may be of either the deadly or non-deadly variety, and have given rise to some special rules.

1. Non-deadly devices: A device that is ***non-deadly*** (i.e., one that is not likely or intended to cause death or serious bodily harm) may be used, generally speaking, whenever it is reasonable to do so. Barbed wire or spiked fence (but not an electrical fence) would fall within this category.

a. Model Penal Code: The Model Penal Code further requires either that the non-deadly device be one that is "customarily used for such a purpose" or that reasonable care be taken to ***warn*** intruders that

the device is being used. M.P.C. § 3.06(5)(c).

2. **Deadly force:** Where the device constitutes ***deadly force,*** on the other hand, courts are much less willing to allow its use.

a. **Traditional view:** The traditional view has been that such devices may at least be used in situations where the owner, if he were present, would be entitled to use deadly force himself. Suppose, for instance, that a homeowner sets up a ***spring gun*** (a gun whose trigger is attached to a door or window, so that it fires when entry is made). If the gun shoots an armed burglar, the owner will probably escape liability, since he would in most jurisdictions have had the right to use deadly force against the burglar personally.

b. **Modern view prohibits:** But the modern view ***prohibits the use of such devices altogether,*** even if they happen to go off in a situation where the owner himself *would* have been justified in using deadly force.

Example: D attaches a loaded pistol to the door of his house, after he has been burglarized. Two unarmed teenagers, X and Y, then try to break into the house; while X is forcing open the door, the gun goes off and hits him in the face. D is convicted of assault with a deadly weapon.

Held, conviction affirmed. California will not allow the use of deadly mechanical devices under any circumstances. "Allowing persons, at their own risk, to employ deadly mechanical devices imperils the lives of children, firemen and policemen acting within the scope of their employment, and others." Where the homeowner is present, there is always a chance he will realize that what he thinks is a burglar is really not; a mechanical device cannot make such judgments. Furthermore, deadly force is allowable, if used in person, only where the intruder creates a danger of great bodily harm; since the house was empty when X and Y entered, there was no danger to inhabitants, so even under the traditional common-law rule the use of the spring gun was unlawful. Nor can the use of the gun be justified on the grounds that D was attempting to apprehend a felon, since there is no evidence that D intended to apprehend rather than to maim. *People v. Ceballos*, 526 P.2d 241 (Cal. 1974).

i. **Model Penal Code follows modern view:** The Model Penal Code similarly holds that a deadly mechanical device may never be used. M.P.C. § 3.06(5)(a).

D. **Recapture of chattel and of re-entry on land:** A similar privilege to use reasonable force exists where the taking of personal or real property has been ***consummated.***

1. **Personal property:** Where personal property has been taken, all

courts agree that the defendant may use reasonable non-deadly force to ***recapture*** it, provided that he does so immediately following the taking. L, p. 506.

a. Interval: But if a substantial period of time has elapsed since the taking, the traditional view is that reasonable force may not be used to reclaim the property, and that resort to the courts must be had instead.

i. Model Penal Code: However, the Model Penal Code, in § 3.06(1)(b), allows the use of such force to retake property at any time, provided that the owner believes that the other person has no "claim of right" to possess the object. Thus if D's bicycle is stolen, and he sees X riding down the street on it several days later, he cannot use force to take it from X if he has reason to believe that X may have bought it from the thief; in this situation, X would be acting under a "claim of right to possession" even though he does not have title. If, on the other hand, D thought that he recognized X as being the thief, he could then use reasonable force to take back the bicycle.

2. Re-entry on real estate: Similar rules exist with respect to a person who is ousted from real property which he owns. That is, the common-law rule is that reentry by force may not be made unless it is done immediately. Again, however, the Model Penal Code would allow forcible re-entry after a lapse of time, at least where the non-owner has no claim of right to possession, and it would be an "exceptional hardship" for the owner to wait to get a court order. M.P.C. § 3.06(1)(b)(ii).

VII. LAW ENFORCEMENT (ARREST; PREVENTION OF ESCAPE AND CRIME)

A. Law enforcement privilege generally: A person engaged in ***law enforcement*** has a general privilege to violate the law when it is reasonable to do so.

Example: D, who has been charged with possession and sale of heroin, claims that he was acting at the request of the police, who wanted to find and arrest dope dealers. *Held,* if D can demonstrate this, he will be entitled to an acquittal, on the grounds that he did not possess a "felonious" intent. *Kohler v. Commonwealth,* 492 S.W.2d 198 (Ky. App. 1973)

1. **Use of force:** The question of privilege to engage in law enforcement usually arises in the context of the ***use of force*** by the defendant. Accordingly, our discussion of the three principal areas of law enforcement (arrest, prevention of escape, and prevention of crime) focuses on when force may be used.

B. **Arrest:** Law enforcement officers are sometimes privileged to use reasonable force in effecting an arrest. However, this privilege exists only where the arrest being made is a ***lawful one.*** Therefore, it is necessary to have a general idea of what constitutes a lawful arrest.

1. **Summary of arrest rules:** The rules governing when arrests may be made can be summarized as follows (see L, pp. 508-09):

   a. **Felonies:** At common law, a policeman may make an arrest for a ***felony*** if it was committed in his presence, or if it was committed outside of his presence but he has reasonable cause to believe that it was committed, and committed by the person to be arrested.

   i. Warrant not required: In these situations, the arresting officer is ***not required*** to have a ***warrant.***

   ii. **Private person:** A ***private citizen,*** on the other hand, may generally arrest for a felony only if the felony has ***in fact*** been committed, and some states may require that it in fact have been committed by the person arrested. In other words, a private citizen will not receive the benefit of a reasonable mistake, where a law enforcement officer will.

   b. **Misdemeanors:** A law enforcement officer may also arrest for a ***misdemeanor,*** without a warrant, if it occurred in his presence. But the common-law rule is that if the misdemeanor occurred outside of the officer's presence, then a warrant is required. (This rule has frequently been changed by a statute).

   i. Private citizen: In most states, a ***private citizen*** may arrest for misdemeanors actually committed in his presence, but generally not for ones committed outside his presence, or in situations where the citizen has made a reasonable mistake about whether the offense really occurred.

2. **Arrest resisted:** If an officer who is attempting to make a lawful

arrest meets resistance, which makes him reasonably believe that he will be hurt, he may use reasonable force to protect himself. If he reasonably believes that he is in danger of serious bodily harm or death, he may even use ***deadly force*** to protect himself. In general, the rules applicable to self-defense *(supra*, p. 115) apply in this situation.

   a. **No need to retreat:** However, there is one important difference: even in those jurisdictions which require one to retreat before using deadly force if it is safe to do so *(supra*, p. 121), an officer is ***not required to retreat rather than make the arrest.*** L, p. 509-10.

3. **Suspect fleeing:** The most frequent kind of controversy involves the use of force against a suspect who, rather than resisting, merely ***flees.*** Since the arresting officer is not in any danger of harm, the reasons for allowing him to use force are less compelling. Accordingly, while an officer may use ***non-deadly force*** wherever it is reasonably necessary to make the arrest, limits have been placed on the use of deadly force.

   a. **Misdemeanors:** If the suspect is fleeing from an arrest for a ***misdemeanor,*** it is universally agreed that ***deadly force may not be used against him.***

   Example: D, a game warden, attempts to arrest X for illegal fishing (a misdemeanor). X tries to escape in his boat, and D chases him. X hits D on the head with an oar, and D shoots him in the arm. D is tried for assault and battery.

   Held, since the arrest was for a misdemeanor, D had no right to use deadly force (a gun) merely to prevent X from escaping. But if the shooting was in response to dangerous resistance by X, then it may have been justified. *Durham v. State,* 159 N.E. 145 (Ind. 1927).

      i. **Speeders:** This rule normally will mean that when the police are chasing a ***speeder*** (generally a misdemeanant), they may not shoot at him or his car. If they shoot at the tires and cause a fatal crash, they will be liable for manslaughter. See L, p. 510. (Shooting a gun in the direction of a person, even without an intent to hit that person, is generally considered to be the use of “deadly force”; see M.P.C. §3.11(2)).

   b. **Non-dangerous felony:** Where the suspect is fleeing from an arrest for a ***non-dangerous felony,*** may the arresting officer use deadly force to apprehend him?

i. **Common-law view:** The common-law view was that the officer could use deadly force to prevent the escape of a person fleeing from an arrest for any felony, even if the felony was not one involving violence or physical danger to others. L, p. 510. Thus if an officer spotted a burglar leaving a house, the officer could (at least after shouting a warning) shoot the fleeing suspect, even if there was no reason to believe that the suspect was armed or dangerous.

ii. **Supreme Court disallows:** But the arresting officer's right to use deadly force to stop one fleeing arrest for a non-dangerous felony is now drastically restricted, as the result of a Supreme Court constitutional law decision, ***Tennessee v. Garner,*** 471 U.S. 1 (1985). In *Garner,* the Court held that "where the suspect poses ***no immediate threat*** to the officer and ***no threat to others,*** the harm resulting from failure to apprehend him does ***not justify the use of deadly force*** to do so." In constitutional terms, the Court decided that use of deadly force to apprehend a nondangerous fleeing suspect amounts to an ***unreasonable seizure*** under the Fourth Amendment.

iii. **Significance for prosecution of officer:** *Garner* was not a criminal prosecution at all. Rather, it was a private suit brought by the suspect's estate against the police department, for damages stemming from the asserted violation of the suspect's constitutional (Fourth Amendment) rights. But *Garner* probably has great significance in the event the arresting officer were tried for murder or manslaughter — the fact that the officer had violated the suspect's Fourth Amendment rights would probably by itself be sufficient to deprive the officer of the defense of force-usedpursuant-to-lawful-arrest.

iv. **Application to facts:** The facts of *Garner* illustrate the kind of situation in which the use of deadly force will not be constitutionally permissible. A police officer received a report that a burglary was in progress at a private residence. He arrived on the scene, and saw in the darkness a young man, who refused to stop when ordered to do so. As the suspect

started to climb over a fence in order to escape, the officer shot him dead in the back. Since the officer had no reason to believe that the suspect was either armed or dangerous to anyone, the use of the gun to "seize" (and, unfortunately, kill) him was "unreasonable" under the Fourth Amendment.

v. When deadly force can be used: *Garner* does not mean that deadly force may ***never*** be used where a suspect escapes following a non-dangerous felony. As the Court explained in *Garner,* "where the officer has probable cause to believe that the suspect poses a threat of ***serious physical harm,*** either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Even where the felony was non-dangerous, the officer may use deadly force if the suspect ***threatens the officer with a weapon;*** he must, however, give some warning if it is feasible to do so.

vi. Model Penal Code view: The Model Penal Code's rules on when deadly force may be used to apprehend a felon are constitutional under *Garner*. By M.P.C. § 3.07(2)(b), deadly force may be used only if the officer believes that the force to be used "creates no substantial risk of injury to innocent persons," and also believes either (1) that the suspect used or threatened the use of deadly force; or (2) that there is a substantial risk that the suspect will "cause death or serious bodily harm" if he is not immediately apprehended. That is, under the M.P.C., deadly force may not be used unless the felon is dangerous, so the *Garner* situation (deadly force used against non-dangerous fleeing felon) would not be sanctioned by the M.P.C.

c. Dangerous felony: If the felony is a ***"dangerous"*** one, the arresting officer may use deadly force if that is the only way that the arrest can be made. Under the Model Penal Code formulation mentioned *supra,* the suspect may be considered "dangerous" only if he is believed to have used or threatened deadly force while committing the crime, or is believed to pose a threat of death or serious harm to others if he is not immediately captured. The *Garner* decision seems to set out similar requirements for "danger-

ousness" — it allows deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Under this formulation, the typical car thief or burglar would not fall within the "dangerous" category.

4. **Arrest by private citizen:** The foregoing discussion assumes that the person attempting to make the arrest by use of deadly force is a law officer. If, however, the arrest is to be made by a ***private citizen,*** the situations where deadly force may be used are even rarer.

   a. **Assistance rendered to policemen:** If the private citizen is responding to a ***policeman's call for assistance,*** he will have roughly the same right to use deadly force as the officer would. (In fact, if he reasonably believed that the officer was trying to make a lawful arrest, he will be protected even if it turns out that the officer lacked probable cause or that the arrest was unlawful in some other way.) L, p. 512. This approach is followed by the Model Penal Code, in § 3.07(2)(b)(ii) and § 3.07(4)(a).

   b. **Arrest on one's own:** But if the private citizen is ***acting on his own,*** attempting to make a "citizen's arrest," he acts at his peril if he uses deadly force. If it turns out that no dangerous felony was committed, or that the suspect was not the one who committed it, the citizen will be criminally liable for death or injury to the suspect. L, p. 512.

   c. **Model Penal Code bars use:** The Model Penal Code goes even further; a private citizen who is not responding to what he believes to be an officer's call for assistance ***may not use deadly force at all,*** even if he correctly believes that the suspect has committed a dangerous felony. M.P.C. § 3.07(2)(b)(ii). The Code drafters justified this rule on the grounds that private citizens should be discouraged from shooting at fleeing felons, because citizens have normally not been trained to use firearms properly, and may therefore injure innocent bystanders.

   d. **Right to use deadly force to prevent escape of non-deadly felon:** A private citizen, like a police officer, may not use deadly force to ***stop a fleeing felon,*** if the felon poses ***no immediate threat*** to the

citizen or to others. In other words, the rationale of *Tennessee v. Garner* (see *supra*, p. 135) presumably applies to attempted arrests by private citizens just as to attempted arrests by police officers. (Of course, this rule would be invoked only where the court rejects — as most courts do — the M.P.C.'s blanket rule that the arresting citizen may *never* use deadly force, even to arrest a felon who *is* dangerous.)

C. Prevention of escape: The same rules apply to the use of force to ***prevent the escape*** of a suspect who has already been arrested. Thus an officer who has arrested a misdemeanant may not use deadly force to prevent him from escaping, since he would not be permitted to use deadly force to make the arrest in the first place. See L, p. 513.

D. Crime prevention: It may also be permissible to use force to ***prevent a crime*** from taking place, or from being consummated once it is begun. This privilege overlaps several others: (1) the right to arrest (since one might arrest for a burglary, and want to prevent the completion of the underlying felony, e.g., larceny); (2) self-defense or defense of others; and (3) defense of property (e.g., by preventing arson or burglary).

1. **Reasonable non-deadly force:** In general, both law enforcement officers and private citizens may use a reasonable degree of ***non-deadly force*** to prevent the commission of a felony, or of a misdemeanor amounting to a breach of the peace (e.g., fighting, but not a parking violation). L, pp. 513-14.

2. **Deadly force:** But the right to use ***deadly force*** is much more limited. The modern rule is that deadly force may be used to prevent only ***dangerous felonies.*** Thus just as the right to defend one's property does not furnish an automatic right to use deadly force against a burglar not believed to be armed *(supra*, p. 131), so deadly force may not be used against such a burglar under the guise of prevention of crime. Only if the burglar is believed to be armed, and likely to do serious bodily harm to the inhabitants, may he be shot at. And, of course, deadly force may never be used unless it appears that lesser force will not suffice. See M.P.C. § 3.07(5)(a)(ii)(1).

VIII. MAINTAINING AUTHORITY

A. Right to maintain authority generally: ***Parents*** of minor children, ***school teachers,*** and other persons who have a duty of supervision, have a limited right to use force to discharge their duties.

B. Parents of minor: ***Parents*** of a minor child may use a ***reasonable degree of force*** to guard the child's welfare. Thus a parent who hits or spanks his child will not be guilty of battery, provided that the degree of force is not unreasonable under the circumstances. The "circumstances" include the child's age, sex, severity of his misbehavior, etc.

1. **Objective vs. subjective standard:** Courts are in dispute about whether the standard for determining the reasonableness of the force is an objective or a subjective one. The "objectivists" look to whether a "reasonable parent" would have used that degree of force in the circumstances. The "subjectivists" would look to whether the parent was motivated by a genuine desire to guard his child's welfare, as opposed to a malicious desire to punish and inflict pain.

2. **Model Penal Code:** The Model Penal Code imposes a test which has aspects of both the objective and subjective approach. First, the parent must be acting "for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct..." (subjective standard). Additionally, the force must be "not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation...." (a somewhat objective standard, since a purpose of promoting the child's welfare will not exculpate a parent who knew that there was a substantial risk of causing, e.g., "extreme mental distress" by the punishment.) M.P.C. § 3.08(1).

    a. **Negligence or recklessness:** If the parent negligently or recklessly fails to realize that he is creating such a risk, he loses the defense of maintaining authority only with respect to crimes as to which the *mens rea* is negligence or recklessness, as the case may be. M.P.C. § 3.09(2). Thus if death resulted, the parent who negligently failed to realize that the beating administered might cause death could not be convicted, under the Code, of murder or manslaughter (both of which require at least recklessness), but could be convicted of criminally negligent homicide.

C. School teacher: A ***school teacher*** may similarly use reasonable force to maintain order or to promote a student's welfare, assuming that there is no statute barring corporal punishment. As with parental authority, the courts are split on whether the test should be an objective test (force that a reasonable person would use) or a subjective one (whether there was "malice").

IX. CONSENT

A. Effect of consent by victim: Generally, the fact that the victim of a crime has ***consented*** does not bar criminal liability. For example, if a terminally ill patient asks a physician to help him commit suicide, the doctor can be found guilty of the crime of assisting in a suicide, even though his actions were done with the victim's consent.[1] However, there are two major types of situations in which the victim's consent may bar liability:

1. Thus the Supreme Court has held that a state ban on assisted suicide does not violate the substantive Due Process clause of the Fourteenth Amendment. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

1. Consent as element of the offense: Some crimes are defined in such a way that lack of consent is an ***element of the crime.*** The most obvious example of this is ***rape:*** if the woman consents, there has been no rape.

2. Consent as relevant factor: There are other crimes as to which lack of consent is not an element, but where consent may induce the offense to occur where it would otherwise not have. In this situation, courts are in dispute about whether the victim's consent negates the existence of a crime.

a. Model Penal Code view: The Model Penal Code view is that consent of the victim negates the crime if the consent "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." M.P.C. § 2.11(1). More particularly, the Code provides that where a crime involves threatened or actual bodily harm, consent is a defense if the bodily harm is ***not serious*** or is part of a lawful ***athletic contest*** or ***competitive sport.*** Thus if one participant in a boxing match injured the other, the former could not be prosecuted for battery, assuming that the boxing match was not in violation of law.

B. Incapacity to consent: Even where the crime is one as to which consent can be a defense, consent will not be found where the victim is too ***young, mentally defective, intoxicated,*** or for other reasons unable to give a meaningful assent.

1. Deception: Similarly, if the consent was obtained by ***fraud,*** it will generally not be valid. However, the fraud will negate the consent, generally speaking, only where it goes to the ***essence*** of the harmful activity, rather than to a ***collateral matter.***

a. Illustration: For instance, if M.D., a gynecologist, induced Patient to have sexual intercourse with him by blindfolding her and telling her he was performing an examination procedure, this would be fraud in the essence, and M.D. would be guilty of rape. But if M.D. merely told Patient that sex would be a beneficial treatment for her, this would be fraud in the inducement, and the consent would not be vitiated. M.D. would thus not be guilty of rape. See L, p. 518.

C. Contributory negligence of victim: The fact that the victim may have been ***contributorily negligent*** will not, by itself, be a defense to any crime. Contributory negligence is a tort doctrine based on the theory that even an injured plaintiff should not be entitled to recover where he is partially at fault. Insofar as the function of the criminal law is to protect the state's interest in proper behavior by all citizens, the plaintiff's contributory negligence does not negate the need to punish the defendant.

1. Relevant as evidence: However, the plaintiff's contributory negligence may have an ***evidentiary bearing*** on the defendant's guilt. Thus a defendant charged with manslaughter arising out of an auto accident might try to show that it was the deceased's negligence, not his own, that caused the accident. See *infra,* p. 278. See L, p. 520.

D. Guilt of victim: The fact that the victim is himself engaged in the same or a different illegal activity will not necessarily prevent the person who takes advantage of him from being criminally liable. For instance, in a situation like that of the movie *The Sting* (A swindles B, who is involved in the running of an illegal betting parlor), A will nonetheless be guilty of larceny by trick.

E. Condonation and compromise: Generally speaking, the fact that the victim ***forgives*** the injury, is unwilling to prosecute, or ***settles a civil suit*** against the party who injured him, will ***not*** absolve the latter from liability. The crime is considered to be against the people, not against the individual victim, and only the people's representative (the prosecutor) has authority to drop the charges. Of course, as a practical matter, if the victim is unwilling to cooperate, there will usually not be a prosecution if the offense is a minor one (and sometimes even a major one, such as rape).

1. **Compromise statutes:** However, a number of states have ***"compromise"*** statutes, by which if the wrongdoer and the victim reach a civil settlement, there is no criminal liability. Frequently, these statutes apply only to misdemeanors, not felonies.

X. ENTRAPMENT

A. Entrapment generally: The defense of ***entrapment*** exists where a ***law enforcement official,*** or some one cooperating with him, has induced the defendant to commit the crime.

1. **Two rationales for defense:** Two rationales for the entrapment defense have been commonly stated. The first, accepted by a majority of state courts and the U.S. Supreme Court, is that the legislature, in enacting the substantive criminal statute, did not intend it to cover one who was led into the crime by a government agent. The other, minority, rationale is that courts as a matter of public policy should not encourage police officials to "manufacture" cases or commit other improper acts.

2. **Two rules for entrapment:** Each of these two rationales has given rise to a test for determining whether entrapment exists:

   a. **"Predisposition" test:** The majority, and U.S. Supreme Court, rule is that entrapment exists "when the criminal design originates with the officials of the Government, and they implant ***in the mind of an innocent person*** the disposition to commit the alleged offense and induce its commission in order that they may prosecute." See *Sorrells v. U.S.*, 287 U.S. 435 (1932). Thus entrapment exists where: (1) the government originates the crime and induces its

commission; and (2) the defendant is an innocent person, i.e., one who is ***not predisposed*** to committing this sort of crime.

Example: The Ds run a small laboratory to manufacture illegal amphetamines. X, a federal narcotics undercover agent, tells the Ds that he wants to participate in the manufacture and distribution of such drugs, and that he is willing to supply propanone, a necessary and hard-to-get substance, as his part of the bargain. The Ds show X that they are already producing the drug, with their own source of propanone, but agree to his proposal. X supplies some propanone, the Ds produce amphetamines from it, and X arrests them. The Ds raise the defense of entrapment.

Held, the Ds' conviction affirmed. It is clear that the Ds were predisposed to commit the crime in question, since they had been previously manufacturing the drug on their own. Therefore, the defense of entrapment cannot be asserted; the court declines to broaden the doctrine to allow its use by one predisposed to commit the crime. Nor does X's supplying of a hard-to-get (though legal) component violate any constitutional right of the Ds. Prosecution of this type of offense would be impossible unless government agents were permitted to gain a suspect's confidence by supplying something of value to the enterprise. *U.S. v. Russell*, 411 U.S. 423 (1973).

b. Police conduct rule: The minority test for entrapment is that entrapment exists where the government agents originate the crime, and their participation is such as is likely to induce unpredisposed persons to commit the crime, ***regardless of whether the defendant himself is predisposed.*** Thus on the facts of *Russell*, under the minority view entrapment would probably not be found, since the supplying of a necessary and hard-to-obtain component is sufficient to cause persons not previously engaged in narcotics manufacture to commence such operations.

i. Model Penal Code follows minority rule: The Model Penal Code follows the minority position. M.P.C. § 2.13(1)(b) permits the entrapment defense where the government agent induces the crime by "employing methods of persuasion or inducement which create a substantial risk that such offense will be committed by persons ***other than those who are ready to commit it."***

3. False representations regarding legality: A separate kind of entrapment is recognized to exist where the government agent ***knowingly makes a false representation that the act in question is legal.*** Thus if X, in *Russell*, had told the Ds that amphetamines could be legally manufactured, the defense of entrapment would be recognized (presumably even by courts following the Supreme Court-

majority rule). See M.P.C. § 2.13(1)(a).

4. **Exception for violent crimes:** Some courts have refused to allow the entrapment defense where the crime is one involving ***violence.*** See, e.g., M.P.C. § 2.13(3), making the defense unavailable where "causing or threatening bodily injury is an element of the offense charged," and the violence alleged was committed by one other than the government agent.

B. Evidence: When the majority test for entrapment is followed, the prosecution is permitted to show the defendant's "predisposition" by evidence of his ***past criminal activities of a similar nature.*** The theory behind allowing such evidence is that if the defendant was willing to commit such crimes in the past, he was probably predisposed to do so on this occasion. Thus the prosecution in *Russell* was permitted to show that the Ds had previously been engaged in the manufacture of amphetamines.

1. **Danger of prejudice:** Allowing such evidence runs counter to the usual principle that evidence of past criminality by the defendant is not admissible. Where the entrapment issue is decided as a matter of fact by the jury (as is usually the case), there is a substantial risk that the jury will consider this evidence not just on the entrapment issue, but also on the merits. For this reason, the majority "predisposition" rule is often criticized (as in a dissent to *Russell, supra,* p. 141).

C. Distinguish from "missing element" cases: Situations involving entrapment should be distinguished from similar ones where, because of the participation of government agents, ***an element of the crime is missing.***

1. Illustration: For instance, if X, a government agent, suspects that D is a confidence man who swindles people out of their property by a "bunco scheme," and he feigns participation in the scheme by giving money to D, D cannot be convicted of obtaining money by false pretenses. This is not due to any entrapment defense, but because the crime of false pretenses requires actual reliance by the victim *(infra,* p. 324), and X was not really fooled. See L&S(1st), p. 370.

Quiz Yourself on
JUSTIFICATION AND EXCUSE *(ENTIRE CHAPTER)*

20. Lewis threatens to kill Clark if Clark does not steal certain valuable camping equipment from their employer, Sacagewea, before they leave for the next leg of their trip the following week. Clark reasonably believes that Lewis will do what he says, given Lewis' past violent behavior. Clark steals the equipment and is charged with larceny.

(A) What defense offers Clark his best chance at an acquittal?

(B) In most states, will the defense you listed in (A) be accepted on these facts?

(C) Will the defense you listed in (A) be accepted on these facts under the Model Penal Code?

21. Norton holds a knife to the throat of Alice, Ralph's wife, and threatens to kill her unless Ralph robs the local convenience store.

(A) If Ralph robs the store, is he guilty of larceny?

(B) Same facts as above, except that Norton's threat is that he will kill Alice unless Ralph kills Trixie, Norton's wife. Ralph does so, and Norton releases Alice, thanking Ralph for making him a free man. Is Ralph guilty of criminal homicide?

22. Etta is kidnapped by Sundance and forced at gunpoint to participate in a bank robbery. (Before she participates in the robbery, Etta realizes that Sundance may well use deadly force to complete the robbery.) During the robbery, Sundance shoots and kills a bank teller, who is trying to summon the police. Etta is charged with felony-murder. Guilty or not guilty?

23. Phineas Phogg is piloting a hot air balloon around the world, accompanied by five paying passengers. The balloon starts to lose altitude, and Phineas must take immediate action.

(A) For this part only, assume that Phineas throws all the passengers' belongings overboard, hoping to lighten the basket's load and regain altitude. If Phineas is charged with larceny, what defense

should he assert, and will that defense prevail?

(B) Say instead that after Phineas throws overboard all the belongings (including his own), and anything else that's not human, the balloon is still plunging at an alarming rate. Phineas makes the reasonable determination that unless he throws one passenger overboard, the balloon will crash land at a speed that is likely to kill anyone aboard. He therefore throws overboard the heaviest passenger. If Phineas is charged with murder, will the defense you asserted in part (A) prevail?

24. Dorothy sees a tornado heading toward her while she is walking home from school with her dog Toto. In order to escape the danger, she breaks a window to get into the only nearby structure, a house, and runs into the basement. Is Dorothy guilty of trespass?

25. Rocky and Rambo meet on a sidewalk one day. Without any apparent provocation, Rocky begins to physically attack Rambo. Rambo reasonably fears that Rocky is about to kill him or do him serious bodily harm.

(A) For this part only, assume the following additional facts: Rambo knows that Rocky is a skilled and brutal fighter, and reasonably believes that if he, Rambo, fights back with non-deadly force (such as his own fists), Rocky is likely to overpower him and hurt him badly. Rambo also realizes that he could simply run away, because he's a faster runner than Rocky. But Rambo does not want to do anything so cowardly as that. Therefore, without any warning, Rambo whips out a hidden gun and shoots Rocky to death. Under the approach of most states, is Rambo guilty of homicide in Rocky's death?

(B) Assume the same facts as in part (A), except that: shortly after the Rocky's attack starts — before Rambo has made any real decision about how to defend himself — Rocky calms down, and starts to walk away. As Rocky is walking away, Rambo whips out his gun and shoots Rocky in the back. Rambo does this not because he fears that Rocky will change his mind and re-attack, but because he's enraged that Rocky had the gall to assault him in the first place. Can Rambo successfully plead self-defense against a charge of murder?

26. Alfalfa insults Butch's mother. Butch responds by slapping Alfalfa once on the cheek. Alfalfa (who thinks that the slap is just a prelude to a bigger attack) fights back by swinging with a closed fist. Butch, who reasonably fears that Alfalfa may slightly hurt him with his swings, swings back, breaking Alfalfa's jaw.

(A) If Butch is charged with battery for the swing that broke Alfalfa's jaw, will he be found guilty?

(B) Assume the same facts, except as follows: Alfalfa, instead of merely swinging at Butch after Butch's slap, wraps his hands around Butch's throat, and starts to squeeze hard. Butch responds by punching Alfalfa in the face (in order to break the choke-hold), and as in part (A) breaks Alfalfa's jaw. If Butch is charged with battery for the jaw-breaking, will he be found guilty?

27. Juliet is in her fifth month of pregnancy. Romeo walks up to her with a knife, and tells her, "Once you have the baby, I'm going to kill you." Juliet pulls out a gun and shoots him. Can Juliet defend on self-defense grounds?

28. Fletcher Christian shoots and kills Captain Bligh because he thinks Bligh is about to shoot and kill him. Actually, Bligh pulled out his gun to shoot deckhand Dick Hand, who was standing behind Christian and looking like he was about to strangle Christian with a clothesline. Can Christian successfully assert the defense of self-defense?

29. Papa Bear and his family are asleep in their home when he is awakened by mysterious noises coming from downstairs. He gets up and picks up a baseball bat from his son's room, and goes downstairs. There he confronts an apparently-unarmed Goldilocks, who is stealing silverware.

(A) For this part only, assume that Goldilocks is startled, but makes no move to leave. Nor does she put down the silverware. Papa Bear tells her to leave, and she starts walking out, taking the silverware with her. Papa Bear (who knows he's very strong) swings a baseball bat at Goldilocks' head, intending to knock her unconscious so he can retrieve the silverware. Goldilocks dies from the blow. Papa Bear is charged with manslaughter. Under the Model Penal Code, should he

be convicted?

(B) For this part, assume the same facts, except that after Papa Bear tells Goldilocks to leave, she runs towards the carving knives at the side of the kitchen. Before she can pick up a knife, Papa Bear swings at her with the baseball bat, fearing that if he doesn't, Goldilocks may attack him with the knife. (In fact, Goldilocks just wants to grab a few knives so she can steal them for their silver value.) Goldilocks dies from the blow. Again, Papa Bear is charged with manslaughter. Under the Model Penal Code, should he be convicted?

30. Paul Bunyon owns a hunting cabin in Northwoods that has been broken into several times during his absences. He devises a trap door just inside the entryway which, when triggered, drops an intruder into a rattlesnake pit. Several weeks later, Daniel Goon, unarmed, breaks into the cabin, intending to take away with him whatever he can carry. However, he falls through the trap door and into the pit, where he is bitten to death by the snakes. Can Paul Bunyon defend a murder charge on the grounds of privilege to defend his property?

31. Police officer Dudley Do-Righteous, walking the beat in the financial district, gets a call on his police radio that there has been an embezzlement at the Awesome Bank, and that the suspect is about to leave the scene with a large satchel in which to carry cash. (The report does not indicate that the suspect is armed.) Dudley happens to be right in front of the bank. He sees Snively Whiplash run out of the building carrying a large satchel, jump in a car, and start to drive away. Dudley yells "Stop, Embezzler!" Snively keeps going. The only way Dudley will be able to detain and arrest Snively is by shooting at him. Can Dudley do so?

32. John Gotti is a law-abiding citizen. One afternoon, while walking down a street in Little Italy, John observes a teenager running out of a store, holding a box. An old man chases the teenager, screaming in Italian (a language that John recognizes but doesn't understand). Some of the other people in the street around him begin speaking Italian and pointing towards the teenager. John reasonably believes that the boy has just committed shoplifting (a felony in the jurisdiction) from the man. Therefore, John gives chase. As he gets

close to the boy, John makes a flying tackle, hoping just to bring the teenager down. Instead, the teenager, while falling, cracks his head and suffers serious injuries. It later turns out that the teenager was the grandson of the old man, and that there had not been any crime, merely a family argument. Assume that John acted reasonably (at least given his lack of ability to understand Italian) in concluding that the teenager was a fleeing thief. If John is charged with the crime of assault, will he be able to raise the defense of private arrest?

33. Bunko, a police officer, convinces Ratso that Bunko is a junkie and that he'll pay anything to get a fix. Ratso refuses to sell him anything, saying he has nothing to do with drugs. Bunko pleads, "Come on, Pal. Have a heart. I'll give you $100 for yourself, plus whatever the stuff itself costs, if you'll help me out." Ratso finally agrees. When Ratso hands over the drugs, Bunko arrests him on narcotics charges.

(A) Assume for this part only that at the time of the transaction Ratso had in fact never dealt in narcotics. Will Ratso have a valid entrapment defense under the majority approach to entrapment?

(B) For this part, assume that Ratso had, in the previous two years, been arrested twice on drug-selling charges, and convicted once. Will Ratso have a valid entrapment defense under the majority approach to entrapment?

34. Annie Oakley, age 17, repeatedly asks Jessie James, a rifle dealer, to sell her a firearm. She finally succeeds, by telling James (who has long been attracted to Annie) that she'll have sex with him if he makes the sale. It's not a crime in the jurisdiction for an adult to have sex with a 17-year-old minor. It is, however, a crime to sell a firearm to a person under 18. James has never sold a firearm to a minor before. As soon as the sale is complete, Annie (who is secretly motivated by a desire to get unregistered firearms off the streets) turns Jessie in to the police. Can Jessie defend on grounds of entrapment, according to the majority definition of entrapment?

Answers

20. (A) Duress. The defense of duress is available where D commits a crime on account of a threat by a third person, which threat produces a reasonable fear in the defendant that he will suffer imminent death or serious bodily harm if he does not comply with the third person's demands.

(B) **No, because the harm wasn't imminent.** Traditionally, courts have required that the harm with which the defendant is threatened must be immediate or at least imminent. Here, the threat is that Clark will be killed if he doesn't take an action during the course of the next week. Although the requirement of imminence is not as iron-clad as it once was, it's still followed by most courts.

(C) **Yes.** M.P.C. § 2.09 does not impose any requirement that the threatened harm be imminent. All that is required is that the threat be such that a person of "reasonable firmness" would be "unable to resist" it. It seems likely that a person of reasonable firmness would choose to steal rather than die (and would believe Lewis' threat, given his past conduct), so Clark should be entitled to the defense under the M.P.C.

21. (A) No. In the vast majority of states today, the defense of duress is available whether the harm threatened is to the defendant himself, or to another. Since Ralph reasonably believed that the threat to Alice was real and immediate (and since the social harm from robbery is less than from murder), his crime will be excused under the doctrine of duress.

(B) Yes, probably. In most states duress cannot be an excuse to commit homicide, even where the defendant reasonably believes that he or his close relative will be killed if he doesn't carry out the homicide. (By the way, some but not all courts *do* allow duress to be a mitigating factor that reduces a murder charge to manslaughter.)

22. Not guilty. Although duress is normally not allowed as a defense to homicide charges (see part (B) to previous question), this is not true where the homicide is felony-murder. In other words, if duress would otherwise be usable as a defense to the underlying felony, duress may be used to prevent the felony from giving rise to felony-murder. Here, if no killing had occurred, Etta would have been entitled to use duress

as a defense to her participation in the bank robbery, since the threat that she'd be shot would have been enough to induce a reasonable person in her position to participate in such a robbery. The duress defense thus means that Etta is not guilty of robbery. Therefore, there is no underlying felony on which the felony-murder doctrine can operate.

23. (A) He should assert the defense of "necessity," which will be successful. Where a person is forced to choose between a violation of law or a greater (and imminent) harm, and he chooses to violate the law in order to avoid the greater harm, he is free of criminal responsibility under the doctrine of necessity. The destruction-of-property situation is, in fact, the classic kind of situation in which the defense is often successful.

(B) Unclear. Courts have generally been extremely reluctant — and in most cases unwilling — to allow the necessity defense when the crime involved is an intentional killing. However, the Model Penal Code allows the defense even in homicide cases, if the killing is necessary to save two or more other lives. Here, since sacrifice of one life was apparently the only way to avoid the likely loss of five other lives, the M.P.C. (and perhaps some courts) would allow the defense.

24. No. Dorothy can defend against the charge of trespass by asserting the defense of "necessity." The situation here meets all the requirements for the defense: (1) the harm of possibly being killed by the tornado was ***greater*** than the harm of breaking a window and trespassing; (2) there seems to have been ***no lawful alternative method*** of avoiding the harm; (3) the harm was ***imminent;*** and (4) Dorothy didn't ***cause the danger*** by recklessly or negligently putting herself in a position where the emergency was likely to arise.

25. (A) No. To begin with, the facts meet the basic requirements for self-defense: (1) Rambo was resisting the present or imminent use of unlawful force (since the act was completely unprovoked); (2) the degree of force was not more than was reasonably necessary to defend against threatened harm (since the facts say that Rambo realized he probably couldn't repel the act using non-deadly means); (3) deadly force was justified since the threat itself consisted of deadly force

(i.e., force that in these circumstances — given Rocky's skills — was likely to kill or seriously injure Rambo); and (4) Rambo was not the aggressor. The question, of course, is whether Rocky was required to ***retreat.***The majority answer to this question is no — perhaps surprisingly, most courts continue to hold that there is no duty to retreat before using deadly force, even where retreat can be accomplished with complete safety. Note, however, that a growing *minority* of courts has held that there *is* a duty to retreat before using deadly force, but even those courts hold there is no duty to retreat where, among other factors: (1) The victim cannot retreat in complete safety, or (2) the attack occurs in the victim's home or place of business, or (3) the attack occurs where the victim is making a lawful arrest. (None of these factors applies here, so in the minority of states sometimes requiring retreat, Rambo is guilty of homicide.)

(B) **No.** Once the danger of the attack is over, the defense of self-defense is no longer available to the defendant. As soon as Rocky turned and began to leave the scene, Rambo lost his ability to use any sort of force against him. (It would have been different if, say, Rambo reasonably believed that Rocky was leaving just in order to recruit his friends to come back and group-attack Rambo — then, Rocky's leaving wouldn't have been a true withdrawal, and Rocky would have been justified in shooting if there was no other apparent way to prevent a life-threatening group attack.)

26. (A) **Yes.** In general, the "aggressor" — the one who first committed a battery or other legal infraction against the other party — thereby loses the right to use force in his own defense. Since Butch began the encounter by committing a battery, he thereby lost the right to defend himself, even by the use of what would otherwise have been an appropriate level of force. (The fact that Alfalfa began the hostilities by insulting Butch's mother is irrelevant — insults not accompanied by force or threat of force aren't unlawful, and may not be responded to by force.)

(B) **No.** These facts illustrate an important exception to the general rule that the aggressor has no right to use force in his own defense: when the victim ***escalates*** the fight, the aggressor may respond with a level of force appropriate to the escalation. Here, Butch was the

aggressor but he started only a minor altercation. Alfalfa, the "victim," is the one who escalated the fight into one involving deadly force. Once that happened, Butch lost his status as aggressor, and was entitled to use self-defense as if he had never been an aggressor. Since a blow to Alfalfa's head was the only way he could reasonably defeat the potentially-deadly chokehold, he was entitled to use that level of force. (Indeed, he would have even been entitled to use deadly force, such as a gun or knife, if non-deadly force would not have sufficed.)

27. No. The defense of self-defense is available only where the threatened force is ***imminent.*** Where the threat refers to the future (i.e., a time beyond the "present occasion," in the words of the M.P.C.), physical violence is not necessary, because other means, such as police help, are presumably available. Here, Romeo's words revealed that Juliet was not under an immediate threat of physical violence, so she was not entitled to use physical force, let alone deadly force.

28. Yes, if Fletcher's mistake was reasonable. Even though the defendant is mistaken about the actual need for self-defense, his use of the defense is not nullified so long as his mistake was a reasonable one. Here, the facts strongly suggest that Fletcher's belief was a reasonable, though tragically mistaken, one. If so, Fletcher will prevail with the defense.

29. (A) Yes. A person has the right to defend his property. However, under the M.P.C. (and in many states today), a homeowner may not use deadly force to defend his home or other property from an intruder, unless either: (1) the intruder has used or threatened the use of deadly force; or (2) the owner or his family are exposed to a substantial danger of serious bodily harm. Here, Goldilocks was unarmed and not posing any apparent physical threat to Papa or any of the other Bears. Therefore, Papa was entitled to use only non-deadly force. The baseball bat — especially given Papa's strength — was likely to produce serious bodily harm if swung at Goldilocks' head, so its use constituted deadly force. Consequently, Papa exceeded the bounds of permissible force in defense of his property, and he will have no defense. (He would probably be able to defeat a *murder* charge, because his "imperfect self defense" would entitle him to have the charge reduced to voluntary manslaughter.)

(B) **No.** As noted in part (A), there is no privilege under the M.P.C. to use force likely to cause death or serious bodily injury if property alone is threatened. But where the threat to property is coupled with a serious bodily threat to the defender, then deadly force can be used in defense, even under the M.P.C. That's what happened here. (The fact that Papa was wrong about what Goldilocks intended is irrelevant — he reasonably believed that she was about to attack him with a knife, and that was enough.)

30. **No.** Although a property owner is sometimes privileged to protect his property against intruders by the use of mechanical devices, he may use only non-deadly ones. Under the modern view and the M.P.C., the use of a deadly mechanical device is *never* privileged – even if the homeowner would have been able to use deadly force himself had he been there at the time of the break-in. But even in a jurisdiction following the traditional view on mechanical devices, the device here would not have been privileged: under that view, the mechanical device may only be used under circumstances that would have entitled the homeowner to use deadly force in person. Here, where Goon did not pose a threat of serious bodily harm to anyone, Bunyon would not have been privileged to use deadly force in person, and was therefore not privileged to do so by proxy.

31. **No.** Although the common-law view was that an officer could use deadly force to prevent a person escaping the arrest of any felony, the Supreme Court, in *Tennessee v. Garner*, restricted that right. According to *Garner*, use of deadly force to stop a suspect fleeing from a non-dangerous felony is only constitutionally permissible if the suspect poses an immediate threat of serious physical harm, either to the officer or others. Here, Dudley would be violating the Fourth Amendment's ban on unreasonable seizures if he were to shoot Snively, since embezzlement is not a dangerous felony and there's no reason to believe that Snively poses a physical threat to anyone. Given that the shooting would be unreasonable, Dudley would lose his common-law privilege to use force in making an arrest, since that privilege is limited to the *reasonable* use of force. (But Dudley could have used non-deadly force, such as parking his car in the middle of the road to block Snively's escape.)

32. No. A *police officer* gets a privilege to use force (at least non-deadly force) to make an arrest for any felony, and he does not waive this privilege by making a reasonable mistake. But when a ***private citizen*** uses force (even non-deadly force) to make an arrest, he does not get the benefit of a reasonable mistake, and acts ***at his own peril.*** Since here, no felony was in fact committed, John cannot escape liability based on his reasonable error. Nor does John get any protection from the fact that he used non-deadly force — a private citizen may not use even non-deadly force based on a reasonable mistake (though John would be protected if the teenager had in fact committed a felony for which John was trying to arrest him).

33. (A) Yes. Under the majority approach to entrapment, entrapment exists where: (1) the government originates the crime and induces its commission; and (2) the defendant is one who was not predisposed to committing this sort of crime. Here, both elements are satisfied: (1) Bunko came up with the idea of a drug transaction, and by pleading induced Ratso to go along; and (2) Ratso's lack of any prior involvement in narcotics sales indicates that he was not predisposed to commit this sort of crime.

(B) No. Here, Ratso does not satisfy element (2) of the majority rule: his record indicates that he was in fact predisposed to sell narcotics. (But note that under the minority "police conduct" rule for determining entrapment, Ratso might win — under that test, if the government originates the crime and the behavior of the government agents is such that a non-predisposed person would be likely to be induced, the fact that the particular defendant himself may have been predisposed is viewed as irrelevant.)

34. No, because Annie is not a government agent, nor is she working with the police. Entrapment arises as a defense where government agents (or those working under their direction) instigate private persons to commit a crime that they were not "predisposed" to commit. The fact that Annie turned Jessie over to the police immediately after the crime (or even the fact that she always planned to do so) is irrelevant — a private citizen will be deemed to be working with the police, and thus a potential agent for entrapment, only if the police are directing or encouraging the operation while it

progresses. (If the police had put a wire on Annie before the sale, that probably *would* be enough to make Annie a government agent for entrapment purposes, in which case Jessie might win.)

Exam Tips on *JUSTIFICATION AND EXCUSE*

Consider all possible justifications and excuses discussed in this chapter when analyzing a fact pattern, because it is possible to assert several of them at the same time. Be aware that the defenses of self-defense, defense of property, and the "fleeing felon" defense present themselves most frequently.

Self-defense

- Key issues to consider when a party uses deadly force to defend herself from an attack or threat of an attack from another person:
  - **Serious bodily harm:** When D has been attacked, concentrate on analyzing whether the attack threatened him with what D reasonably believed was ***serious bodily harm.*** This matters because you can only use ***deadly force*** (force likely to kill or do serious bodily harm) to repel an attack that you reasonably believe threatens serious bodily harm.
  - **Proportionality rule:** Remember the ***"proportionality"*** rule: whether D uses deadly or non-deadly force, he may not use ***more force than seems reasonably necessary*** in the circumstances.

    Example: V attacks D with a knife (deadly force). D knows that he could readily twist V's arm and thereby make V drop the knife. Instead, D shoots V in the kneecap, to teach him a lesson. D has used more force than reasonably necessary in the circumstances, so he loses the defense of self-defense even though he was attacked with deadly force.

  - **Mistaken perception of threat:** When deadly force has not yet been used, you must analyze the ***reasonableness*** of D's belief that there was an imminent threat of deadly force. Even if D is

wrong in this belief, he can plead self-defense so long as his belief was reasonable.

Example (reasonable belief): D is selling cocaine outside a high school. T sticks his hand in his pocket, thrusts a finger forward, jabs D with it, and says, "I've got a gun. Give me the dope or I'll blow you away." D shoots T. It doesn't matter that T didn't really have a gun — so long as D's belief that there was a gun (and that T might use that gun) was reasonable, D was entitled to use deadly force in return.

Example (unreasonable belief): D brings her watch in to be repaired and the jewelry store owner sells it to V. At a bowling alley, D notices her watch on V's wrist. D angrily demands the watch. Concerned because of a previous argument with D, V fumbles in her pockets for the receipt to show she had purchased the watch. Thinking that V is reaching for a weapon, D strikes V on the head with a heavy metal ashtray, seriously injuring her. D would probably not be able to assert the privilege of self-defense, because her belief that V was reaching for a gun when she put her hands in her pockets was probably unreasonable in the circumstances.

☞ *Trap:* Don't be fooled by a fact pattern in which D shoots a ***police officer*** — if D had a reasonable belief that the police officer was a dangerous intruder, this may still be self-defense.

Example: D, the owner of a tavern, has been burglarized several times. As a result, he sleeps at the tavern with a pistol. V, a police officer, sees the tavern window open at night and climbs in to investigate. D cocks his pistol at V. V doesn't say he's a police officer, but shouts, "Drop that gun or I'll shoot." D, believing that V is an armed burglar, shoots V. D's belief that V was an armed burglar may well have been reasonable; if so (and if he reasonably feared that V would use deadly force), this was valid self-defense.

☞ **Belief must be bona fide:** Remember that even if a reasonable person might have believed that a threat exists, if the defendant did not ***actually*** believe that there was one, then the defense may not be asserted.

☛ **Assailant retreats or is otherwise incapable of inflicting harm:** Remember that if the ***initial threat no longer exists,*** the defense of self-defense no longer applies.

Example: Following a rape, the rapist falls asleep. The victim ties his hands and feet to the posts of the bed, and beats him severely. The victim may not assert the privilege of self-defense as to the serious injury because once the rapist was tied up, the threat was over.

☞ **Aggressor may not assert privilege:** Also, look for a fact

pattern where the initial aggressor's actual threat of or use of deadly force is responded to with force (perhaps deadly force) and the initial aggressor then defends himself. Remember that ***a wrongful aggressor has no right of self-defense against a reasonable response to her initial aggression.*** *Example:* After an exchange of insults, D pulls a gun and points it at V. V pulls out a knife and moves towards D. D shoots V. Since D was the wrongful aggressor and used deadly force, V's response was permissible (deadly force proportional to the threat).

Therefore, D was not permitted to use deadly force to counter it.

☞ **Exception for withdrawal:** But remember that even this rule has an exception: if the initial (wrongful) aggressor retreats, attempting to end the encounter, the aggressor is entitled to use force — even, where necessary, deadly force — to protect himself if the target persists in his defense. (And, the target's use of deadly force following the retreat is itself not reasonable). So be on the lookout for the retreat of the initial aggressor.

Example: D attends weekly sessions with a psychotherapist. While in the waiting room of the psychotherapist's office, D draws a knife, waving it at N, the nurse, and screaming, "Vader must die. The Empire will be restored." N takes a heavy, replica of a medieval sword and holds it in front of him. D hands the knife to N, kneels before him and says, "Forgive me, Lord of the Galaxy." N, who should (but doesn't) realize that he is no longer in danger of being injured by D, swings at D with the sword, narrowly missing him. D then grabs back his knife and stabs N. Despite the fact that D was the initial aggressor, his initial aggression had ended by the time N swung the sword. Therefore, N's response was not reasonable. This unreasonableness entitled D to use self-defense just as if N had never been a wrongful aggressor in the first place. So if D's use of the knife was proportional to the threat he reasonably perceived from N, D can successfully plead self-defense.

☞ **"Aggressor" narrowly defined:** Also, remember that "aggressor" is ***narrowly defined*** to cover only the case where D ***intentionally provokes a violent encounter.*** So if D merely ***trespasses*** against V, or non-violently ***steals*** from V, or ***insults*** V, then when V responds by using force, D isn't the initial aggressor and therefore has not forfeited his right to use self-defense.

☛ **No duty to retreat from one's own home:** Remember that even in

jurisdictions requiring D to retreat rather than using deadly force if retreat can be safely done, D is ***not obliged to retreat from his own home.*** That means that where the altercation occurs in D's home, you don't even have to worry about whether the jurisdiction ordinarily requires retreat before deadly force.

> *Example:* D invites V to D's house. V gets drunk, and attacks D with a knife. D asks V to leave, but V refuses. V gets closer, and D (reasonably) believes that his only choices are to leave his house through the front door (which D is confident that he can get to without being knifed) or to shoot at V. D decides to shoot at V, and hits him in the leg, badly injuring him. D is not guilty of assault, because he had a right of self-defense — since the encounter took place in D's house, he was not required to retreat before using deadly force, even though he could have retreated with complete safety. That's true even if the jurisdiction ordinarily requires retreat before the use of deadly force.

Defense of property

☛ **Deadly force not privileged:** When a party uses ***deadly force*** to protect his property, you should write in your answer that, generally, the use of deadly force is not privileged. However, note that in some jurisdictions, a party may use deadly force to prevent another from invading that party's ***home.*** In that case you must analyze the following:

- ☞ **Definition of dwelling:** The privilege applies only to intrusion of a ***dwelling,*** i.e., an occupied residence. So, for instance, a tool shed on the property would probably not be covered. But any room within the residence would be covered even if the room is used only for business (e.g., a doctor's office inside the doctor's house).

☛ **Degree of force:** Under the modern view, deadly force may be used only when the home occupier reasonably believes that an intruder is about to ***commit a violent felony*** within the premises and poses a danger to the inhabitants. So there's ***no automatic right to shoot at a burglar.***

Fleeing Felons and Law Enforcement

☛ **Private citizens:** The most common fact pattern in this area concerns a ***private citizen*** using force to ***stop a fleeing felon.*** If a party has just committed a dangerous felony and is fleeing, a private citizen is

justified in using deadly force only if the felon poses an ***immediate threat*** to the citizen or others. Check for the following:

- ☞ Make sure the party asserting the defense ***actually believes*** that the victim has just committed a felony.

  Example: X, Y and Z commit a robbery in a casino. As they are leaving, on the steps of a gambling casino, D approaches them, believing them to be the operators of the casino. He shouts, "Death to gamblers," and shoots at them. D was unaware of the robbery — his motive for shooting was to close down the casino because he had lost all his savings there and his life had been ruined. Therefore, although X, Y and Z were in fact fleeing felons, D may not assert apprehension-of-felons as a defense.

- ☞ Make sure the party asserting the defense was ***correct*** in his belief that the victim had just committed a felony. If he is mistaken, he bears the risk of his mistake, even if the mistake is "reasonable".

  Example: U, an undercover police agent, participates in the robbery of a drugstore with members of a group of thieves that U has infiltrated. U approaches the store owner, O, draws her gun, and hands to O a note that reads: "I am a police undercover agent. Pretend to be frightened. Give me the money in the cash register." O is illiterate, and therefore doesn't read the note. When U turns to leave, O shoots at her. Since U was not in fact a fleeing felon, O is not entitled to the fleeing-felon defense.

☛ **Police arrest:** Remember that a ***police officer*** who has probable cause to believe that a person has committed a ***felony*** (and is ***dangerous*** to others) may use *deadly force* to make an arrest. But where the officer believes that the person has merely committed a ***misdemeanor,*** or has committed a felony but poses ***no threat*** to others, the officer may ***not*** use deadly force to make the arrest.

- ☞ Don't be fooled by a fact pattern in which the arrestee has committed a dangerous felony, but the officer is making the arrest for a different crime, which is a mere misdemeanor or non-dangerous felony. What matters is what the officer reasonably believes, not the underlying facts.

  Example: After fatally stabbing somebody in a bar brawl, X drives away in her car. A few blocks away, a police officer, D, observes X going through a stop sign and begins to chase her. X speeds away because she thinks she is being chased regarding the stabbing. D fires at X's tires, but the shot accidentally kills a pedestrian, V. If D is charged with homicide in the death of V, he probably won't

succeed, because he was trying to arrest X for a misdemeanor (running a stop sign), and D wasn't privileged to use deadly force in doing so. The fact that X may have been guilty of a dangerous felony and could have been arrested with use of deadly force for that won't bail D out, since he didn't know these facts and his state of mind is the issue.

Entrapment

☛ **Requirements:** Remember that D usually must prove that (1) the government agent ***originated*** the crime and ***induced*** D to commit it; *and* (2) D was ***not predisposed*** to committing the crime.

☛ **Induce commission:** You will usually find that the police officer (or agent) did not ***induce or instigate*** the commission of the crime.

- ☞ **Absence of inducement:** Watch for a police officer who involves himself heavily in the planning or commission of the crime, but is not the actual one to suggest that it be committed. This won't be entrapment, because of the lack of inducement.

  Example: X and Y are suspected of having committed a series of recent robberies. P, an undercover police agent, invites X and Y to her home for drinks and mentions to them that she is impressed with the perpetrators of the recent robberies in the neighborhood. X then suggests that a neighborhood drugstore would be an easy target for a robbery. P agrees to join in the robbery, in order to obtain evidence of X's and Y's past crimes. X and Y are arrested as they enter the drugstore accompanied by P. Since P never suggested the commission of the crime, or otherwise induced X and Y to commit it, there's no entrapment despite her participation in the planning.

- ☞ **Predisposition:** You will also usually find that the party asserting the defense was predisposed to commit the crime, again blocking a finding of entrapment.

  Example: P agrees to assist the police in return for reduced charges on a drug-related crime. The police set him up in a used-car business and spread the rumor that he deals in stolen vehicles. With police permission, P purchases a stolen vehicle from X. Then D comes to P's place of business requesting to purchase a stolen vehicle. With police permission, P sells the stolen vehicle to D. This is not entrapment, because by seeking out the dealership and asking for a stolen vehicle, D showed a predisposition to commit the crime.

Duress

☛ **Duress generally:** When considering the defense of duress, the most important things to remember are:

- ☞ The defense ***may not be used*** in a ***murder*** charge.
- ☞ D's fear of harm must have been both ***reasonable*** and ***actual.***

CHAPTER 6
ATTEMPT

Introductory Note: Even if a person does not complete the commission of a substantive crime, she can in some instances be convicted of the separate crime of "attempting" to commit that substantive crime. The most important elements of liability for attempt are: (1) To be liable for attempting crime X, D must have had the ***intent*** to do acts which, if they had been carried out, would have resulted in the commission of crime X; (2) Thoughts alone won't suffice — D must have committed some ***act*** in furtherance of the crime (though exactly what types of act will suffice varies among jurisdictions); and (3) The claim that D couldn't possibly have succeeded — that is, the defense of ***"impossibility"*** — usually fails.

I. INTRODUCTION

A. Concept of attempt generally: It has long been recognized that there are sound reasons for punishing a person who tries to commit a substantive crime and who, for reasons beyond his control, comes close to succeeding but in the end fails. For instance, if A shoots at B with an intent to kill him, and he fails only because his aim is faulty, A is obviously a dangerous person whom it is desirable to punish. Otherwise, he may try again, either against B or against someone else.

1. Need to have police intervene: Furthermore, if attempts were not punishable, the police would be severely impeded in their ability to stop the commission of substantive crimes. Suppose, for instance, that the police knew that A would try to kill B. If they were forced to wait to see whether A were successful, and allowed to arrest him only if he were, their prevention powers would obviously be destroyed. Furthermore, their prevention powers would even be severely diminished under a rule of law that allowed them to arrest A for attempted murder after he shot at B and missed, but not to arrest him before he pulled the trigger for the first time.

a. Social interest: Therefore, there is a strong social interest not only in making unsuccessful efforts to commit a substantive crime criminal in themselves, but also in moving forward in time the point at which the planning and preparation of a crime becomes a punishable attempt.

2. Countervailing issues: On the other hand, if unsuccessful efforts become criminal too soon in the continuum between conception and

execution, undesirable effects may also occur:

a. **Punishment of innocent:** First, since the external evidence that someone is planning a crime is often ambiguous, there is a risk that this evidence may be wrongly interpreted, and will lead to the conviction of persons who had no intention at all of ever executing a substantive crime.

b. **No chance for abandonment:** Secondly, even assuming that the person in question did have an intention to commit a crime, by making his conduct punishable too early, we may be punishing someone who ultimately would have abandoned his efforts, perhaps before he even came reasonably close to committing the crime. We would thus run the danger of punishing him for little more than ***evil thoughts;*** as noted *supra* (p. 15), punishment for thoughts alone is not a desirable feature of a criminal justice system.

3. **Modern trend toward broader attempt liability:** Prior to this century, the tendency in Anglo-American law was to give great weight to the arguments urging strict limitation on liability for attempts. But the tendency in this century, particularly within the last twenty years, has been almost universally towards an extreme ***broadening of attempt liability.*** This broadening can be seen by considering briefly each of the three major aspects of attempt liability:

   a. **The mental state requirement:** It has traditionally been required that for a defendant to be convicted of attempting a particular substantive crime, he must have had an ***intent to commit that crime.*** There has been a greater willingness to convict for an attempt if the defendant had a mental state short of intent, but one which would have been enough to satisfy the *mens rea* requirement of the substantive crime itself. For instance, if A shoots at B with an intent to do him serious bodily harm, but not to kill him, this will be enough for murder in most jurisdictions (see *infra*, p. 251). However, the traditional, but probably not the modern, view is that if A misses, he is not guilty of attempted murder. This area is discussed *infra*.

   b. **The act requirement:** Similarly, the traditional view has been that the defendant cannot be convicted of an attempt to commit a

substantive crime unless he performed acts which came very close to commission of the substantive crime itself. But the modern view is that almost any sort of overt act that represents a substantial step towards the offense, and that is strongly corroborative of the defendant's intent to commit the substantive crime, will suffice. See *infra*, p. 160.

c. Impossibility: Lastly, the traditional attitude has been to give reasonably broad scope to a defense called the defense of "legal impossibility." In contrast, the modern view has been to limit this defense sharply. See *infra*, p. 164.

4. General attempt statutes: The vast majority of prosecutions for attempt today occur under ***general attempt statutes.*** That is, the typical criminal code does not specifically make it a crime to attempt murder, to attempt robbery, etc. Instead, a separate statutory section makes it a crime to attempt to commit any of the substantive crimes enumerated elsewhere in the code. Unfortunately, these statutes are not usually very specific as to what constitutes an attempt; a statute may say, for instance, simply that "it shall be an offense to attempt to commit any of the crimes enumerated in...," without specifying the requisite mental state, the kind of act which will suffice, or the scope of the impossibility defense.

a. Completed offense: However, the statutes do usually say that they apply only where the defendant does not succeed in committing the substantive crime; thus it is sometimes held that the defendant cannot be convicted of an attempt if the completed crime is proved. See *infra*, p. 173.

II. MENTAL STATE

A. Intent usually required: As a general rule, for a defendant to be convicted of attempting a particular substantive crime, he must have had an ***intent*** to do acts which, if they had been carried out, would have resulted in the commission of that crime. This view is in accord with the common understanding of what it means to "attempt" something. For instance, under this approach one can attempt to kill another person only if one ***intends to kill that person,*** and not if a danger of death to that other person arises from some other mental state (e.g., recklessness).

This is true even though mental states other than intent might suffice for a conviction of committing the substantive crime.

Example: D, hoping to scare V (but not physically injure him), fires a gun in V's direction. The shot narrowly misses V, and lands harmlessly. If the shot had hit and killed V, D would probably have been guilty of reckless-indifference murder. But reckless-indifference does not suffice as a mental state for attempt. Therefore, D will not be guilty of attempted murder.

1. **Specific crime in question:** Furthermore, the defendant must not only have an intent to commit a criminal act, but an ***intent to commit an act*** that if completed would constitute ***the same crime as he is charged with attempting.*** It is not enough that the defendant is shown to have intended some other sort of criminality.

Example: D accosts X, a woman, on the sidewalk, grabs her arm, and waves a screwdriver. He orders her to unlock the door of her car, and tells her that "we're going in your car." X is too frightened to find the keys, so she gives the purse to D, who looks for them. Another car pulls up, D is frightened, and X escapes. D is charged with attempted kidnapping, and convicted.

Held, D's statement that "we're going in your car" did not necessarily demonstrate an intent to kidnap, but may have signified merely an intent to rape X inside her car, or to steal from her. An intent to commit some crime other than kidnapping would not support a conviction of attempted kidnapping. Therefore, D's appellate counsel was incompetent in not raising this defense, and D is entitled to a new appeal. *In Re Smith*, 474 P.2d 969 (Cal. 1970).

2. **Knowledge of likely consequences:** Generally, the mere fact that the defendant knew that certain consequences were ***highly likely*** to result from his act is ***not equivalent*** to intending those consequences.

Example: D fires a gun in V's direction, knowing that it's highly likely that the bullet will hit V. (But D doesn't intend to hit V, just to frighten him.) The bullet misses. D is probably not guilty of attempted murder — his knowledge that death was highly likely was not equivalent to an intent to bring about that death.

a. **"Substantially certain" results:** But if it can be shown that the defendant knew that a certain result was ***"substantially certain"*** to occur, then this may be enough to meet the intent requirement, even though the defendant may not have desired that result to occur. For instance, the commentary to the Model Penal Code puts the case of a defendant who desires to demolish a building, and accordingly detonates a bomb, knowing that people inside will almost certainly be killed; according to the Code draftsmen, the defendant could be

convicted of attempted murder. See Comment 2 to M.P.C. § 5.01.

3. **Crimes defined by recklessness, negligence or strict liability:** Since an intent to bring about a certain result is generally required for crimes of attempt, it would seem at first glance that there can be no attempt to commit a crime defined in terms of recklessness or negligence.

   a. **Bringing about certain result:** This is clearly true as to those crimes defined in terms of recklessly or negligently bringing about a ***certain result.*** For instance, involuntary manslaughter is generally defined (see *infra,* p. 276) as grossly negligent causing of death. There can be no such thing as attempted involuntary manslaughter; either the defendant intended to bring about death, in which case he can be liable for attempted murder, or he did not intend it, in which case he is not guilty of any sort of attempted homicide. Thus suppose that D gets into his car knowing that it has bad brakes, but negligently (or recklessly) deciding to take a chance. If he almost runs into X because he can't stop in time, he will not be guilty of attempted involuntary manslaughter.

   b. **Crime not defined by result:** But if a crime defined in terms of recklessness or negligence does not require a particular physical consequence to occur, it may be possible to attempt to commit it. Suppose, once again, that D knows his car has bad brakes. If he gets into the car intending to drive it notwithstanding the risk, but is unsuccessful in starting the engine, he might theoretically be convicted of attempted negligent driving. See L, pp. 542.

   c. **Strict-liability crimes:** Where a crime is defined as bringing about a certain result regardless of the defendant's mental state, i.e., the crime is a ***strict-liability crime,*** the prevailing view is that D ***won't*** be guilty of attempting that crime unless he ***attempted to bring about the forbidden result.*** L, §6.2(c)(3), pp. 543-44.

Example 1: Statutory rape is defined in the jurisdiction as "having sexual intercourse with a person not one's spouse, where the person is under the age of 17." Assume that the case law of the jurisdiction imposes liability even where D honestly and reasonably, but incorrectly, believes that the other person is 17 or older. D believes that V, whom he has recently met, is 19 (that's how old she looks), but she is in fact 16. The two go out to dinner on a date, and then go back to D's apartment. There, D repeatedly tries to persuade V to have sexual intercourse with him. V agrees, and

allows D to partly undress her, then changes her mind, gets dressed again, and leaves.

D will not be convicted of attempted statutory rape. While he might have been convicted of *actual* statutory rape if he had had sex with V, he won't be convicted of attempt, under the prevailing view, unless he intended to have sex with a person he believed was under the age of 17. Since he actually believed V was 17, he did not have the requisite intent. (And that's true even if his mistaken belief was *unreasonable,* as long as it was genuine.)

Example 2: It's a crime in the jurisdiction to sell "adulterated" milk (milk with impure ingredients) even though the seller doesn't know that the milk is adulterated. D operates a convenience store. V selects a bottle of milk from D's shelf and brings it to D at the checkout counter, where D rings it up. But V suspects the milk is bad, and refuses to complete the transaction. The milk is in fact adulterated (something D didn't know.) D will not be convicted of an attempt to sell adulterated milk, because he did not attempt to bring about the forbidden result (selling milk that was adulterated).

4. Proving intent by circumstantial evidence: But keep in mind that the defendant's intent may be proved by ***circumstantial evidence.*** And one of the kinds of circumstantial evidence that would tend to demonstrate intent might be that the defendant has acted in circumstances where he must have had at least an awareness of the likely consequences of his conduct.

Example: Suppose D shoots twice at X, each shot missing by only eighteen inches from a distance of one hundred feet. D claims that he did not intend to kill X, but merely to frighten him. A jury could infer from D's acts that, beyond a reasonable doubt, D intended to kill X. Therefore, the jury could properly find D guilty of attempted murder, based solely on circumstantial evidence of D's intent.

a. Event must be probable to justify inference: But the jury will generally be permitted to make this inference (that D intended the result that was a likely consequence of his actions) only if the consequence was ***in fact a very likely result*** of D's action. If D commits act X, and particular bad result Z is only *somewhat* likely to result from act X, then the jury will ***not*** be permitted to infer that D intended result Z, and thus not permitted to find D guilty of attempting a crime defined in terms of achieving result Z.

Example: D, who knows that he is HIV positive, has been warned by a social worker to wear a condom before having sex. D then rapes three victims without wearing a condom. He is charged with three counts of attempted murder (in addition to rape). He is convicted and appeals, on the grounds that the state produced no evidence that D ever intended to kill his rape victims. The state responds that the trier of fact was permitted to infer such an intent from the fact that D engaged in behavior (having unprotected sex) that he knew posed a serious danger of inflicting death on his

victims.

Held, for D. It's true that where X fires a gun at another's head, the trier of fact may infer from this fact alone that X intended to cause death. But that is so because the likelihood of death from firing at a person's head is very great. Here, "The state has presented no evidence from which it can reasonably be concluded that death by AIDS is a probable result of [D's] actions to the same extent that death is the probable result of firing a deadly weapon at a vital part of someone's body." Without such evidence (and without any other independent evidence that D intended to kill his victims, such as statements made by D about his intent), D's conviction of attempted murder must be reversed. *Smallwood v. State,* 680 A.2d 512 (Md. App. 1996).

5. Intent as to surrounding circumstances: It is probably not necessary that the defendant's intent encompass all of the ***surrounding circumstances*** that are elements of the crime. The draftsmen of the Model Penal Code, for instance, put the case of a statute making it a federal crime to kill an F. B. I. agent. Supposing that recklessness or even negligence with respect to the victim's identity suffices for the completed crime, according to the Code an attempt to violate the statute can be found if the defendant intended to kill X, but was merely reckless or negligent with respect to whether X was an F.B.I. agent. See Comment 2 to M.P.C. § 5.01.

6. Completion of crime no bar: Suppose D actually ***commits*** crime X. D does this fact prevent D from being instead convicted of attempt to commit X? The modern view is ***"no"*** — D can't be convicted of *both* attempt and the completed crime, but no legal rule prevents her from being convicted of just attempt.

III. THE ACT — ATTEMPT VS. "MERE PREPARATION"

A. Attempt distinguished from mere preparation: Everyone agrees that attempt liability should be premised on something more than mere thoughts or verbal expressions of thoughts. Thus it is uniformly required that, before the defendant can be convicted of an attempt, he must have committed ***some act*** in furtherance of his plan of criminality. But there has been great dispute about what kind of act suffices. In the nineteenth century, it was usually held that only an act that came quite close to successful commission of the substantive crime could suffice. In this century, there has been a tendency to find that acts much earlier in the sequence of conception-to-commission are enough.

1. Different views: Nor have courts been in agreement even on what

factors should be looked to in determining whether or not an act is sufficiently demonstrative of criminal intent to meet the *actus reus* requirement for an attempt. In general, courts have gone in one of two directions: (1) focusing on ***how close*** the defendant came to committing the substantive crime (the "proximity" approach); and (2) focusing on how clear it is from the act that the defendant indeed intended to commit the substantive crime (the "equivocality" approach). Each of these approaches, and the variations upon it, are discussed below. Finally, we discuss the view of the Model Penal Code, which is more or less a combination of these two approaches.

B. The proximity approach: Most courts have based their decision about whether a particular act is sufficient on ***how close the defendant came to completing the offense.*** Courts have phrased the standard in various ways, including the ***"last act"*** test and the "dangerous proximity to success" test.

1. **"Last act" test:** At one time, courts often required that the defendant have committed ***every act which was in his power*** towards completion of the offense. This was known as the "last act" test.

2. **"Dangerous proximity to success" test:** However, the "last act" test turned out to be too restrictive — it prevented liability from attaching in situations where common sense dictated that it ought to. For instance, suppose that D decided to embark on a course of systematically poisoning X by the administration of small doses of arsenic. If he administered the first one or two doses, common sense would dictate that he had gone far enough to be liable for attempted murder; yet, he clearly had not committed the "last act," and would not do so until he set out the final dose of poison, by which time the only prosecution likely to occur would be for murder, not attempted murder. Accordingly, courts articulated the rule that so long as the defendant achieved a ***"dangerous proximity to success,"*** he would be liable.

   a. **Preparation may be enough:** It followed from this rule that what might be called ***"mere preparation"*** on the part of the defendant could nonetheless be a sufficiently overt act to confer liability. For instance, in *Commonwealth v. Peaslee,* 59 N.E. 55 (Mass. 1901),

the defendant was charged with attempted arson; he had arranged combustible materials inside the building in question, but his plan required the additional step of taking a candle from a shelf, lighting it, and moving it across the room. The court suggested (but did not decide) that even without the lighting of the candle, the defendant had done enough to meet the act requirement; "Some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a [crime]...."

b. Some preparations not enough: But the "dangerous proximity" requirement nonetheless means that some acts, although they very clearly indicate the defendant's intent to commit a substantive crime, are not sufficient to meet the act requirement. This is generally because there are circumstances ***outside the defendant's control*** which either may, or do, turn up to block successful completion of the crime. The following two examples illustrate this result.

Example 1: D, with three others, plans to rob Rao while he is carrying from the bank a payroll for his company. On the day when Rao is expected to carry the payroll, the four set out by car looking for him. They go first to the bank, then to sites where Rao's company is working, but do not find Rao or any other payroll messenger. As they are searching, they are arrested by the police, who have become suspicious. D is charged with attempted robbery.

Held, D is not guilty of the crime. For him to have been guilty, he would have had to commit an act which was "so near to [the crime's] accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference." Here, however, D did not come "dangerously" close to robbing Rao. At the very least, it was necessary that D locate the robbery victim; just as one cannot be convicted of an attempt to burglarize a building if one has merely searched for the building without finding it, so one cannot attempt a robbery before locating the victim. *People v. Rizzo,* 158 N.E. 888 (N. Y. 1927).

Example 2: D1 requests a $20 withdrawal from an ATM at Bank. She then fails to remove the bill. This "bill trap" causes the machine to be shut down and a service technician to be dispatched. (D1 knows that this is how things work, because she previously worked for Bank.) Shortly thereafter — apparently before the arrival of the technician — police find D1 and two other Ds sitting in a rental car near Bank. A search reveals several weapons and ammunition, as well as a stun gun and two pair of latex surgical gloves. One of the Ds also has someone else's ATM card. The Ds are charged with attempted bank robbery. The prosecution reasons that the Ds caused the bill trap in the expectation that once the technician arrived and opened the ATM, the

Ds could rob the machine.

Held, there is insufficient evidence to convict on the attempt charge. The Ds never made a move toward the technician or Bank to accomplish the criminal portion of their intended mission. Therefore, they had not yet taken a step of "such substantiality that, unless frustrated, the crime would have occurred'. ... Making an appointment with a potential victim is not of itself such a commitment to an intended crime as to constitute an attempt, even though it may make a later attempt possible." *United States v. Harper,* 33 F.3d 1143 (9th. Cir. 1994).

c. **"Indispensable element" test:** A variation on the "dangerous proximity to success" test is to look at whether the defendant's plan, to succeed, required cooperation or action by ***third persons,*** which had not yet taken place. (This is the "indispensable element" test.) If so, the defendant's conduct, by this test, does not yet amount to an attempt.

i. **Rejection of "indispensable element" test:** However, it seems clear that most modern courts would reject this view that there cannot be an attempt where the action of a third party is necessary for completion of a crime.

ii. **"Mere solicitation" not enough:** A related principle — probably accepted by most courts — is that if all the defendant has done was to try to ***convince another person*** to commit a crime, he has not met the act requirement. That is, one who has merely committed the offense of ***"solicitation"*** (discussed *infra*, p. 231) has not committed an attempt.

C. **The "equivocality" test:** All of the tests described above are similar, in that they look to how close the defendant came to succeeding. An entirely different test, usually called the ***"equivocality"*** test, requires instead merely that the defendant's conduct ***unequivocally manifest his criminal intent.*** If the conduct could be indicative either of a non-criminal intent or of a criminal one, it is not sufficient. But if it does unequivocally manifest criminality of intent, it suffices even though completion of the plan is many steps away.

1. **Confessions excluded:** Perhaps the most significant aspect of this test is that any ***confession*** by the defendant, made either to police or to other persons, is ***not to be considered*** in determining whether the defendant's acts were unequivocally criminal in intent. As one court put it, "That a man's unfulfilled criminal purposes should be

punishable they must be manifested not by his words merely, or by acts which are in themselves of innocent or ambiguous significance, but by overt acts which are sufficient in themselves to declare or proclaim the guilty purpose with which they are done." *The King v. Barker,* 1924 N.Z.L.R. 865 (N.Z. 1924).

2. **Criticism:** The equivocality test is often criticized principally on the grounds that there is almost ***no act that is completely unequivocal.*** For instance, suppose the defendant is arrested after lighting a match next to a haystack, and is charged with attempted arson. If he happens to be carrying a pipe, he can argue that he was merely going to light the pipe; since any confession to the contrary would be disregarded in measuring the equivocality of his conduct, the defendant would have to be acquitted.

3. **Uselessness of confession:** Even assuming that the equivocality test is interpreted so as to require only a "reasonable" degree of unambiguity, the test is open to the serious objection that it drastically undermines the utility of properly-obtained ***confessions*** — the confession can't be used to turn the equivocal act into an unequivocal one.

D. Model Penal Code's "substantial step" test: The Model Penal Code incorporates aspects of both the "proximity" test and the "unequivocality" test. Yet the aspects of each that it incorporates are relatively unstringent, so that almost any conduct meeting any of the variations of either of these tests would be sufficient under the Code, and many acts that would fail some or all of these tests would also be sufficient under the Code.

1. **"Substantial step" test:** Conduct meets the act requirement under the Code if, under circumstances as the defendant believes them to be, there occurs ".an act or omission constituting a ***substantial step*** in a course of conduct planned to culminate in [the defendant's] commission of the crime." M.P.C. § 5.01(1)(c).

   a. **"Strongly corroborative" requirement:** However, the Code adds that conduct meeting this "substantial step" test will not suffice unless, in addition, ".it is ***strongly corroborative*** of the actor's criminal purpose."

2. **Combination of proximity and equivocality test:** Thus a very watered-down version of the proximity test is contained in the requirement that the act be a “substantial step” towards completion of the crime, and a watered-down version of the equivocality test is contained in the requirement that the act be “strongly corroborative” of the defendant’s criminal purpose.

3. **Close proximity not required:** The Model Penal Code test will frequently confer attempt liability even where the defendant does not get very far along the path to consummation of his crime, as can be seen from the following example.

Example: X is a government undercover narcotics agent. He tells D, a reputed drug dealer, that he is looking for some heroin. D first makes four telephone calls to locate a source, and when that doesn’t work, offers to visit his contact if X will give him $650. D leaves to look for his contact, and an hour later comes back without having found him. He returns the money to X. D is arrested and charged with attempted distribution of heroin.

Held, D’s conviction affirmed. The jury could properly find that, under the Model Penal Code test, D’s requesting and accepting the money was a “substantial step” towards distribution of heroin, and that it was “strongly corroborative” of D’s intent to complete the crime. This was true even though the jury did not find beyond a reasonable doubt that D made any telephone calls to obtain heroin. *U.S. v. Mandujano*, 499 F.2d 370 (5th Cir. 1974).

a. **Examples given by Code:** The tendency of the Code to require relatively little to meet the act requirement is further enhanced by a number of examples given in M.P.C. § 5.01(2)(a) through (g). These subsections give illustrations of conduct which, according to the Code, shall not be held to be, as a matter of law, insufficiently substantial steps, provided that they are “strongly corroborative” of the defendant’s criminal purpose. These illustrations include the following:

   i. ***“Lying in wait, searching for*** or following the contemplated victim, of the crime.” This subsection thus overrules *People v. Rizzo, supra,* where the defendant’s act of searching for his robbery victim was held insufficient.

   ii. ***“Enticing*** or seeking to entice the contemplated victim of the crime to ***go to the place*** contemplated for its commission.” (Note that this subsection is inconsistent with the holding in *U.S. v. Harper, supra,* p. 160, in which the court held that

setting a "bill trap" in an ATM to entice a technician to appear so the ATM could be robbed was not a sufficient act to constitute an attempt.)

iii. ***"Reconnoitering*** the place contemplated for the commission of the crime." Thus a would-be burglar who is caught while "casing the joint" might be charged with attempted burglary.

iv. "Unlawful ***entry*** of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed."

v. ***"Possession of materials*** to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances." A would-be burglar who is stopped on the street, and found to be in possession of lock-picking tools, might be convicted of attempted burglary under this subsection.

vi. ***"Possession,*** collection or fabrication of ***materials*** to be ***employed in the commission of the crime,*** at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances." This provision, according to Comment 6(b)(vi) to M.P.C. § 5.01, is intended to be used principally in prosecutions for attempted arson. Recall, for instance, the defendant in *Commonwealth v. Peaslee, supra,* p. 158, who arranged combustibles in a building, but intended that they not be ignited until a later time. Under the Code, this arranging of flammable substances would itself be sufficient for an attempt (whereas the *Peaslee* court indicated that the defendant's solicitation of a third party to light the candle was also required before there could be an attempt).

vii. ***"Soliciting*** an innocent agent to engage in conduct constituting an element of the crime." This provision is not designed to apply where the crime of solicitation has occurred. (That crime only occurs where the solicited party would be guilty of a completed crime if he did as he was asked.) Thus if the solicitee is an innocent party because the solicitor has withheld

facts from him (e.g., A asks B to pick up a suit from the cleaners, and unbeknownst to B the cleaning ticket stub was stolen by A), this is not the crime of solicitation, but it can be an attempted crime (here, attempted larceny by A).

b. Misrepresentation: Although the Code itself does not furnish any examples dealing with attempts to commit crimes of ***misrepresentation*** (e.g., attempted obtaining money by false pretenses), the Comment 6(b)(viii) to M.P.C. § 5.01 indicate that ***actual communication*** with the party to be defrauded is ***not necessary,*** as long as the defendant has done what he believes to be necessary to make the communication.

Example: D fakes the theft of his jewelry, reports the theft to the police, and mails a claim form to Insurance Co. Even if the claim letter is never received, D has, under the Code, committed an attempt to obtain money by false pretenses, since he has taken all action which he believed necessary to communicate the misrepresentation.

4. Followed in many states: The M.P.C.'s "substantial step" test has been popular. About half the states, and two-thirds of the federal circuits, now use something like this test. K&S, p. 651.

IV. IMPOSSIBILITY

A. Nature of "impossibility" defense: It frequently happens that the defendant has done everything in his power to accomplish the result he desires, but that due to external circumstances, no substantive crime is committed. He may, for instance, be a would-be pickpocket who reaches into his victim's pocket, but discovers that it is empty. Or, he may be a would-be rapist who achieves penetration, but discovers, for instance, either (a) that the victim is his wife; or (b) that the victim is dead. In such situations, the defendant will often make the argument that not only did the completed offense not occur, it ***could not have occurred.*** That is, there was no way, theoretically, to pick the empty pocket, or to rape either one's wife or a corpse. This sort of defense has come to be called the ***"impossibility"*** defense.

1. Several kinds of "impossibility": However, the broad category of "impossibility" masks the fact that there are at least three analytically distinct kinds of situations where a claim that "the crime could not have possibly been committed" may be raised. For our purposes these

will be called the defenses of "actual impossibility," "true legal impossibility" and "impossibility as to a fact governing a legal relationship." As we shall see, claims of ***"factual"*** impossibility almost ***never succeed,*** claims of ***"true legal" impossibility always succeed,*** and claims of ***"factual impossibility related to legal relationships"*** formerly succeeded frequently, but are much ***less likely*** to do so today.

B. Factual impossibility: A claim of ***"factual"*** impossibility arises out of the defendant's mistake concerning an issue of fact, such that had the defendant not been mistaken, he would have known that his attempt had no possibility of success. A classic example of this is the would-be pickpocket who reaches into an empty pocket; had the criminal known that the pocket was empty, he would have realized that there was no possibility of succeeding in his criminal enterprise.

1. **Not accepted as defense:** Except for a few nineteenth century cases, the defense of factual impossibility has almost ***never been successful.*** Thus the would-be pickpocket just discussed would almost definitely be convicted of attempted larceny. As the idea is often put, impossibility is no defense in those cases where, ***had the facts been as the defendant believed them to be, there would have been a crime.*** Thus had the victim's pocket been filled with money, our would-be pickpocket would have been a successful one, so his claim of impossibility must fail.

2. **Other examples of factual impossibility:** Thus claims of impossibility would fail in the following typical sorts of situations:

   a. D points his gun at X, and pulls the trigger, but the gun does not fire because, unbeknownst to D, it is not loaded;

   b. D intends to rape X, but he is unable to do so because he is impotent;

   c. D is a confidence man who attempts to pull a "bunco" scheme on X, but X is a plainclothes police officer who is not fooled for a second;

   d. D attempts to poison X with what his pharmacist has labeled as arsenic, but which in fact turns out to be a harmless substance.

e. D sells to X (an undercover agent) what D believes is heroin. Unbeknownst to D, her own supplier has sold her a harmless mix of sugar and flour.

3. Rationale for convictions: It is not hard to see why courts have generally refused to acquit in situations of "factual" impossibility like those listed above. The defendant in these situations is a ***manifestly dangerous person,*** whose intent is every bit as culpable as it would have been had he been right about the facts. The principal theory behind the entire law of attempts, that unsuccessful efforts should sometimes be punished, would be nullified if a mistake about external facts was exculpatory.

C. "True legal" impossibility: A different sort of impossibility defense arises where it is not only the case that what the defendant has done could not possibly be a crime, but also that ***even had the facts been as the defendant supposed them to be,*** no crime would have been committed. This situation occurs when the defendant is mistaken about ***how an offense is defined.*** That is, the defendant engages in conduct which he believes is proscribed by a statute, but he has misconstrued the meaning of the statute. In this situation, which we shall call the case of "true legal impossibility," courts will ***always acquit.***

Example: D obtains a check for $2.50. He alters the numerals in the upper righthand corner, making them read "$12.50." But he does not change the written-out portion of the check, which continues to read "Two and 50/100 dollars." D is charged with attempted forgery.

Held, conviction reversed. The crime of forgery is defined as the ***material*** alteration of an instrument. Because the numerals are considered to be an immaterial part of the check (the amount written out in words controls), D cannot be convicted of an attempt, because what he tried to do did not violate any statute. *Wilson v. State,* 38 So. 46 (Miss. 1905).

1. Statement to policeman not perjury: Similarly, suppose that D, when questioned by a policeman during a criminal investigation, lies, and believes that lying to a policeman constitutes perjury. D will certainly not be convicted of attempted perjury, because the act he was performing (and more importantly, the act he thought he was performing) is simply not a violation of the perjury statute.

2. Relation to rule of "ignorance of law no excuse": The defense of "true legal impossibility" is a corollary of the rule that a "mistake of law" cannot be an ***excuse*** (see *supra,* p. 41). That is, just as a

defendant who commits an act proscribed by statute cannot defend on the grounds that he did not know that such acts were prohibited, so a defendant who commits an act that he believes to be proscribed will not be guilty of an attempt.

D. Mistake of fact governing legal relationship (the "hybrid" case): If the label of "legal impossibility" were applied only to cases of what we have called "true legal impossibility," there would be relatively little dispute about the validity of the legal impossibility defense. Unfortunately, however, another, analytically quite different, situation is also termed "legal impossibility" by many courts. This is the situation where the defendant has made a ***mistake of fact*** that ***bears upon legal relationships*** (sometimes called the ***"hybrid legal impossibility"*** scenario).

The classic illustration of this hybrid category is the case set forth in the following example.

Example: D is offered goods belonging to X. The goods have previously been stolen from X, but by the time the offer is made to D, they have been recovered by the police and returned to X, thereby losing their character as stolen goods. The offer to D is made as part of an undercover scheme; D makes the purchase. He is tried for an attempted violation of the statute prohibiting the knowing receipt of stolen property.

Held, conviction reversed. What D intended to do was to buy the goods in question; his act when carried out would not be a crime, since the goods were not in fact stolen. Therefore, D cannot be liable for an attempt, in part because the statute prohibiting receipt of stolen goods requires that the receipt be "knowing," and D cannot "know" goods to be stolen if they are not. (But most courts would ***decide the issue differently today,*** as is discussed below.) *People v. Jaffe,* 78 N.E. 169 (N.Y. 1906).

Note: As we'll see in further detail below, most modern decisions ***reject*** the impossibility defense even in the hybrid scenario, and would thus disagree with the result in *Jaffe.*

1. Other illustrations: Here are some other hybrid (i.e., mistake-of-fact-bearing-on-legalrelationships) scenarios raising the impossibility issue:

- □ Game wardens set up a stuffed deer as a decoy, and D shoots it while thinking that he is shooting a live deer and knowing that it is not hunting season. At least one court has held that D is not liable for an attempt to hunt out of season. (See L, p. 557.)
- □ D tries to bribe X, thinking that X is a juror. D has been held not

guilty of attempted bribery when X turns out not to be a juror. (Id.)

□ D has sex with V knowing that V is not consenting. V turns out to have been already dead of a heart attack at the time of the sex act. (See *U.S. v. Thomas*, 13 U.S.C.M.A. 278 (1962), rejecting the impossibility defense and therefore convicting D of attempted rape on these facts.)

□ D has sex with V, thinking she's 16, and thus under the age of consent (17) in the state. In fact, D is 17. A few courts would allow D to claim impossibility to avoid a charge of attempted statutory rape.

2. **Distinguished from "true legal" impossibility cases:** It is obvious that these cases are different in principle from those which we called cases of "true legal impossibility." In the true legal impossibility case, the defendant is mistaken as to ***what kind of conduct the statute prohibits.*** In the "mistake of fact relating to legal relationship" case, on the other hand, the defendant understands what the statute prohibits, but mistakenly believes that ***the facts bring his situation within that statute.*** Thus the defendant in *Jaffe, supra*, presumably understood that it was a crime knowingly to receive stolen goods; his mistake was in believing that the goods in question were stolen.

3. **Defense now seldom accepted:** The "mistake of fact relating to legal relationships" defense has fallen on hard times in recent years. The substantial majority of American jurisdictions today ***reject the impossibility defense in this hybrid situation.*** Dressler Hnbk, § 27.07[3][a]. Thus most courts would ***convict*** the defendant in the *Jaffe* "receipt of goods that are not really stolen" situation.

   a. **Attempt to possess heroin:** Similarly, it is now standard practice for undercover narcotics agents to sell suspects a substance that purports to be ***heroin,*** but which is really sugar or some other non-narcotic. If the suspect makes the purchase, he will almost certainly be convicted of attempted possession of narcotics.

   b. **Internet-based attempts at sex crimes:** An increasingly important scenario raising the hybrid legal-impossibility issue involves defendants who attempt, by use of the ***Internet,*** to commit ***statutory rape, distribution of pornography to a minor,*** or other

sex-related offenses that turn out to be "impossible" only because ***the other party is secretly not a minor.*** Perhaps because the societal danger from such defendants is perceived to be so great, courts have been especially ***unlikely to accept*** the impossibility defense in these circumstances.

Example: V, an undercover sex-crimes detective, logs into an Internet chat room and poses as a 14-year-old girl with a screen name of "Bekka." D logs in as "Mr. Auto-Mag," makes repeated lewd invitations to Bekka despite multiple online indications that she's a minor, and then sends her over the Internet a photograph of male genitalia. D is charged with, *inter alia,* attempted distribution of obscene material to a minor. He defends on the grounds that, since the existence of a child victim was a necessary element of the completed crime, he should be entitled to the defense of the impossibility.

Held, for the prosecution. As the court below accurately put it, "Ultimately any case of hybrid legal impossibility may reasonably be characterized as factual impossibility." The vast majority of jurisdictions have now "recognized that legal and factual impossibility are 'logically indistinguishable' ... and have abolished impossibility as a defense." Here in Michigan, there is no evidence that when the state enacted the present attempt statute, the legislature intended to recognize an exception for "those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception."

In the present case, it is true that the fact that V was not a minor means that it would have been "impossible" for D to have committed the *completed* offense of distributing obscene material to a minor. But this fact is "simply irrelevant to the analysis" of whether D can be convicted of attempt. As long as the prosecution can show that D possessed the requisite specific intent (to distribute obscene materials to one he believed to be a minor) and took some act "towards the commission" of the intended offense, this will be enough for him to be convicted of attempt. *People v. Thousand,* 631 N.W.2d 694 (Mich. 2001).

c. Rationale: The rationale for the modern view — rejecting the impossibility defense in the hybrid scenario — is that the purpose of punishing attempts is principally to ***deter dangerous conduct.*** The defendant who not only believes that he is violating a statute, but who would be violating a statute if he had not made a mistake of fact, is probably at least as dangerous as the defendant who fails to commit a crime for other reasons (e.g., because he aims his gun badly.) Nor is there a compelling reason for treating factual mistakes bearing on legal relationships differently from mistakes as to other factual matters. Why should one who mistakenly believes, say, that goods are stolen be handled more leniently than one who mistakenly believes that the substance he is administering is poison

when it is really sugar?

4. **Model Penal Code view:** This modern rejection of impossibility in the "mistake of fact relating to legal relationships" scenario is typified by the Model Penal Code. M.P.C. § 5.01(1)(a) makes it an attempt to "purposely engage in conduct which would constitute the crime if the attendant circumstances were as [the defendant] believes them to be.... "Comment 3 to M.P.C. § 5.01 states that the Code approach ".is to ***eliminate the defense of impossibility in all situations."*** (However, Comment 4 makes it clear that what we have called the defense of "true legal impossibility" remains: "If, according to his belief as to facts and legal relationships, ***the result desired or intended is not a crime,*** the actor will ***not*** be guilty of an attempt even though he firmly ***believes that his goal is criminal.")***

5. **Modern view criticized:** The Model Penal Code rejection of the defense of "factual impossibility related to legal relations," although it now represents a majority position, has often been criticized. The three principal criticisms are: (1) that the ***risk of an erroneous conviction*** is measurably raised; (2) that it is unwise to punish for ***evil thoughts*** not accompanied by evil deeds; and (3) that there is little reason to distinguish this defense from the defense of "true legal impossibility."

   a. **Risk of erroneous conviction:** When one convicts a defendant who has made a mistake of fact regarding a legal relationship, one is by hypothesis punishing him for conduct which is, to an external observer, innocent. As the proponents of the "equivocality" test for distinguishing between preparations and attempts *(supra,* p. 160) point out, punishing innocent physical acts increases the risks of convicting a completely innocent (and non-evil-intending) defendant.

      i. **Illustration from *Jaffe:*** For instance, consider the situation in *People v. Jaffe (supra*, p. 164), where D buys goods which, according to the prosecution, D believes to have been stolen. If the goods are not really stolen, then we have relatively little objective evidence from which to conclude that D believed them to have been stolen. If, on the other hand, the goods are

in fact stolen, we have at least that fact to corroborate the accusation that the defendant knew them to be stolen. Since the defendant's intent can only be proved by circumstantial evidence anyway (frequently by unreliable confessions), there is a greater risk of convicting a man for intentions which were not evil if no evil conduct is required. See L, p. 559, fn. 77.

b. Punishment for thoughts alone undesirable: Related to this argument, but analytically somewhat different, is that even putting aside the danger of convicting a man whose intentions were not evil, it is not desirable to punish ***thoughts alone,*** however evil they may be. This argument, too, appears in the debate about when preparations should be treated as attempts (*supra*, p. 154).

c. Distinction unimportant: Acceptance of the Model Penal Code's view requires, as we have noted, that one distinguish between situations where the defendant's mistake is as to the scope of the relevant law (the "true legal impossibility" defense, which requires acquittal) and situations in which the defendant is mistaken as to a factual issue bearing on a legal relationship (where, as we have seen, the Code requires conviction.) A number of commentators have noted that while this distinction is real, ***there is no reason to attach so much importance to it.***

i. Illustration: Consider, for instance, a hypothetical posed by Kadish & Schulhofer (pp. 638-40): Two friends, Mr. Fact and Mr. Law, go hunting on October 15, in a state whose law makes it a misdemeanor to hunt any time other than from October 1 to November 30. Both kill deer. Mr. Fact is under the erroneous belief that the date is September 15; Mr. Law is under the erroneous belief that the hunting season is confined to the month of November, as it was the previous year. Mr. Fact can be convicted, under the Model Penal Code view, of an attempted violation, since his mistake was one of fact regarding a legal relation (and, on the facts as he believed them to be, he would have committed a crime). Mr. Law, however, since he is mistaken about the scope of the statute on hunting, would have to be acquitted. There does not seem to be any good policy reason why different results should be

reached in the two cases; certainly the two men are equally "dangerous," since they have both indicated their willingness to commit what they believe to be a violation of the same law.

E. **"Inherent" impossibility (inaptness and superstition):** So far we have considered actions by defendants which, although unsuccessful, bore a reasonable chance of culminating in a completed substantive crime. The defendant in *Jaffe*, for instance, might very well have bought goods that had in fact remained stolen. But suppose that the defendant's act is, to a reasonable observer, so farfetched that it had ***no probability of success.*** Should this fact induce us to acquit, based on a doctrine that might be called ***"inherent impossibility"?***

1. **Voodoo practitioner:** The problem is most commonly posed by the hypothetical of a Haitian witch-doctor who comes to the U.S. and continues practicing ***voodoo.*** If the prosecution can show that the witch-doctor intends to kill X and believes that he can do so by sticking pins in a doll resembling X, is this attempted murder?

2. **No clear consensus:** Such situations obviously do not arise very often, and it is therefore hard to say what most courts would do in this kind of case. On the one hand, it may be argued that such a defendant should not be convicted because he is not dangerous; there was, by hypothesis, virtually no chance that he would have succeeded. On the other hand, although it is true that there was little chance that he would succeed on this particular attempt, he may try other, more reasonable means next time. The witch-doctor, for instance, may try a gun when the voodoo doesn't work.

3. **Model Penal Code allows conviction:** The Model Penal Code authorizes a ***conviction*** even in such cases of "inherent impossibility." See Comment 3 to M.P.C. § 5.01. However, a separate Code section, § 5.05(2), provides that "If the particular conduct charged to constitute a criminal attempt.is so inherently unlikely to result or culminate in a commission of a crime that neither such conduct nor the actor presents a public danger.the court shall exercise its power...to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution."

   a. **Witch-doctor might be convicted:** Observe that by this

formulation, a prosecution against, say, the witch-doctor would be dismissed only if it were shown not only that the black magic could not possibly have succeeded, but also that the defendant himself is not dangerous to the public. This in turn requires that the court be satisfied that the defendant will not turn to other, more reasonable, means.

V. RENUNCIATION

A. Renunciation of criminal purpose: Suppose that D proceeds far enough with his plan that he has committed an overt act that satisfies the *actus reus* requirement. Assuming that he has the appropriate mental state, he is now guilty of an attempt. Suppose further, however, that he then ***changes his mind,*** and abandons the plan. Should this for some reason "purge" him of criminality?

1. Distinguished from substantive crimes: If the offense were a substantive one, it is clear that no such purging would result from a change of heart; thus one who takes another's property with intention to deprive him of it will not escape a larceny conviction by returning the goods the next day. But in the case of attempts, there are several reasons why it might be sensible to recognize the defense of ***"abandonment"*** or ***"renunciation of purpose":***

a. Encourage desistance: Such a defense would encourage people to ***stop short*** of the completed substantive crime. Since the defense would only be relevant where the line between mere preparation and attempt had been crossed, we would be encouraging desistance by the very people we are most interested in motivating: those who are relatively close to the final crime.

b. Lack of dangerousness: Also, if the person has abandoned his scheme, then a strong argument can be made that he has shown his ***lack of dangerousness.*** Since one of the purposes of punishing attempts is to incarcerate dangerous persons, this goal would not be served by denying the defense of abandonment.

c. Lack of intent to carry through: Finally, the abandonment is relevant to the question of *mens rea* in two respects. First of all, the fact that the defendant has abandoned may show that he never had

the requisite *mens rea* in the first place. Secondly, even if he did once have it, by hypothesis he no longer does, and it can be argued that it is this continuing "intent to carry through," which the defendant does not possess, that should be the required *mens rea.* See Fletcher, pp. 187-8.

2. Arguments against defense: Reasonable arguments can be made against each of these rationales, however.

a. Little deterrent effect: With respect to the deterrence argument ((a) above), it will be quite rare that anyone who has committed the requisite overt act, and who is willing to run the risk of being prosecuted for the completed substantive crime, will be deterred by the thought that he will not be punished for an attempt if he stops now.

b. Dangerousness: With respect to the defendant's dangerousness (argument (b) above), while the defendant may have shown himself not to be dangerous with respect to this particular episode, it is not at all clear that he will not prove dangerous in the future, with respect to a different offense — he has already shown his theoretical willingness to violate the law.

c. Mental state: With respect to the defendant's mental state (argument (c) above), there is no reason to treat the required *mens rea* as an ongoing "intent to carry through." Certainly if the defendant is caught by the police before he can consummate his plan, we would not require proof that he ultimately would have gone through with it (due to the universally-accepted requirement that the abandonment be voluntary, discussed *infra);* why should we make lack of an ongoing intent relevant where the abandonment is not due to external factors?

B. Modern view accepts defense: Many modern courts and statutes ***recognize the defense*** of abandonment in at least some situations. See Fletcher, p. 185; L, pp. 563-64.

1. Model Penal Code allows defense: Similarly, the Model Penal Code recognizes the defense, which it calls "renunciation of criminal purpose." § 5.01(4) provides that where there has been what would

otherwise be an attempt, "it is an affirmative defense that [the defendant] abandoned his effort to commit the crime or otherwise prevented its commission...." However, the Code, like virtually all case-law and statutes accepting the defense, requires that the abandonment be a ***voluntary*** one.

C. Voluntariness requirement: Suppose that D intends to shoot X to death at a particular place and time. D arrives at the projected shooting ground, but realizes that there is a police car cruising nearby, and decides to postpone his plan indefinitely so that he will not get caught. It seems apparent that we should not recognize a defense of abandonment in this situation; D has not been deterred in the long run, and he is as dangerous and self-willed as ever.

1. Universal requirement: Thus it is not surprising that virtually all courts and statutes accepting the defense of abandonment require that the abandonment be ***"voluntary".*** Precisely what constitutes a "voluntary" abandonment, however, is a subtle issue on which there are differences of opinion.

a. Threat of immediate apprehension: Where the defendant learns that if he goes through with his plans, he is likely to be ***immediately apprehended*** (e.g., D, the would-be murderer who sees the police car), it is clear that his abandonment should be treated as ***"involuntary."***

b. General timidity or fear of apprehension: On the other hand, if the defendant abandons because of a ***generalized*** timidity or general fear of apprehension, not linked to any particular threat or occurrence, most jurisdictions will treat this as voluntary. Thus if D in the above example had simply decided that murderers are likely to get caught, and had made his decision to renounce on that basis rather than because he saw a police car, he would probably be successful with his renunciation defense. However, it will often be difficult to tell whether the defendant's abandonment was in response to a specific threat or a generalized fear; for this reason, the defense of abandonment is usually held to be an ***affirmative defense*** (one which the defendant must establish).

c. Postponement for better time: If the defendant merely ***postpones***

his plan, because the scheduled time proves to be less advantageous than he thought it would be, this does ***not*** constitute a voluntary abandonment. Thus the Model Penal Code, in § 5.01(4), rules out renunciation that is "motivated by a decision to postpone the criminal conduct until a more advantageous time..."

d. Different victim: Similarly, if the defendant decides to transfer his efforts to a different, but similar, ***victim,*** this will not be treated as a voluntary abandonment. See M.P.C. § 5.01(4).

e. Disappointment of small fruits: If the cause of the defendant's change of heart is that the ***anticipated fruits of the crime*** are ***smaller*** than expected, it is not clear whether most courts would regard this as voluntary. Suppose, for instance, that D is a would-be mugger who walks up to his victim, says "Your money or your life," and when he finds out that the victim has only $10, walks away in disgust. While D's motive for abandoning is certainly not morally commendable, at least one commentator (Fletcher, p. 191) states that "[o]ne finds it hard to think of [D's] activity as attempted robbery."

f. Dissuasion by victim: A difficult situation is also presented where the defendant's renunciation is the result of ***dissuasion by the victim.*** In general, courts are probably not too likely to find such a renunciation voluntary. For instance, if D throws X on the ground, saying that he intends to rape her, and X says "Don't do it here on the ground; if you come back to my apartment this evening I'll be glad to accommodate you," D's acceptance of the proposal will probably not be held to be voluntary.

i. **Product of defendant's will:** But Fletcher (pp. 192-94) suggests that this case should be decided not on whether the defendant's motives were commendable, but on whether he abandoned his attempt as an exercise of will, rather than as a response to the threat of apprehension or other undesirable occurrence. Here, although X's proposal is an external factor, D has made his own decision, just as he would if he responded to X's appeals to his moral sensibilities. Thus according to Fletcher, D should be acquitted of attempted rape.

2. **Time to abandon:** If one accepts the merits of allowing an abandonment defense, then it would seem sensible to allow the defense even once the defendant has done his ***"last act."*** Thus if D plans to burn down a building, and lights the fuse, the abandonment defense should be allowed if he comes back and stamps the fuse out. This is the approach of the Model Penal Code; See Comment 8 to M.P.C. § 5.01(4).

   a. **Forces which no longer can be stopped:** But if the defendant has not only committed his "last act," but has put in motion forces which he ***cannot stop,*** then he can no longer claim abandonment. Thus if D tries to shoot X, and misses, it is too late to abandon. See M.P.C., *ibid.*

VI. ATTEMPT-LIKE CRIMES

A. **Inchoate crimes generally:** In addition to the generalized law of attempt, there are a number of ***substantive*** crimes which also punish incompleted ***("inchoate")*** behavior.

1. **Burglary and assault:** For instance, common-law burglary is defined as the breaking and entering of a dwelling at night with an intent to commit a felony therein (*infra*, p. 331). And one kind of assault is defined as an attempted battery. While these crimes have an aspect of completeness about them, they are in an important sense crimes which have not been brought to complete fruition; the burglar has not necessarily committed the intended felony inside the dwelling, and the assailant has not caused bodily injury to his target.

2. **Possession crimes:** Similarly, many statutes proscribing ***possession*** of certain items represent attempts to prevent more dangerous conduct from occurring. Where possession of ***burglar's tools*** without a lawful purpose is made a statutory crime, for instance, the purpose is obviously to prevent the more serious crimes of breaking and entering, burglary, etc.

B. **Attempt to commit attempt-like crimes:** Where defendants have been charged with attempting to commit these attempt-like crimes, they have, not surprisingly, raised the argument that it is logically impossible to ***"attempt to attempt,"*** and that they therefore may not be convicted. This

argument has generally ***not*** fared well.

1. **Assault:** Where the charge is for ***attempted assault,*** and the assault is of the attemptedbattery type, defendants have occasionally been able to get the charge dismissed on the grounds that it is logically impossible to attempt to attempt a battery. But most courts have sustained such charges, on the grounds that they do not violate common sense.

Example: D comes looking for V, his wife, at her place of business. D is carrying a shotgun, intending to shoot V. V's co-workers hide her, so that D is unable to find her. *Held,* D's conviction of attempted assault is affirmed. It is reasonable to distinguish between assault and attempted assault, since in the former case the defendant has a *present ability* to commit harm and in the latter case he does not. *State v. Wilson,* 346 P. 2d 115 (Ore. 1959).

2. **Burglary:** Defendants charged with ***attempted burglary*** have had even less success arguing that the charge is a logical absurdity than in the case of attempted assault. For instance, if D is apprehended near a jewelry store, and the police find signs of tampering on the door but no evidence that there has been actual entry, D is quite likely to be convicted of attempted burglary. See K&S, pp. 642-43.

C. Constitutional objections to attempt-like crimes: Where the legislature goes to unusual lengths to punish conduct on the grounds that it poses the threat of subsequent substantive criminal violation, the statute in question may be ***unconstitutional.*** This has sometimes been the case with respect to ***vagrancy*** and ***loitering*** statutes.

1. ***Papachristou*** **case:** Thus in *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), the Ds were charged with violating a vagrancy ordinance allowing for punishment of numerous classes of persons, including "persons wandering or strolling around from place to place without any lawful purpose or object," "habitual loafers," and "persons able to work but habitually living on the earnings of their wives or minor children... "The Supreme Court reversed, holding that the statute was ***void for vagueness*** under the 14th Amendment, because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and also because it "encourages arbitrary and erratic arrests and convictions."

VII. MECHANICS OF TRIAL; PUNISHMENT

A. Relation between charge and conviction: It may happen that D is charged with a completed substantive crime, but the evidence at trial shows that he is guilty at most of an attempt. Conversely, he may be charged with attempt, but proof at trial may show that, if he did anything, he committed the underlying substantive crime. Such situations raise two kinds of issues:

1. **Substantive crime charged, attempt proved:** If the defendant is charged with a completed crime, and the proof shows that he committed only an attempt, American courts virtually all agree that the defendant ***may be convicted of attempt.*** The attempt is said to be a "lesser included offense" (that is, a lesser offense included within the indictment on the substantive crime).

2. **Attempt charged, completed crime proved:** Where the defendant is charged with an attempt, he obviously cannot be convicted of a completed crime; this would violate the principle that one is entitled to fair notice of the charges against him.

   a. **Conviction of attempt:** But the defendant in this situation may sometimes be convicted of an attempt, ***even though the proof shows that the complete crime occurred.*** For instance, if D is charged with attempted burglary, and it develops at trial that he actually entered the dwelling in question, he may be convicted of attempted burglary notwithstanding proof of completed burglary. Such a result is justified on the theory that the defendant should not be allowed to complain "where the determination of his case was more favorable to him than the evidence warranted." See L, pp. 566-67. (But the attempt statute may be drafted so as to make failure an element of attempt; if so, D would escape liability.)

B. Penalties: The penalties for attempts vary a great deal from state to state; in general, they are significantly less severe than for the completed substantive crime. Many states, for instance, authorize a sentence of up to one-half the authorized sentence for the substantive crime.

1. **Model Penal Code takes stricter position:** The Model Penal Code is somewhat stricter. For all misdemeanors, and all felonies except those of the "first-degree," the same sentence may be given for an attempt as for the completed substantive crime. As to the first-degree felonies

(e.g., murder, some kinds of rape, and kidnapping where the victim is not voluntarily released alive and in a safe place), the sentence for an attempt is limited to that which may be imposed for completed second-degree felonies (ten years maximum).

Quiz Yourself on
ATTEMPT (ENTIRE CHAPTER)

35. Boris Badanov wants to make a political statement by blowing up the United Nations Building. He does not particularly want to kill any people – he just wants to destroy the building. He sets a very powerful charge, one that if detonated will almost certainly cause the entire multi-story building to collapse. Just as he is about to press the detonator on a Friday afternoon at 3 p.m., he is arrested by the police, and the explosion does not occur. Obviously Boris can be convicted of attempted bombing; but may he be convicted of attempted *murder?*

36. Hatshepsut likes to drive fast. She gets behind the wheel one day and races through a school zone at 90 m.p.h., not caring about the possibility she may hit a child. She hits Tut King, who is crossing at a crosswalk, and serious injures him.

(A) Suppose Hatshepsut is brought up on attempted murder charges. Can she be convicted?

(B) Suppose instead that Hatshepsut is charged with attempted involuntary manslaughter. Can she be convicted?

37. Nero, who makes a habit of torching buildings belonging to his employers, gathers a bunch of rags, papers and other combustibles in the basement of a warehouse with the intention of returning later to ignite them. He also buys 2 gallons of lighter fluid, which he stores on site. The combustibles are discovered, and Nero is tracked down and arrested. Under the Model Penal Code, can Nero be convicted of attempted arson?

38. In mid-October, Don Juan and Sancho Panza plan to burglarize Zorro’s home (which they have never seen) sometime during the following week. Their plans are overheard by Zorro, who calls the

police. The police arrest Don Juan and Sancho Panza on their way out of a costume shop where they have rented black masks, which they consider essential to a successful burglary. The two have not yet taken any other acts in furtherance of their burglary plan. Can Juan and Panza be convicted of attempted burglary?

39. Lucrezia Borgia slips a small amount of poison into her husband’s morning coffee, intending to slowly poison him. Lucrezia knows her poisons, and knows it will take at least seven doses to kill him. After the first cup of coffee, hubby suspects something’s wrong, and has the coffee analyzed in a lab. Lucrezia is immediately arrested and charged with attempted murder. Can she properly be convicted?

40. Mickey Spillane intends to kill Mike Hammer. He pulls out his gun (which he believes to be a .357 Magnum) and aims it at Hammer, saying, “Prepare to die.” Unbeknownst to him, his gun has been switched with a toy, and a paper banner reading “bang” pops out when he pulls the trigger. Is Mickey guilty of attempted murder?

41. Irving Brilliant fancies himself as a legal scholar. While lacking formal training, he watches “People’s Court” faithfully, and buys every alcoholic beverage endorsed by famous trial lawyers. Irving’s back yard is a popular watering hole for crows. One day, Irv takes out his shotgun and shoots at one of the crows, even though he believes this violates the Migratory Birds Act of 1918. Unbeknownst to Irving, the Migratory Birds Act does not apply to crows, because they don’t migrate in the way the act covers. Can Irving be convicted for attempted violation of the Migratory Birds Act?

42. Phil Goode is a small-time drug dealer. After his previous supplier is arrested, Phil changes to a new supplier, Yuwanna Bye. In their first transaction, Yuwanna sells Phil 10 packets that he says are cocaine. Phil goes out on the street, and begins “advertising” the bags as cocaine, and selling them. He sells one bag to Narco, who unbeknownst to Phil is an undercover narcotics officer. Narco immediately arrests Phil. Upon testing, the packet proves to contain only talcum powder, a substance that is not banned. Phil is charged with attempting to distribute cocaine, and evidence at his trial shows that Phil in fact believed that the substance was cocaine. May Phil

properly be convicted?

Answers

35. Yes, probably. In general, crimes of attempt require that the defendant have the specific intention of bringing about the criminal result required for the underlying crime he is charged with attempting. Thus normally, one could not be convicted of attempted murder by recklessly bringing about a near-killing, since the result embodied in the definition of murder is a killing, and for attempted murder one must therefore intend (not merely recklessly disregard the possibility of) a killing. But where the defendant ***knows with substantial certainty*** that a particular result will follow from his contemplated action, most courts (and the M.P.C.) take the position that this is tantamount to an intent to bring about that result. So here, since Boris knows with substantial certainty that if he carries out his plan people will die (after all, the building is full on a Friday afternoon and Boris knows the building will collapse if there's an explosion), Boris will be deemed to have intended to bring about killings. Consequently, he may be convicted of attempted murder.

36. (A) No. Where a crime is defined in terms of bringing about a certain result, the mental state required for an attempt to commit that crime is normally an *intent* to bring about that result. The mere fact that the defendant had a mental state that would have sufficed for the underlying crime does not suffice. Murder is defined to require, inter alia, a killing of another. Therefore, a person can be convicted of attempted murder only if she intends to kill another. The fact that Hatshepsut may have behaved with a mental state adequate for reckless-indifference murder (a wanton indifference to the value of human life) will not suffice for the crime of attempted murder.

(B) No, for the same reason as in (A). That is, where a crime is defined as recklessly bringing about a certain result (here, a death), there can be no attempt to commit that crime. So the fact that Hatshepsut had the mental state that would suffice for involuntary manslaughter (recklessly causing the death of another) is irrelevant on

the attempted manslaughter charge.

37. **Yes, because he took a "substantial step" towards committing the crime.** As in all jurisdictions, under the M.P.C. a defendant cannot be convicted of an attempt unless he takes some sort of act in furtherance of his criminal plan. Under the M.P.C., that act (or multiple acts) must satisfy two requirements: (1) it constitutes a "substantial step" in a course of conduct planned to culminate in the commission of a crime; and (2) it is "strongly corroborative" of the defendant's criminal purpose. Here, Nero's conduct satisfies both requirements: (1) gathering all the materials needed for a crime will generally constitute a "substantial step" towards commission of that crime, and certainly does so here; and (2) there is no innocent explanation for Nero's gathering activities, so they're "strongly corroborative" of the proposition that he planned to burn down the building. Indeed, M.P.C. § 5.01(2)(f) contains a special provision covering these facts quite precisely: activities shall be considered sufficiently corroborative if they consist of "possession [or] collection ... of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession [or] collection ... serves no lawful purpose of the actor under the circumstances."

38. **Probably not, because their preparations have not come close enough to success.** Courts vary as to how far along the defendants' preparations must have advanced before they give rise to attempt liability. But under virtually any test, it's unlikely that the Ds here advanced sufficiently. Under the popular "dangerous proximity to success" test, for instance, the purchase of the masks did not make the Ds dangerously close to success — there's no evidence that they picked a particular time for the burglary, for instance, and they haven't reconnoitered the scene to determine a point of entry. Even under the relatively easy-to-satisfy 2-part M.P.C. test (summarized in the answer to the previous question), the preparations here probably would not succeed: the purchase of the masks might be a "substantial step" towards commission of the crime (though this is debatable), but it's unlikely that a court would find that the rental of the masks "strongly corroborated" the burglary — the masks might have been

rented just for upcoming Halloween, for instance.

39. Yes, probably. The precise analysis will depend on exactly what test is used by the court. Under the "dangerous proximity to success" test, the prosecution's case is probably the weakest, but even here, a court would probably conclude that if hubby had drunk the first cup without complaint, it wouldn't have taken too long for him to consume another six cups on, say, six consecutive mornings. The "probable desis-tance" approach is almost certain to lead to a conviction, since one who administers one dose of a poison is unlikely to voluntarily abandon the plan. The "equivocality" test is also easily satisfied, since Lucre zia's actions are not the slightest bit equivocal — it's perfectly obvious that one who puts poison in a person's cup wants to kill or at least seriously injure the drinker. Finally, the M.P.C.'s "substantial step" approach is clearly satisfied: administering the first dose of fatal poison is obviously a substantial step towards carrying out the completed poisoning, and it's certainly a step that's "strongly corroborative" of the defendant's ultimate criminal plan (there's no alternative explanation for the poison).

40. Yes, because "factual impossibility" is not a defense. Mickey certainly satisfies the mental state for attempted murder (intent to commit a killing), and has done everything reasonably in his power to bring that result about. The question, of course, is whether Mickey can use the defense of impossibility. Here, the defense would have to be "factual impossibility" — that is, Mickey is claiming that he made a mistake on an issue of fact, such that had he not made the mistake, he would have known that his plan had no possibility of success. The defense of factual impossibility is not accepted by any court. Indeed, the present setting — defendant uses a weapon that malfunctions — is almost the archetypal illustration of the universally-rejected factual-impossibility defense.

41. No. This is a case of ***"true legal impossibility."*** That is, the mistake is a pure mistake of law — Irving's only mistake is about ***how a particular offense is defined.*** Even if all the surrounding facts (except for legal definitions) had been as Irving believed them to be, his actions would still not have been a crime, because it is simply not a crime to shoot crows. Therefore, the defense of true legal

impossibility — which is accepted in all courts — protects Irving from attempt liability.

42. **Yes.** Phil could assert a variant of the impossibility defense, namely, what might be called ***"factual impossibility related to legal relationships,"*** sometimes called ***"hybrid*** impossibility." But in general, courts reject this defense almost universally now, just as they reject garden-variety claims of factual impossibility. The issue for most courts is whether, had the facts been as the defendant supposed, the defendant would have committed a crime. Here, had the packet really contained cocaine rather than talcum powder, Phil would have committed the crime of drug sale; therefore, he can be convicted of attempting to commit that crime. (In an analogous situation, defendants are convicted every day of "attempted purchase" of drugs, where they buy from an undercover officer what they think is an illegal drug but what is in fact a harmless substance such as sugar.) Be sure to distinguish the unsuccessful defense of "factual impossibility related to legal relationships," which is what's at issue here, from the successful defense of "true legal impossibility," as in the previous question. Where the defendant's mistake consists of a mistake about how an offense is defined, that's true legal impossibility, and is successful. (For instance, had Phil mistakenly believed that it was a crime to sell talcum powder without a license and then sold what he knew was talcum powder without a license, he'd have a valid defense to, say, a charge of attempted illegal sales of merchandise.) But where the defendant's mistake consists of a mistaken belief about the nature of a particular object, the fact that the mistake relates to the object's legal status doesn't help the defendant. So here, Phil's mistake was a factual mistake about the nature of the bags he was selling (not a "purely legal" mistake about how a particular crime is defined), so he's no different than a person who makes a mistake of fact about some non-legal subject, like whether a gun is loaded — his essentially factual mistake doesn't lead to a valid defense.

Exam Tips *on*

ATTEMPT>

When a defendant is unsuccessful in committing a substantive crime, consider a charge of criminal attempt.

- **Definition of "attempt":** You should have a general definition of "attempt" in mind. A good definition (but not necessarily precisely the law in any particular jurisdiction) would be: A person is guilty of a criminal attempt when: (1) with an ***intent to commit acts*** that are the ***actus reus*** for a particular ***substantive crime,*** she (2) takes a ***substantial step*** towards the commission of that crime.

Mental State

- **Specific intent required:** Remember that ***specific intent*** is required, regardless of the level of intent necessary to be convicted of the completed offense. That is, D must ***intend to take an act*** (or bring about a result) that, if committed, would constitute the underlying crime.
  - **Strict liability, negligence or recklessness:** Thus if an underlying crime is defined to require only negligence, recklessness or even no mental state at all (i.e., a strict liability crime), that state of mind won't be enough for an attempt to commit that underlying crime.

    Example: The state Liquor Sales Act prohibits the sale of liquor between the hours of midnight and 8 A.M., regardless of the mental state of the seller. V, an undercover police officer pretending to be a customer, enters a liquor store and asks to buy a bottle of vodka. D, an employee, looks at the clock and it reads five minutes after eleven in the evening. D does not realize that there was a change to daylight savings time the night before and that the store's clock has not been changed. Just as D is about to hand over the bottle and receive V's money, V arrests him, and charges him with an attempt to violate the Liquor Sales Act. D can't be convicted, under the majority view, because he didn't intend to commit an act *(after-hours* sale of liquor) that was prohibited by the underlying statute. This is so even though D would have been guilty of violating the underlying statute had he finished the transaction.

  - **Attempted murder:** If the crime is defined in terms of a particular result, the required mental state is the desire to bring about that result. Thus, since murder is defined in terms of a result (death of another), in order to successfully prosecute for

attempted murder the defendant must have had the specific intent to cause that result ***(death of another).***

Example: D, while trying to study for an exam, hears a loud argument coming from V's house across the street. She fires a rifle out her own window and into the front window of the living room of V's house, which D thinks is vacant. D's motive is merely to frighten V and the other arguer into silence. Unbeknownst to D, V is in fact in the living room, and is hit in the leg. V survives. D can't be convicted of attempted murder, because she didn't intend to bring about V's death. That's true even though, had V died from the shot, D would probably have been guilty of actual murder (of the depraved-indifference variety).

Requirement of Act

☛ **"Substantial step" test):** Remember that under the modern/Model-Penal-Code approach, the requirement of an act is met by any act that is a ***"substantial step"*** towards completion of the underlying crime.

Example: X wants to test the faithfulness of his girlfriend, G, and if she proves to be unfaithful, to kill her. X plans with Y to give Y a box of chocolates laced with poison. Y is to pretend to like G, and to offer her the chocolates. If she accepts the chocolates, then X will believe her to be unfaithful and deserving to die (from the poison). X brings the box of poisoned chocolates to the pool hall he and Y frequent and places the chocolates near his coat on the bench. Somebody else takes the chocolates (and throws them away without eating them), so X can't give them to Y. X's act of poisoning the chocolates and bringing them to the pool hall would probably be found to constitute a substantial step toward completion of the crime of murdering G, despite the fact that the chocolates were never given to G.

Impossibility

☞ **Factual impossibility:** Look for a fact pattern where: (1) ***had the facts been as D believed them to be, his act would have constituted a crime;*** but (2) under the facts as they really were, his act did not constitute a completed crime. This is ***"factual impossibility,"*** and it is ***not a valid defense.****Examples:*

[1] D shoots to kill V, whom he believes is asleep, but V actually died of a heart attack moments before. (This is still attempted murder.)

[2] D shoots to kill V with an unloaded gun, although D thinks it's loaded. (This is still attempted murder.)

[3] D puts LSD into chocolate intending to kill the person consuming it, but does not know that the amount of LSD put into the food cannot cause death. (This is still attempted

murder.)

[4] D sells X (an undercover agent) a substance that D thinks is heroin. Unbeknownst to D, her own supplier has tricked her by selling her a harmless concoction made mostly of sugar. (This is attempted sale of narcotics.) (But if D tried to defraud X by selling him what X thought was heroin and D knew wasn't, this *wouldn't* be attempted sale of narcotics.)

☞ **Factual mistake bearing on legal relations ("hybrid" situation):** Where D's mistake is a factual mistake about the ***legal status*** of some person or thing, in most courts the mistake is still not a defense, any more than any other kind of factual mistake is a defense. So if D is mistaken about whether V is still alive (Example [1] above) or mistaken about whether a car is stolen (see example below), this won't be a defense to an attempt charge.

Example: X and Y, undercover police officers, pretend to be criminals in order to catch D, a criminal known to buy and sell stolen cars. X meets D and tells him that Y is looking for a buyer for stolen cars. After D says that he might be interested in buying one for resale, X offers to buy it with him as a partner. X sets up a meeting between D and Y. Y offers to sell D what he says is a stolen car. (The car has actually been requisitioned from the police department.) D pays Y for the car. Although the car was not actually "stolen property" (so D cannot be convicted of receiving stolen property), he's guilty of attempt to receive stolen property. That's because D's factual mistake about legal status (whether the car was stolen) is irrelevant, since had the facts been as D thought they were, he would have completed the crime of receiving stolen property.

☞ **True legal impossibility (mistake about how a crime is defined):** On the other hand, if D's mistake is about ***how a particular crime is defined*** — that is, D thinks his act matches the definition but it really doesn't — then this *is* a defense. This is the defense of ***"true legal impossibility."*** (But be sure to distinguish between this true legal-impossibility situation, and the "factual mistake bearing on legal relations" situation, described above, that *isn't* a defense.)

Example 1: Due to the advice of an attorney, D believes that the crime of arson in her jurisdiction covers the intentional burning of any dwelling, although it actually applies only to the dwelling of "another." With a belief that she is committing arson, D burns down her house in order to collect

insurance proceeds. D thought she was committing arson, but she may not be charged with attempted arson. The defense of “legal impossibility” applies: D’s mistake was a mistake about how the crime of arson is defined.

Example 2: Until recently, the hunting season for the flivver, a rare migratory bird, was restricted to March and April. The law fixing the hunting season was recently amended to permit hunting during May and June. D, unaware of the change in the law, decides to go flivver hunting in May, because he does not like to compete with other hunters. D shoots and kills a flivver. Despite the fact that D thought he was in violation of the hunting law, he may not be charged with an attempt to violate it. Again, the defense of legal impossibility applies: D’s mistake was a mistake about how the crime of flivver-hunting is defined.

Merger, and Convictions of Both Attempt and the Underlying Crime

☛ **Merger:** Remember that a lesser included offense, such as attempt, ***merges*** with the more serious one if the crime was completed — merger means that D can’t be convicted of both.

☞ **No merger of attempt and conspiracy:** However, remember that the crime of attempt ***does not merge with conspiracy,*** so a person can be convicted of both, arising out of a single fact pattern and a single underlying crime.

Example: X and Y agree to kill V. Y loads the gun, and X pulls the trigger. The bullet misses. X and Y can each be convicted of *both* attempted murder *and* conspiracy to commit murder.

☛ **Standalone prosecution for attempt:** Also, remember that the prosecutor can choose to charge the defendant *only* with attempt, even if a conviction for the substantive crime could have been attained.

Example: D shoots at V, intending to kill him. V is wounded, and dies in the hospital. D can’t be convicted of both murder and attempted murder. But the prosecutor may choose to bring just an attempted-murder charge; D may be convicted of that charge, even though the facts might also support a murder conviction.

CHAPTER 7
CONSPIRACY

Introductory Note: When two or more people agree to commit an act that is a crime, they can be convicted of "conspiracy" to do that act. This is true even if they don't ever carry out the crime itself. (In fact, in most states, they can be convicted even if they don't do anything more than make the agreement, and never carry out *any acts* in furtherance of the conspiracy). Conspiracy is an increasingly important prosecutorial tool whenever groups of people plan to commit crimes together.

I. INTRODUCTION

A. Definition of "conspiracy": The common-law crime of ***conspiracy*** is defined as ***an agreement between two or more persons to do either an unlawful act or a lawful act by unlawful means.*** At common law, the prosecution is required to show the following elements:

1. **Agreement:** An ***agreement*** between two or more persons;

2. **Objective:** To carry out an act which is either ***unlawful*** or which is lawful but to be accomplished by unlawful means;

3. ***Mens rea:*** A ***culpable intent*** on the part of the defendant. In the usual case of a conspiracy to commit an act that would be a crime, the intent must consist of at least the mental state ***required for the object crime.*** (For instance, for conspiracy to commit murder, each conspirator must have an intent that would suffice for the crime of murder.)

B. Purposes of conspiracy law: There are two principal purposes that are served by defining and proscribing the crime of conspiracy:

1. **Inchoate crime:** First, since a conspiracy may be (and frequently is) found where no substantive crime is ever committed, society is able to stop conduct before the harmful effects of substantive criminality occur. Thus conspiracy is an "inchoate" crime, and serves the same functions as the law of attempts (*supra*, p. 153).

2. **Group activity:** Secondly, it is often felt that ***group activity*** of a criminal nature is ***more dangerous*** than criminal conduct engaged in by an individual working alone. Under conventional theory, persons working in combination will give each other courage, dissuade each other from abandoning the criminal plan, and render each other mutual assistance that makes the ultimate success of the crime more

likely. Thus the law of conspiracy serves a function of policing group activity.

a. **Contrary view:** Others have pointed out, however, that there is no empirical evidence that group criminality is more likely to succeed than solo activity, and that there are theoretical reasons why this may not be so. For instance, the risk of a ***leak*** to law enforcement authorities, and the risk that one of the participants may be an undercover agent, are obviously potent anti-success factors that are not present when an individual works alone. See Commentary to M.P.C. § 5.03, fn. 17.

C. Procedural advantages: Conspiracy law furnishes the prosecutor with a potent weapon. Substantively, he is given extraordinary latitude in some states, which define conspiracy as an agreement to do not only criminal acts, but acts that are "immoral," "contrary to the public interest," or some other vague phrase. (See the fuller discussion of this aspect *infra*, p. 189). Even more significantly, a number of ***procedural*** advantages come to the prosecutor in a conspiracy case. We discuss two of these advantages here.

1. **Joint trial:** Joinder laws in virtually all states permit the prosecution to try in a ***single proceeding*** all persons indicted on a single conspiracy charge. Such a joint trial saves the prosecution a great deal of work, since the case only has to be presented once; furthermore, witnesses are likely to be much more willing to testify a single time than in multiple proceedings.

2. **Admission of hearsay:** Perhaps the most devastating procedural advantage available to the prosecution in a conspiracy trial is the ***exclusion*** from normal ***hearsay*** evidence rules given for statements made by a defendant's ***co-conspirator*** in furtherance of the conspiracy. Normally, the rule against hearsay evidence prevents the in-court repetition of a previous statement by one person to be used against a different person (i.e., the defendant). But in a conspiracy case, the rule is that ***any previous incriminating statement by any member of the conspiracy, if made in furtherance of the conspiracy, may be introduced into evidence against all of the conspirators.*** See, e.g., Federal Rule of Evidence 801(d)(2)(E), codifying the common-

law rule that a statement is admissible, and not excludable hearsay, if it is offered against a party and is “a statement by a co-conspirator of [the] party during the course and in furtherance of the conspiracy.”

a. **Rationale:** This rule is generally defended on the grounds that, by agreeing to pursue criminal ends together, all of the conspirators have authorized each of them to act as “agent” for all of them, and an agent’s statements are binding against his “principal.” The use of this exception to the hearsay rule can be demonstrated by the following example.

Example: D1, D2 and D3 are charged with conspiracy to rob a bank. Before the robbery occurs, D1, the organizer of the plan, tells his mistress, X, that D3’s part in the plan is to steal a getaway car. (D3 makes this statement in an unsuccessful attempt to recruit X to the conspiracy.) At trial, the prosecution has X repeat this statement in its case against D3, who is convicted with D1 and D2. Assuming that there is enough *non*-hearsay evidence to show, by a preponderance of the evidence, that D3 and D1 were a part of a conspiracy, the statements to X were properly admitted against D3, on the theory that the statement were acts in furtherance of the conspiracy, and were implicitly authorized by D3.

II. THE AGREEMENT

A. **“Meeting of the minds” not required:** As noted, the essence of a conspiracy is an ***agreement*** for the joint pursuit of unlawful ends. However, the sort of “agreement” that is required is not a true “meeting of the minds” of the kind necessary for a legally enforceable contract. All that is necessary is that the parties communicate to each other in some way their intention to pursue a joint objective.

1. **Implied agreement:** The agreement does not have to be reached in words; each of two parties might, ***by his actions alone,*** make it clear to the other that they will pursue a common objective. For instance, if A is in the process of mugging X on the street, and V comes along and helps pin X to the ground while A takes his wallet, a conspiracy to commit larceny or robbery might well be found, despite the absence of any spoken communication.

2. **Proof by circumstantial evidence:** Furthermore, courts are very liberal as to the ***proof*** that must be given of the agreement’s existence. Unless one of the co-conspirators turns state’s evidence, the prosecution is unlikely to be able to prove through direct testimony that an agreement was reached. Therefore, the prosecution is normally

permitted to prove the agreement merely by ***circumstantial evidence,*** that is, evidence of the acts committed by the party, in circumstances strongly suggesting that ***there must have been a common plan.***

Example: The Ds claim to be "citizens" of the "Republic of New Africa" (RNA) in Jackson, Mississippi; RNA is composed of black Americans who are descended from African slaves. In the midst of a stake-out by FBI agents, several RNA members shoot and wound some of the agents and kill a local policeman. The gunmen, and several other RNA members, are charged with, *inter alia,* conspiracy to assault a Federal officer. The evidence shows that the gunmen acted almost simultaneously, in what appears to have been a coordinated attack on the agents.

Held, convictions affirmed. The conduct of the shoot-out was "strong evidence of a common plan and certainly showed concerted action." The existence of an agreement, rather than haphazard self-defense, is buttressed by testimony that the RNA members organized highly regimented "combat-win" drills to train for an anticipated attack by law enforcement personnel. (Also, even those defendants who were not present at the shootout, but who participated in the drills, may be convicted of the conspiracy.) *U.S. v. James,* 528 F.2d 999 (5th Cir. 1976).

a. **But must be some agreement:** But the rule permitting proof of agreement by circumstantial evidence does not dispense with the need for showing that there was indeed an agreement. Suppose, for instance, that the jury in *James, supra*, believed that the RNA members spontaneously and individually decided to shoot at the FBI agents; the mere fact that they were pursuing a common objective would not have been enough to sustain a conspiracy conviction. "[C]oncurrence of acts is only evidence of conspiracy, not equivalent to conspiracy." (Glanville Williams, quoted in K&S, p. 801.)

B. **Aiding and abetting:** As is discussed *infra,* p. 213, under the rules of accomplice liability a person may become liable for the substantive crimes of another merely by ***furnishing assistance*** to that other person. Does accomplice liability extend to the substantive crime of conspiracy, so that one who "aids and abets" a conspiracy is guilty of conspiracy, despite the fact that he has not reached even a tacit agreement with the conspirators to help them?

1. **Illustration:** The question is illustrated by a well-known murder case, *State ex rel. Attorney General v. Tally,* 15 So. 722 (Ala. 1894). D, a judge, knew that A and B planned to kill X. D, without making any agreement with A and B, prevented a telegram of warning from

reaching X; X therefore did not flee, and A and B killed him. D was convicted of aiding and abetting the murder of X, and was therefore held liable of the substantive crime of murder under accomplice liability principles. Our present question becomes: is D also guilty of ***conspiracy*** to murder X, even though there was no agreement between him and A and B? Courts are split on this question.

a. View favoring liability: In favor of finding a conspiracy in this situation, it can be argued that D knew he was serving an existing conspiracy, and he therefore had as great an evil intent, and as much willingness to act affirmatively in furtherance of that intent, as if he had made an agreement with A and B.

b. View against liability: On the other hand, since conspiracy is defined as an "agreement," it can be argued that one aids and abets conspiracy only by ***aiding the act of agreement*** (e.g., by bringing A and B together and helping them agree on a plan), not by aiding and abetting the substantive object crime. (See L, p. 578.)

i. Unfairness: Furthermore, as the draftsmen of the Model Penal Code point out, there are so many severe implications to being treated as a member of a conspiracy (e.g., admissibility of declarations by one conspirator against another, despite hearsay rule) that it may be unfair to treat the aider and abettor as a full-fledged conspirator when he has not become part of the agreement. See Comment 2(c)(iv) to M.P.C. § 5.03. Accordingly, under the Code, the aider and abettor is liable for the substantive object crime if the conspirators commit it. But he does *not* become a co-conspirator merely by aiding and abetting the conspirators.

C. Parties do not agree to commit object crime: Although there must be an agreement, it is not necessary that each conspirator agree to commit the ***substantive object crime(s)*** (or "immoral act," etc.; see *infra*, p. 189). A particular defendant can be a conspirator even though he agreed to help only in the ***planning stages.*** Thus in the example on p. 182), D3 would be guilty of conspiracy to commit bank robbery even though he has only agreed to obtain the getaway car, not to participate in the bank robbery itself.

D. Feigned agreement: Suppose A and B verbally agree with each other that they will rob a bank, but B is secretly an ***undercover agent,*** and never has any intention of committing the robbery (and in fact plans to have A arrested before he can go much further). In this situation, has the requirement of an "agreement" been met?

1. Traditional view that there is no conspiracy: The traditional common-law view is that there is ***no agreement,*** and therefore ***no conspiracy.***

2. ***Modern view allows conspiracy finding:*** Modern courts, however, generally hold that despite the lack of subjective intent on the part of one conspirator to carry out the object crime, ***the other party may nonetheless be convicted of conspiracy.***

Example: D agrees with his cousin that the two of them will murder D's mother. The cousin turns D into the police, and testifies at D's conspiracy trial that he, the cousin, never had any intention of carrying out the plan. *Held,* D was properly convicted. "[A] man who believes he is conspiring to commit a crime and wishes to conspire to commit a crime has a guilty mind and has done all in his power to plot the commission of an unlawful purpose," even if the other party has no intention of cooperating. *State v. St. Christopher*, 232 N.W.2d 798 (Minn. 1975).

a. Model Penal Code agrees: The Model Penal Code agrees with this result, although it reaches it in a slightly different way. The Code follows a ***"unilateral"*** approach to conspiracy, rather than the traditional "bilateral" one. That is, it does not define conspiracy as an agreement "between two or more persons," but rather, makes an individual liable for conspiracy if he "agrees with [an] other person or persons." M.P.C. § 5.03(1)(a). Under this formulation, since the individual defendant has intended to reach an agreement, he meets the statutory requirement even though the other person is in reality not part of the plan. Comment 2(c)(iv) to M.P.C. § 5.03 concedes that "the project's chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events." But in view of the evidence that the defendant has had a firm purpose to carry out the plan, the Code draftsmen believe a conspiracy conviction to be justified.

E. Knowledge of the identity of other conspirator: Because the necessary "agreement" does not have to be an explicit one *(supra,* p.

183), it may be the case that a defendant is held to have conspired with a person whom he had never met, and whose precise ***identity he was not aware of.*** For instance, if A agrees with B to rob a bank, and B then agrees with C with respect to a different aspect of the same bank robbery plan, A and C may be held to have been part of the same conspiracy, even though they may never have met each other, or even known of each other's precise identity. (However, it is probably necessary that each of them at least knew that there was some person other than B in the conspiracy.) This topic is discussed further in the treatment of "wheel" and "chain" conspiracies *infra,* p. 193.

III. *MENS REA*

A. The intent requirement generally: Since, as noted, the essence of a conspiracy is an "agreement," there must be, on the part of each conspirator, an ***intent to agree.*** (An "agreement" is, by definition, a product of intent.) But beyond the intent to reach an agreement, the conspirator must be shown to have had a ***further, unlawful, intent.*** It is this further intent that we now examine.

B. Intent to commit object crime: In many jurisdictions, the conspirators must be shown to have agreed to commit a ***crime*** (although some jurisdictions permit conviction based upon an agreement to accomplish an "immoral act"; see *infra,* p. 189). Assuming that the prosecution is for conspiracy to commit a criminal act, it is universally held that each of the conspirators must be shown to have had ***at least the mental state required for the object crime.***

Example: Suppose that A and B are caught trying to break into a dwelling at night. They can be convicted of conspiracy to commit burglary only if it is shown that they had the intent necessary for the crime of burglary, i.e., not only an intent to break and enter, but also an intent to commit a felony once they got inside.

1. **Must have intent to achieve objective:** Furthermore, a conspiracy to commit certain crimes defined in terms of causing a ***harmful result*** may require a mental state that is ***more culpable*** than needed for the object crime itself. The conspirators must be shown to have ***intended to bring about that result,*** even though such an intent may not be necessary for conviction of the substantive crime.

   a. **Illustration:** Consider an example put by the draftsmen of the

Model Penal Code: assume that A and B plan to blow up a building by exploding a bomb. If they know that there are persons in the building who are highly likely to be killed, and they go through with the plan, they will be liable for the completed crime of murder if death results (because murder may be committed with "reckless disregard" of the danger of death, rather than intent to kill; see *infra*, p. 252). But they will ***not*** be guilty of conspiracy to murder the inhabitants, because they did not have an ***affirmative intent to bring about death.*** See Comment 2(c)(i) to M.P.C. § 5.03.

2. **Crime of recklessness or negligence:** It follows from the intent requirement that there can be no conspiracy to commit a crime that is defined in terms of ***recklessly or negligently*** causing a particular result. For instance, where the crime of involuntary manslaughter is defined as the causing of death due to criminal negligence *(infra*, p. 276), there can be no conspiracy to commit such manslaughter; either one plans to bring about a death, in which case it is conspiracy to murder, or one behaves negligently (even in conjunction with the negligence of others) in which case there is no conspiracy to commit any homicide crime.

3. **Strict-liability crimes:** Where the defendants are charged with conspiring to commit a crime that has no *mens rea* requirement (i.e., a ***strict-liability*** crime; see *supra*, p. 33), it is usually agreed that they must be shown to have ***intended*** to bring about the result in question. As Learned Hand put it, "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." *U.S. v. Crimmins*, 123 F.2d 271 (2d Cir. 1941).

   a. **Ignorance of law:** But it is not usually required that, to be liable for conspiracy, the defendants have understood that the act they intended to commit was a crime. If A and B agree to race their cars through a red light, they can be convicted of a conspiracy to do so even if they are able to prove that they did not know it was a crime to go through a red light.

4. **Attendant circumstances:** An offense defined completely in strict-

liability terms must be distinguished from a crime with ***several elements,*** as to which only ***some*** require intent or knowledge. As a result of a Supreme Court ruling, one ***can be convicted*** of conspiring to commit such a crime even though one may have been unaware of the facts fulfilling the strict-liability elements of the crime. These strict-liability elements typically have to do with ***"attendant circumstances"*** surrounding commission of the crime.

a. **Federal jurisdiction:** The issue arises most frequently with respect to crimes some elements of which relate principally or solely to the existence of ***federal jurisdiction.*** For instance, the federal mail fraud statute applies only where fraud is committed through use of the mails. One who actually uses the mails may be convicted of the substantive crime of mail fraud, even though it is not shown that he knew that the mails had been used. But until the Supreme Court's decision in *U.S. v. Feola,* 420 U.S. 671 (1975), it was not clear whether a defendant could be convicted of ***conspiracy*** to commit mail fraud if it were not shown that he intended to use the mails. *Feola* shows that the answer is yes.

b. ***Feola* case:** In *Feola,* the Ds were involved in a classic narcotics "scam," in which they attempted to have their victim pay them for heroin, but give him merely powdered sugar. When the victim got suspicious, the Ds attempted to beat him up. Unbeknownst to them, the victim was a federal narcotics agent. The Ds were charged with conspiring to commit an assault on a federal officer engaged in performance of his duties. The Ds argued that, since they did not know that the victim was a federal officer, they could not be convicted of conspiracy to assault a federal official.

   i. **Conviction affirmed:** The Supreme Court ***rejected*** this contention. The Court noted first that the "federal officer" requirement is ***purely jurisdictional.*** Furthermore, the Court found that Congress, in enacting the substantive statute, had intended in part to protect federal law enforcement personnel, and that a strict *mens rea* requirement in conspiracy cases would tend to defeat this congressional purpose.

c. **Model Penal Code view:** In state prosecutions, where a crime is

similarly defined so as to include attendant circumstances as to which knowledge or intent does not have to be proved, it is not clear whether the states will follow the lead of *Feola* and allow conspiracy conviction where such intent or knowledge is absent. The Model Penal Code does not explicitly resolve this problem, but the draftsmen state that they believe it to be "strongly arguable" that the *mens rea* requirement should be found to be met in such a conspiracy prosecution, even though intent or knowledge with respect to the attendant circumstances is lacking. See Comment 2(c)(ii) to M.P.C. § 5.03.

C. Supplying of goods and services: The defendants must, as noted, be shown to have ***intended*** to further a criminal objective. It is generally not enough that a particular defendant merely ***knew*** that his acts might tend to enable others to pursue criminal ends. One situation in which courts are often required to distinguish between intent and mere knowledge occurs when a person ***supplies goods or services*** to others with knowledge that what he supplies will be used to further criminal ends. Can the supplier be said to have joined a conspiracy?

1. Mere knowledge usually insufficient: Generally, ***something more than mere knowledge*** is necessary to show an intent to further the criminal objective. Courts have found the following elements to be enough "extra" (beyond knowledge) to make the supplier a member of the conspiracy:

a. "Stake in venture": The supplier will be held to have joined the conspiracy if the nature of his sales shows that he in some sense acquired a ***"stake in the venture."*** (But this is not shown merely by the fact that he made profits from selling items which the conspirators would not have bought had they not been engaged in the criminal activity in question.) For instance, if he agrees to postpone payment until he can be paid out of proceeds of the crime — or if he agrees to be paid a fixed percentage of the proceeds from the crime — he'll have a stake in the venture and therefore be deemed to be part of the conspiracy.

b. Controlled commodities: The supplier is more likely to be held to have been a participant in the conspiracy if the substance sold was

a ***governmentally-controlled*** one that, in the quantities in question, could, to the supplier's knowledge, only have been used for illegal purposes.

c. Inflated charges: If the supplier is charging his criminal purchasers an ***inflated price*** compared with what the items would cost when sold for legal purposes, this is evidence of his intent to further the criminal purposes. See *People v. Lauria,* discussed *infra,* citing this factor.

d. Large proportion of sales: If sales to criminal purchasers represent a ***large proportion*** of the supplier's overall sales of the item, he is more likely to be held to have had the requisite intent.

e. Serious crime: The supplier's participation in illegal activity is more likely to be found where the illegal activity is known to the supplier to constitute a ***serious crime,*** than where the end use is a misdemeanor.

Example: D1 runs a telephone answering service. The service numbers among its clients several prostitutes, for whom the service processes messages from potential clients. D1 and the prostitutes are charged with conspiracy to commit prostitution; prostitution is a misdemeanor. The evidence shows that D1 knew that the clients in question were prostitutes, but no acts by him in furtherance of their trade are proven except for the taking of messages.

Held, Dl's conviction reversed. If one supplies goods or services that one knows will be used for a serious crime, his intent to facilitate that crime may be inferred from this alone. "For instance, we think the operator of a telephone answering service with positive knowledge that his service was being used to facilitate the extortion of ransom, the distribution of heroin, or the passing of counterfeit money who continued to furnish the service with knowledge of its use, might be chargeable on knowledge alone with participation in a scheme to extort money, to distribute narcotics, or to pass counterfeit money. The same result would follow the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use." But where, as here, the end use constitutes only a misdemeanor, mere knowledge of it is not enough. Since there are no other indications of Dl's intent to participate in the venture (e.g., he did not charge inflated prices to the prostitutes, and they did not account for a large share of his business), the necessary intent has not been shown. *People v. Lauria,* 59 Cal. Rptr. 628 (Cal. App. 1967).

D. Differing mental states: It will often be the case that the alleged conspirators have different mental states. Each defendant's mental state must, of course, be judged on its own. Thus if A, B and C all agree to break into X's house at night, but only A and B intend to steal something when they get inside (and C is just going along as a lark), C

cannot be convicted of conspiracy to commit burglary. See L, p. 585-86.

1. **Plurality requirement:** Furthermore, since under the traditional definition conspiracy requires an agreement between two or more persons, if only one defendant has the requisite mental state, he must normally be acquitted of conspiracy. Thus if, in the housebreaking hypothetical above, neither B or C intended to commit a felony inside the house, A would be entitled to acquittal, since there is no "agreement" between him and the others to commit the substantive offense of burglary. See L, p. 586.

   a. **Model Penal Code rejects this result:** But the Model Penal Code, with its "unilateral" approach to conspiracy (see *supra*, p. 185)), would reject this result. A would be held to have had the necessary intent to agree, regardless of whether B and C had the appropriate subjective intent.

   b. **Inconsistent results:** Furthermore, even in a jurisdiction not accepting the Model Penal Code's unilateral approach, it would not be necessary that B and C actually be ***convicted*** in order for A's conviction to stand. For instance, if B turned state's evidence, and C was simply not prosecuted, A would not be able to defend on the grounds that this showed that B and C did not have the requisite intent. (But A could still argue that the evidence at his own trial showed that B and C did not have the needed intent.) See the discussion of inconsistent results, *infra*, p. 201.

IV. THE CONSPIRATORIAL OBJECTIVE

A. Non-criminal objectives: The definition of common-law conspiracy is usually construed to require an agreement to pursue an ***"unlawful objective"*** or a lawful objective by ***"unlawful means".*** However, courts have traditionally interpreted the term "unlawful" to include not only acts that have explicitly been made ***criminal*** if pursued by a single person, but also acts that are ***"immoral,"*** "contrary to the public interest," "fraudulent," etc.

Example: Suppose that a state makes any loan above 15% unenforceable as usury, but does not make making the loan a crime. If D1 and D2 agree to write such loans, under the common-law approach they could be convicted of conspiracy, for jointly pursuing an immoral (but non-criminal) objective.

1. **English view:** The punishment of conspiracies to perform acts that are not by themselves criminal is still very much a part of ***British*** law.

Example: D is charged with conspiracy to "corrupt public morals." The prosecution shows that D collaborated with prostitutes for the publication of a "Ladies Directory," which contains the "names, addresses and telephone numbers of prostitutes with photographs of nude female figures, and in some cases details [about the photographed womens'] willingness to indulge not only in ordinary sexual intercourse but also in various perverse practices." D is convicted at trial. He argues on appeal that he can't be guilty of conspiracy because none of the underlying acts which he was accused of conspiring to commit would have itself been a substantive crime.

Held (by the House of Lords on appeal), for the prosecution. The conviction will stand, regardless of whether D's conduct would have constituted any substantive, non-conspiratorial, crime. *Shaw v. Director of Public Prosecutions*, 2 W.L.R. 897 (Eng. 1961).

2. **Modern American view rejects this approach:** But the modern American tendency is to allow a conspiracy conviction ***only*** if the defendants intended to perform an act that was ***explicitly criminal.*** Thus Model Penal Code, § 5.03(1), speaks only of conspiracy "to commit a crime." The Code draftsmen state that statutes imposing conspiratorial liability for acts which would not be criminal in themselves generally "fail to provide a sufficiently definite standard of conduct to have any place in a penal code." See Comment 2(a) to M.P.C. § 5.03.

   a. **Conspiracy to defraud government:** But one area in which a broad definition of conspiratorial objective still exists occurs in statutes making it a crime to conspire to ***"defraud" the government.*** The best known such statute is the federal one, making it a crime to "conspire to defraud the United States." This statute has been broadly construed, so as to make it a crime not only to conspire to obtain pecuniary gain at the expense of the government, but also to conspire to commit many other kinds of interference with the functions of government.

B. **Overt act requirement:** The common-law doctrine of conspiracy provides that the crime is complete once the agreement has been made. So there's no requirement at common law that any of the conspiracy co-defendants have taken any ***"overt act"*** in furtherance of the conspiracy. But about half the states have statutes requiring, in addition, that in some circumstances an overt act in furtherance of the conspiracy must also be

committed.

1. **Rationale:** The usual explanation for this requirement is that it is needed to verify that there has been a reasonably ***firm intent*** on the part of the conspirators to go through with the crime; the requirement is therefore similar to the requirement in the law of attempts *(supra,* p. 158) that the defendant must have come reasonably close to success.

2. **Model Penal Code limits requirement:** The Model Penal Code limits the overt act requirement to ***non-serious crimes.*** A conspiracy to commit a felony of the first or second degree may be proved without an overt act, because of the greater importance of "preventive intervention" in such cases than in less serious conspiracies. See Comment 5 to M.P.C. § 5.03(5).

3. **Kind of act required:** Where a state requires an overt act, what qualifies is ***any act*** that is taken in ***furtherance of the conspiracy.*** It does ***not*** have to be an act that is ***criminal in itself,*** or even one which represents the beginning of the commission of the substantive offense. Thus acts of ***mere preparation*** will be sufficient; for instance, if the conspiracy is to make moonshine liquor, purchase of sugar from a grocery store would meet the overt act requirement.

4. **Act of one attributable to all:** Even in a state requiring an overt act, it is not necessary that *every defendant* charged with the conspiracy be shown to have committed an overt act. Instead, the overt act of one will be ***attributable to all*** (since, by hypothesis, the act is in furtherance of the conspiracy that all have joined). See *Pinkerton v. U.S.,* 328 U.S. 640 (1946) (dictum).

   a. **No overt act required:** Therefore, don't fall into the trap of thinking that if a particular defendant did not do any overt act, she can't be liable for conspiracy.

      i. **Alibi for underlying crime irrelevant:** So, for instance, a defendant who has a perfect ***alibi*** (e.g., he's in jail or out of the country) when some overt act in furtherance of the conspiracy occurs, ***won't benefit.*** Once a given defendant agrees to the conspiratorial objective with some other person, the defendant's liability is complete.

Example: On Friday, D1 and D2 agree to rob the First National Bank of Ames the following Tuesday. Assume the jurisdiction requires an overt act for conspiracy. D1 gets arrested on Saturday, and remains in jail. On Tuesday, D2 robs the bank himself. D1 (and D2) can be convicted of conspiracy to rob the Bank — the fact that only D2 committed any overt act in furtherance of the conspiracy is irrelevant, because D2's overt act will be attributed to D1. (And notice that at *common law* the conspiracy would have been complete the second D1 and D2 reached their agreement, so that no overt act by *either* was required.)

C. Impossibility: Recall that in the law of attempts, the defense of so-called "legal impossibility" is often asserted, though rarely accepted. For instance, one who buys goods thinking they are stolen property, when in fact they are not, might try to escape conviction for attempted receiving of stolen goods. (See *supra*, p. 165). Can such a defense of legal impossibility succeed in conspiracy cases?

1. **Generally rejected:** Where the impossibility is of the sort we have termed *(supra*, p. 164) "factual impossibility relating to legal relations," which corresponds to the common label "legal impossibility," most courts have ***not accepted*** the impossibility defense for conspiracy, any more than they have accepted it in attempt cases. For instance, if two Ds conspire to purchase property which they believed to be stolen, it is unlikely that they would succeed with their impossibility defense.

2. **Mistake as to coverage of statute:** If the defendants' mistake, rather than being a factual one that relates to legal matters, is instead one relating to ***interpretation of the criminal statute itself,*** presumably this will be a defense against conspiracy just as against attempt. (See *supra*, p. 164). For instance, suppose that the defendants believe that it constitutes the crime of perjury to lie to a police officer investigating a crime; if the defendants agree to tell such a lie, they would presumably not be guilty of conspiracy to commit perjury, any more than of attempt to commit perjury.

3. **Factual impossibility:** Where the impossibility is so-called "factual impossibility," it will virtually never be a defense to conspiracy (or to attempt; see *supra*, p. 163). Thus if the Ds agree to pick the pocket of a certain victim, and the pocket turns out to be empty, they will be liable for conspiracy to commit larceny.

D. Substantive liability for crimes of other conspirators: Suppose that

the members of a conspiracy proceed to commit actual crimes. Assuming that the crimes are in "furtherance" of the conspiracy, is each member of the conspiracy, by virtue of his *membership alone*, ***liable for the substantive crimes committed by his colleagues?***

1. ***Pinkerton* case imposes liability:** The U.S. Supreme Court has answered "yes" to this question, in *Pinkerton v. U.S.,* 328 U.S. 640 (1946). (However, *Pinkerton* is not only an older case, it's a case that is not binding on the states when they decides matters of state criminal law.)

   a. **Facts of *Pinkerton:*** In *Pinkerton,* two brothers, Daniel and Walter, were charged with violating the Internal Revenue laws by conducting a moonshining business, as well as with conspiracy to violate those laws. There was no evidence that Daniel had participated directly in the commission of the substantive offenses (and in fact he was in prison when some of them were committed by Walter).

   b. **Held liable:** Nonetheless, the Court upheld Daniel's conviction of the substantive crimes as well as the conspiracy, on the grounds that Walter had committed them in furtherance of the conspiracy between the two brothers. Since the requirement of an overt act can be met as to all defendants by showing an overt act by one (see *supra*, p. 190), the Court saw no reason why liability for substantive crimes committed in furtherance of a conspiracy should not also be imputed to all defendants. (The Court conceded that Daniel would not have been liable if the crimes were not done in furtherance of the conspiracy, or were not "reasonably foreseeable" as "necessary or natural consequence" of the agreement when it was entered into.)

   c. **Dissent:** A dissent stressed that there was no evidence that Daniel even counseled, advised or knew of the particular substantive crimes committed by Walter, and argued that such vicarious criminal liability was even broader than the vicarious civil liability of a partner for acts done by a co-partner in furtherance of the partnership's business.

2. **Modern view limits *Pinkerton:*** It is well accepted that one

conspirator may, by actively “aiding and abetting” another to commit a substantive crime in furtherance of the conspiracy, become liable for that substantive crime. This is a product of the rules on accomplice liability (discussed *infra*, p. 213). The difficult issue, however, is whether, ***even without proof of “aiding and abetting,”*** a conspirator is necessarily liable for the substantive crimes committed by his colleagues in furtherance of the conspiracy. Despite the decision in *Pinkerton*, most modern courts have tended to ***reject*** such substantive liability founded upon mere membership. See L, p. 634-35.

a. **Model Penal Code view:** Similarly, the Model Penal Code does not make “conspiracy,” without more, a basis for imposing liability for the substantive crimes of others. The Code draftsmen pose the case of a large prostitution ring, in which the ringleaders place many girls in houses of prostitution and receive money for doing so. It is justified to hold the ringleaders liable for each individual act of prostitution; this can be done on an “aiding and abetting” theory. But would it be justified to hold ***each girl*** liable for the acts of prostitution committed by each of the ***others,*** on the sole grounds that they were all part of the same conspiracy? The draftsmen suggest that the answer is clearly “no”: “Law would lose all sense of just proportion if in virtue of that one crime [of conspiracy], each were held accountable for thousands of offenses that [s]he did not influence at all.” See Comment 6(a) to M.P.C. § 2.06(3).

V. SCOPE: MULTIPLE PARTIES

A. Parties not in contact with each other: It may happen that some of the parties involved in a substantial criminal undertaking do not know each other personally, and are not even aware of each others’ identities. This is particularly likely to be the case with respect to the activities of organized crime. When this happens, it will be important to have a way of deciding whether there is ***one large conspiracy,*** some members of which will not even know the others, or a ***series of smaller ones,*** composed of sets of participants who know each other and work together. The question is often discussed in terms of two sorts of organizations: (1) ***“wheel”*** or ***“circle”*** conspiracies; and (2) ***“chain”*** conspiracies.

B. "Wheel" conspiracies: The term ***"wheel"*** or ***"circle"*** conspiracy is applied to an arrangement in which a "ringleader" participates with each of the conspirators, but these conspirators deal only with the ringleader, and not with each other. The ringleader may be thought of as the "hub," to which the other members are connected like "spokes." These peripheral "spokes" do not have any contact with each other.

1. "Community of interest" test: In many cases, there will be found to be a series of separate conspiracies, each one composed of a single spoke and the hub. For a "wheel" arrangement to be considered a ***single conspiracy*** rather than a series of smaller ones, it will usually be necessary that: (1) each spoke knows that the other spokes exist (although he does not necessarily have to know their precise identity) and; (2) the various spokes have, and realize that they have, a ***"community of interest."*** This second requirement means that it must be the case that each spoke realizes that the success of the venture depends on the performance of the other spokes.

> **Example:** Several bookmakers each independently agree to subscribe to an illegal horse-racing wire service. *Held,* each bookmaker may be convicted of participating in an overall wire-service conspiracy involving all of the bookmakers, because the evidence showed that each subscriber realized that subscriptions from others were necessary to make the service feasible. That is, all the bookmakers recognized that they had a community of interest. *State v. McLaughlin,* 44 A.2d 116 (Conn. 1945).

a. Multiple conspiracies found: Conversely, if there is no "community of interest" among the various spokes, or each individual spoke does not know of the existence of the others, there will be multiple small conspiracies. The best-known such case is *Kotteakos v. U.S.,* 328 U.S. 750 (1946). The hub, one Brown, helped a number of individuals obtain FHA loans based on fraudulent applications. In many cases, the loan recipients did not know each other. The Court held that there was a series of conspiracies (each one between one loan recipient and Brown), not a single large conspiracy. While the Court appeared to base its decision principally on the grounds that the loan recipients had no direct connection with each other, a subsequent Supreme Court case *(Blumenthal v. U.S.,* discussed *infra)* explained the result in *Kotteakos* by saying that "each loan was an end in itself, separate from all the others, although all were alike in having similar illegal

objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through."

i. **Consequence of *Kotteakos:*** The consequence of the ruling in *Kotteakos* was that the defendants' convictions were reversed. The faulty premise that there was only one conspiracy had led the trial judge to allow declarations made by various loan recipients to be admissible in evidence against all, and to hold that an overt act committed by one recipient could be attributed to all for purposes of meeting the overt act requirement.

C. "Chain" conspiracies: In a "chain" conspiracy, on the other hand, there is a sequence of distribution of a commodity (usually ***drugs)*** from, say, importer to wholesaler to retailer to consumer. Here, as in the "wheel" conspiracies, it will often be the case that not all participants know each other; thus the importer may not know the retailers, and one retailer may not know the others (though they will all know the wholesaler).

1. **"Community of interest" test:** The principal test for determining whether there is one conspiracy or several is, as with "wheel" conspiracies, the existence of a ***"community of interest"*** among the participants.

a. **Knowledge of others' identity not necessary:** It is not necessary that each member of the chain know the others' precise identity for there to be a single conspiracy, so long as the members are aware that there are others involved in the scheme, fulfilling certain general functions.

Example: X, the owner of two carloads of whiskey, arranges for its resale by Francisco Distributing Co., a wholesale liquor agency run by D1 and D2. D1 and D2 arrange for D3 and D4, who have no connection with Francisco Distributing, each to sell and deliver a portion of the whiskey to local taverns at an illegally high price. All the Ds are charged with having conspired with X (whose identity was never divulged in court) to violate the price laws.

Held, by the U.S. Supreme Court, there was a single conspiracy among the Ds and X, notwithstanding the fact that D3 and D4 never knew who X was. "The salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined

together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." The *Kotteakos* case *(supra,* p. 193) is distinguishable, because there, each loan was an end in itself; here, each salesman knew that he was helping to further a larger common objective (disposition of the entire lot of whiskey). *Blumenthal v. U.S.,* 332 U.S. 539 (1947).

D. Organized crime: Whether the conspiracy at issue is a "wheel" or a "chain," it will, as noted, be necessary to show that each member being prosecuted was joined with the others in pursuit of a common objective. In the case of ***organized crime,*** this can be a very difficult showing to make, since organized crime "cells" or "families" often engage in a variety of different crimes, committed by many persons, each of whom may be unaware of what the others are doing.

1. **RICO statute:** To facilitate prosecution of such organized crime groups, Congress in 1970 passed the ***Racketeer Influenced and Corrupt Organizations Act (RICO),*** which makes it a substantive crime to engage in a ***"pattern of racketeering activity"*** in connection with the affairs of an interstate ***"enterprise."*** "Racketeering" is defined in the statute to include a large number of crimes (e.g., murder, narcotics violations, arson, bribery, extortion, etc.). Anyone who commits two such crimes in association with an enterprise has engaged in the necessary "pattern" of racketeering, and has violated the Act.

2. **Conspiracy:** RICO also has its own ***conspiracy provisions.*** The net result is that anyone who commits or even agrees to commit two of the enumerated crimes can be lumped together with all others who agree to commit other crimes in connection with the same "enterprise," and all can be convicted of conspiracy. This is so even though the individual defendants did not know each other, and ***did not even have any idea of the sorts of activities the others were engaging in.***

Example: The Ds are a group of six persons who, among them, commit fraud on investors, arson, passing of counterfeit auto titles, theft, drug sales, and murder. Only one D is connected with all the offenses, and several Ds have no idea of the activities of the others (e.g., that two were committing murder). They are all charged with RICO conspiracy.

Held, all but one of the Ds may properly be convicted of RICO conspiracy. That's because each committed or agreed to commit two crimes falling within the definition of "racketeering," and all activities by all of these Ds were part of what the court finds to be a criminal "enterprise." Therefore, it doesn't matter that a particular defendant had no idea

what crimes various other members of the "enterprise" were committing. (The remaining D, although he committed two or more crimes, is not guilty — he did not participate in a "pattern" of racketeering in connection with the enterprise, since only one of his two crimes was part of the enterprise.) *U.S. v. Elliott,* 571 F.2d 880 (5th Cir. 1978).

E. Party who comes late or leaves early: In handling any problem involving multiple parties, it is important to give special attention to the fact that a conspirator has entered the conspiracy ***after it has begun,*** or left it ***before it is finished.***

1. Party who leaves early: A person who ***leaves a conspiracy before it's finished*** is liable for the ***later activities*** of those who remain only if those activities are fairly ***within the confines of the conspiracy as he understands them*** while he was still present.

2. Party who joins late: Conversely, a person who belatedly enters a conspiracy whose other members have ***already committed substantive acts*** will be a conspirator as to those acts only if he not only is told about them but ***accepts them as part of the general scheme*** in which he is participating. For instance, a "fence" who buys from two jewelry thieves may be a conspirator to receive stolen property, but he will *not* normally be a conspirator to commit the original theft crime (unless, perhaps, he were told all about the theft when the goods were fenced to him, and he somehow acknowledged that he was furthering the overall course of conduct).

VI. DURATION OF THE CONSPIRACY

A. Significance of issue: It will frequently be of critical importance to determine the ***ending point*** of a conspiracy. For instance, the longer the conspiracy is found to have gone on, the more likely it is that additional persons will be found to have joined it (or at least portions of it, under the modern "unilateral" view). Also, since the ***Statute of Limitations*** does not normally start to run until a crime is complete, the longer the conspiracy is found to have gone on, the better chance the prosecution has of satisfying the Statute. Similarly, declarations of conspirators may be admissible against each other, despite the hearsay rule, if those declarations were made while the conspiracy was still in progress.

1. Relation to other questions: The question of a conspiracy's duration is thus closely related to some of the issues discussed above, including the distinction between single and multiple conspiracies,

and the problems of multiple parties with different functions and intents. Here, however, we are concerned solely with the question of finding the ending point of the conspiracy; this involves primarily the problem of distinguishing the conspiracy from a subsequent ***"cover-up."***

B. Abandonment: One way that a conspiracy can come to an end, of course, is if it is ***abandoned*** by the participants.

1. **Abandonment by all:** If ***all the parties*** abandon the plan, this will be enough to start the Statute of Limitations running. Since it may be difficult to tell at what point abandonment occurred, the court will generally presume that the Statute of Limitations has run if there has been ***no overt act*** performed by any conspirator within the applicable limitations period. This rule gives the conspirators the benefit of the doubt, by treating them as having abandoned the plan immediately after forming it, if they take no overt acts. Thus if a conspiracy crime has a five-year Statute of Limitations, and the indictment is handed down on June 1, 1979, the prosecution must show that some overt act was taken by at least one of the conspirators after June 1, 1974.

   a. **Abandonment no defense to conspiracy charge:** While abandonment will start the Statute of Limitations running, it will ***not serve as defense to the conspiracy charge itself.*** The common-law view is that the conspiracy is complete once the agreement is made; therefore, abandonment is logically irrelevant. (The Model Penal Code allows a defense of "renunciation of criminal purpose," which is discussed in the context of withdrawal by a single person, *infra,* this page; it is unclear whether this provision, M.P.C. § 5.03(6), can apply where all the conspirators mutually decide to abandon the plan.)

2. **Withdrawal by individual conspirator:** It frequently happens that an ***individual conspirator drops out*** of the plan, and the others go on to complete it (or get caught). The issue of whether the drop-out has sufficiently withdrawn is answered differently depending on the purpose for which withdrawal is sought to be shown.

   a. **Procedural issues:** If the reason the defendant tries to show that he withdrew is to establish either: (1) the running of the Statute of

Limitations; (2) the non-admissibility of declarations by other conspirators after he left; or (3) his non-liability for the substantive crimes committed by the others after his departure, the rule is fairly liberal; the defendant must merely show that he made an ***"affirmative act*** bringing home the fact of his withdrawal to his confederates." L, p. 603. It is not necessary that the defendant thwart the success of the conspiracy.

i. **Notice to each:** It is generally required that the notice be given to ***each*** of the other conspirators, although in the case of a far-flung conspiracy, this requirement may not be strictly construed.

ii. **Notification of police:** Alternatively, notification of the ***police*** will suffice for this purpose.

b. **Defense to conspiracy charge:** But if the defendant tries to show withdrawal as a ***substantive defense*** against the conspiracy charge itself, he will have a much tougher row to hoe. The common-law rule is that ***no act of withdrawal,*** even thwarting the conspiracy by turning the others in to the police, will be a defense; this stems from the principle that the crime is complete once the agreement has been made. See L, p. 604.

i. **More liberal Model Penal Code view:** But the Model Penal Code allows a limited defense of ***"renunciation of criminal purpose."*** Under Code § 5.03(6), "it is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Under this section, not only must the defendant show that his renunciation was ***"voluntary"*** (as opposed to having been motivated by a fear of immediate detection), but he must also show that the ***conspiracy was thwarted.*** In general, to do this it will be necessary to ***inform the police.*** Furthermore, as the Code commentary makes clear, even a notification to the police which would ordinarily be sufficient to thwart the conspiracy but which, due to police inefficiency, fails to have that result, will not meet the requirements of the defense. See

Comment 6 to M.P.C. § 5.03(6).

3. **Crime completed:** If, rather than abandoning the plan, the conspirators carry through with it to the point of committing substantive offenses, it will be more difficult to determine when the conspiracy has ended, for purposes of Statute of Limitations, admissibility of co-conspirators' declarations, etc. The difficulty arises principally from the fact that virtually every crime in history has been followed by attempts to ***avoid discovery.*** If the conspirators attempt to conceal their traces, are they to be regarded as continuing the conspiracy during this cover-up?

   a. **Acts of concealment not sufficient:** It is well accepted that ***acts of concealment*** are ***not,*** by themselves, sufficient to continue the conspiracy.

   Example: D1 is charged with conspiring with D2, a woman, to transport X, another woman, from New York to Florida for purposes of prostitution (a violation of the Mann Act). The prosecution introduces into evidence a statement made by D2 more than a month after the alleged violation; the statement is part of an attempt by D2 to prevent D1 from being implicated in the crime. The prosecution argues that the statement is therefore part of the original conspiracy, which included a subsidiary conspiracy to avoid detection, and that the statement therefore is admissible.

   Held, attempts at concealment are not to be treated as part of the original conspiracy. Accepting the prosecution's argument would require major inroads to the rule against hearsay, and would be applicable to all conspiracies. (A concurring opinion by Justice Jackson stressed the many respects in which a conspiracy trial is often unfair to the individual defendants. These unfair results include wide-ranging venue, proof of conspiracy based solely upon hearsay declarations by co-conspirators, the risk that the jury will convict a defendant solely by reason of his association with the others, and the likelihood that co-defendants can be "prodded into accusing or contradicting each other," in which case "they convict each other.") *Krulewitch v. U.S.,* 336 U.S. 440 (1949).

   b. **Original intent concealed:** However, it is theoretically possible for the prosecution to prove that when the crime itself was planned, there was also an ***explicit plan*** to continue acting in concert to avoid detection following the crime's consummation. If so, the detection-avoiding steps *would* be deemed part of the conspiracy.

   c. **Concealment as fulfillment of original crime:** But acts of concealment may be shown to be part of the original conspiracy on a different theory entirely. The prosecution may be able to demonstrate that such acts were not merely attempts to avoid

detection, but attempts to ***consummate the crime itself.*** The most obvious example is kidnappers who go into hiding while waiting for the ransom to be paid; they are acting to avoid detection, but they are also acting to fulfill an element of the kidnapping scheme itself, i.e., collection of payment.

VII. PLURALITY

A. Significance of plurality requirement: Since conspiracy is defined in terms of an "agreement," it necessarily involves two or more persons. This requirement of more than one person is sometimes called the ***"plurality"*** requirement. There are a number of situations where it may not be certain whether this requirement has been satisfied. The most important issues are: (1) whether there can be a conspiracy when no more people are involved than are ***logically necessary*** to commit the substantive offense that is the object of the conspiracy (the so-called ***"Wharton's Rule"*** problem); (2) whether a conspiracy can exist where the only conspirators are a ***man*** and ***wife,*** or a ***corporation*** and its ***officer or agent;*** and (3) whether a person can be found guilty of conspiracy if ***none*** of the other conspirators is ***convicted*** (either because they are acquitted or for other reasons).

B. Wharton's Rule: ***Wharton's Rule,*** named after the commentator who articulated it, provides that where a substantive offense is defined so as to necessarily require more than one person, a prosecution for the substantive offense must be brought, rather than a conspiracy prosecution. Examples include ***adultery, incest, bigamy, bribery*** and ***gambling.*** Thus if a married man and a woman have intercourse, they cannot be charged with conspiracy to commit adultery; prosecution must be for adultery itself.

1. **Degree of acceptance:** Some courts — but probably only a minority — apply Wharton's Rule as a ***substantive rule*** of law. Other courts hold that the "Rule" is not a substantive limitation on the law of conspiracy, but merely a rebuttable ***presumption*** about what the legislature intended. (This is true of federal courts, as the result of *Iannelli v. U.S.*, discussed below.) Still other courts don't follow Wharton's Rule at all.

2. **Rationale:** The rationale for Wharton's Rule is that where a crime has

been defined so as to require a plurality of participants, the legislature was presumably aware of the danger stemming from group criminality, and has presumably factored these dangers into its punishment scheme for that crime. The prosecution should not be allowed to thwart this scheme by charging a general conspiracy (particularly since, in some jurisdictions, conspiracy has a punishment scheme all its own, often unrelated to the object crime; see *infra*, p. 202).

3. **More persons than necessary:** One well-established exception to Wharton's Rule is that there is no bar to a conspiracy conviction when there were ***more participants*** than were logically necessary to complete the crime. For instance, if A persuades and assists his friend B, a married man, to have intercourse with C, ***all three*** can be convicted of conspiracy to commit adultery. This is because there were more persons involved than merely the two necessary direct parties to the adultery. See L, p. 609.

4. **Only one participant punishable:** Another exception is that if a substantive crime is defined so as to require two or more participants, but ***only one*** of them is ***punishable*** under the substantive statute, ***all*** may be convicted of conspiracy. For instance, if the sale of liquor is prohibited, but penalties are prescribed only for the seller, both seller and buyer may be convicted of conspiracy to violate the prohibition law. L, p. 610-11. (But there may be "policy reasons" for not permitting a conspiracy conviction in this situation; see the discussion of *Gebardi v. U.S.*, *infra*, p. 200.)

5. **Merely a presumption:** The U.S. Supreme Court has indicated that in the case of many federal crimes, Wharton's Rule should be treated not an inflexible principle but merely as a ***presumption*** that will not apply if the legislative history behind the substantive crime fails to indicate a legislative intent to bar convictions of conspiracy to violate the substantive law. See *Iannelli v. U.S.*, 420 U.S. 770 (1975).

   a. **Facts of Iannelli:** In *Iannelli*, the Ds were charged with conspiring to violate a provision of the Organized Crime Control Act of 1970 ("OCCA"), which makes it a substantive federal offense for five or more persons to conduct, manage, finance, own, etc., a gambling

business prohibited by state law. The Ds argued that since the substantive offense required participation of at least five persons, Wharton's Rule prohibited a charge of conspiring to commit that offense.

b. **Holding:** But the Supreme Court disagreed, holding that the fact that the substantive offense required five or more participants merely created a rebuttable presumption that Congress did not intend to allow conviction of conspiracy to commit the OCCA. The Court also found that this presumption had not been rebutted (so the conspiracy prosecution was allowed to go forward.) The Court gave two reasons:

   i. **Large-scale social implications:** First of all, the Court asserted that in the case of the classic Wharton's Rule offenses, such as adultery and dueling, ***only the participants*** are typically ***affected*** by commission of the substantive offense. Here, by contrast, operation of a gambling business will inevitably draw into it ***additional persons*** (gamblers), and is more likely to be part of a generalized pattern of criminal conduct. (So the Court seemed to hold that any time attempts to commit a particular federal crime are likely to involve additional persons beyond those logically required for completion of the crime, Wharton's Rule will not apply.)

   ii. **Congressional intent:** Furthermore, according to Court, the legislative history of the Organized Crime Control Act showed no ***intent*** on the part of Congress to merge conspiracy charges into the substantive crime. On the contrary, the majority stated, the requirement of five or more participants "reflects no more than a concern to avoid federal prosecution of small-scale gambling activities which pose a limited threat to federal interests and normally can be combatted effectively by local law enforcement efforts." Therefore, the Ds could be convicted of *both* conspiracy and violation of the substantive provision of the Act.

6. **Model Penal Code rejects Rule:** Wharton's Rule is almost completely ***rejected*** by the Model Penal Code. The draftsmen note

that the Rule “completely overlook[s] the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it.” (See Comment 4 to M.P.C. § 5.04.) For instance, although it might be unfair and contrary to legislative intent to subject two participants in a non-fatal duel to both a dueling conviction and one for conspiracy to duel, there is nothing illogical about convicting two persons who plan to have a duel and are stopped from going through with it, of conspiracy to duel.

a. **No conviction for conspiracy and substantive offense:** Thus the Code provides simply that one may not be convicted of both a substantive crime and a conspiracy to commit it. M.P.C. § 1.07(1)(b).

C. **Statutory purpose not to punish one party:** A related problem, but distinct from Wharton’s Rule, arises where a crime necessarily requires two or more persons, but the legislature has ***imposed punishment only on one.*** Although this situation is not covered by Wharton’s Rule (see *supra*, p. 198), the court may conclude that, since the legislature has not authorized a party’s punishment on the substantive crime, he should not be punished for conspiracy either.

1. *Gebardi* case: The best-known such case is *Gebardi v. U.S.,* 287 U. S. 112 (1932). The Ds, a man and a woman both married but not to each other, were charged with conspiracy to violate the Mann Act, in that they jointly arranged for the man to transport the woman across state lines, for purposes of having sexual intercourse with each other. The Court held first that the Mann Act should not be construed so as to permit punishment of a woman who simply acquiesces in her transportation by others. The legislative intent not to punish her would be thwarted if she could be convicted of conspiracy. Similarly, the court stated, it would not make sense to punish a woman under the age of consent as a co-conspirator with a man to commit statutory rape on herself.

   a. **Man’s conviction reversed:** Since the woman in *Gebardi* could not be convicted of conspiracy, and since there was no evidence that there were any other parties than she and the man, the man’s

conviction was also reversed (apparently on the theory that there cannot be one conspirator). However, it is not clear that, under the modern approach, the man's conviction would necessarily be vitiated by the reversal of the woman's conviction. See *infra*.

2. **Model Penal Code view:** The Model Penal Code accepts part but not all of the *Gebardi* rationale. Under M.P.C. § 5.04(2), one may not be convicted of conspiracy to commit a crime if one could not be convicted of the substantive crime itself, or of being an accomplice to that crime. Thus in the *Gebardi* situation, since the Mann Act is construed so as to prevent conviction of the woman of a Mann Act violation itself, or of aiding and abetting such a violation, she could not be guilty of conspiracy either.

   a. **Man could be convicted under Code:** But the Code would produce a different result from that in *Gebardi* as to the man, because of the Code's "unilateral" approach. That is, the fact that the woman must be acquitted of conspiracy does not mean that man's conviction also must be reversed; the man is guilty of "agreeing" with the woman, regardless of her immunity. This aspect of the Code is discussed further *infra*, in the treatment of inconsistent disposition.

3. **Statutory rape:** All courts agree that where an underage person has sex with an adult, the ***underaged person cannot be charged*** with ***conspiracy to commit statutory rape*** **—**since the whole purpose of the statutory rape provision is to protect underage persons, allowing a conspiracy conviction of the protected person would defeat the purpose of the statute.

D. Spouses and corporations: Two common situations in which it may be argued that there are not two distinct conspirators are: (1) where the only alleged conspirators are a married couple; and (2) where the only alleged conspirators are a corporation and its stockholder, officer, or other agent.

1. **Spouses:** The traditional common-law rule was that a ***husband*** and his ***wife*** could ***not*** by themselves make up a conspiracy. This rule was the product of the common-law theory that a man and his wife were one person in the eyes of the law. (But if a third person was part of the conspiracy, they could all be convicted.) L, pp. 607-08.

a. **Modern view:** But virtually all modern courts have ***rejected*** this common-law rule, and a conspiracy composed solely of husband and wife is punishable. L, p. 608.

2. **Corporations:** It is necessary that at least two members of the conspiracy be ***human beings.*** Thus although a corporation can be punished as a conspirator, there can be no conspiracy when only one ***corporation*** and one human being (e.g., an ***officer*** or stockholder of the corporation) are implicated. L, p. 609.

E. **Inconsistent disposition:** Suppose that the evidence shows that, if there was a conspiracy, it involved only two persons, A and B. If A is not convicted (either because of acquittal, lack of prosecution, immunity, failure of the police to find him, etc.), does the plurality requirement mean that B's conviction may not stand? The answer depends mostly on whether the two alleged co-conspirators are tried in the same, or different, proceedings.

1. **Same trial:** Where A and B are tried in the ***same proceeding,*** and A is acquitted, it is universally agreed that ***B must also be acquitted.*** This result is due principally to the "community sense of a just outcome." L, p. 605.

a. **May not be any other defendants:** Of course, this rule assumes that A and B are the only persons alleged to be part of the conspiracy. If A, B and C are charged, the fact that A is acquitted does not require the acquittal of B and C, even if the prosecution's evidence suggests that A was the ringleader. But conversely, if A and B are both acquitted, C must be acquitted also; the premise is that there must be more than one guilty party.

2. **Different trials:** But now suppose that A and B are tried in ***different trials.*** (This happens frequently, because courts often order that the two trials be ***"severed"*** from each other in order to prevent unfairness to one party or the other. For instance, a particular confession may be admissible against one of the co-conspirators but not the other) In this "different trials" situation, most courts today hold that A's acquittal does ***not*** require B's release.

a. **Rationale:** The fact that different evidence may have been

presented in the two trials, and the fact that the two juries have a different composition, are enough to eliminate the rationale present in the "single trial" situation, that inconsistent results offend the community's sense of justice.

3. **One conspirator not brought to justice:** If one of the two alleged conspirators is not ***brought to justice*** at all, this will ***not*** prevent conviction of the other. However, the prosecution must of course show that both participated in the agreement. L, p. 606-07.

4. **Model Penal Code rejects consistency requirement:** The Model Penal Code, as a result of its "unilateral" approach, would never release a conspirator solely because of an inconsistent verdict in a different trial. Thus if A and B are the only two alleged conspirators, and A is acquitted in one trial, B may nonetheless be convicted in another trial under the Code. See Comment 2(b) to M.P.C. § 5.03. But the Code leaves open the question of whether one conspirator may be acquitted and the other convicted if both are tried in the same proceeding.

VIII. PUNISHMENT

A. Typical penalty schemes: There are a number of statutory schemes for punishing conspiracies. In some states, conspiracy is a misdemeanor, regardless of its objective. In other states, conspiracy is a felony whose maximum sentence remains the same, regardless of the seriousness of the object crime; this can produce the result that the sentence for conspiracy is more severe than that for the completed crime could have been.

1. **Model Penal Code:** The Model Penal Code does not permit the sentence for conspiracy to be greater than the maximum sentence allowed for the object crime. Generally speaking, the Code authorizes penalties equal to those that could be imposed for the most serious object crime intended (except that a conspiracy to commit a first-degree felony is a second-degree felony). M.P.C. § 5.05(1).

B. Cumulative sentencing: Suppose that members of a conspiracy intend to commit only one substantive offense, and they complete this offense. May they be convicted of ***both*** conspiracy to commit that crime and the

crime itself?

1. **Cumulative sentencing usually allowed:** Most states ***allow*** a ***cumulative sentence,*** i.e., conviction for ***both conspiracy and the underlying crime.*** L, § 6.5(h), p. 612.

   Example: D1 and D2 agree to rob a 7/11 at gunpoint the next Friday night. They meet as scheduled, and commit the robbery. They are arrested shortly thereafter. In most states, the two may be charged with the separate crimes of robbery and conspiracy to commit robbery. Each may be convicted of both counts, and given consecutive sentences.

2. **Model Penal Code limits cumulative sentencing:** But the Model Penal Code rejects the assertion that a conspiracy that is limited solely to committing crime X can be more dangerous than the actual commission of crime X. Therefore, provided that all object crimes of the conspiracy are carried out, the court is ***not*** permitted under the Code to convict for both the conspiracy and the underlying crime. M.P.C. § 1.07(1)(b).

   a. **Some objectives not realized:** If, however, the conspiracy has a number of objectives, and only one or some of these are carried out, then even under the M.P.C. there can be a conviction of both the conspiracy and the carried-out crimes. See Comment 2(a) to M.P.C. § 5.03. Thus if it is shown that the defendants conspired to run a gambling and loansharking operation, and only the gambling offenses are proved to have been carried out, separate sentences for conspiracy and gambling may be imposed.

Quiz Yourself on
CONSPIRACY (ENTIRE CHAPTER)

43. Che, an internationally-famous left-wing guerilla from South America, migrates to the U.S. He decides to try to overthrow the government of Miami Beach, Florida. To that end, he approaches Sam Surplus, a dealer in excess Army supplies. He tells Sam, “I’ll be planning a little insurrection over at City Hall sometime soon, and I’ll need some supplies.” Sam is himself a pretty right-wing kind of a guy, but he figures that Che’s bucks are as green as anyone else’s. Therefore, Sam sells Che, at his standard prices, some military

uniforms, knapsacks, and surplus Uzis. (All items are ones that appropriately-licensed government-surplus dealers are legally permitted to sell in the ordinary course of business.) Che uses the supplies to outfit his army, and he successfully — though very temporarily — ousts the elected government of Miami Beach. A federal statute makes it a crime to overthrow a municipal government. Is Sam guilty of conspiracy to overthrow the government?

44. Sitting Bull wants to get revenge on Custer by burning down Custer's barn. Therefore, Sitting Bull tells Crazy Horse that the barn is on Bull's property, and asks Crazy Horse to help him raze it to "clear the land."

(A) For this part only, assume that Crazy Horse believes Bull's bull, and agrees to help Bull light a fire to burn down the property. Before they can light the fire, both are arrested and charged with conspiracy to commit arson. Assume that the crime of arson is defined as intentionally burning the property of another without the owner's consent. Is Crazy Horse guilty of conspiracy to commit arson?

(B) Assume the same facts, except this time, Sitting Bull tells Crazy Horse that he wants to use a particular substance, dextromethorpan, or DXM, as the igniter in the fire. As Crazy Horse knows, it is illegal to possess DXM without a license. Crazy Horse nonetheless agrees to purchase some DXM from a crooked dealer. After he buys the DXM, but before he can light the fire with Bull, they are both arrested and charged with conspiracy to commit arson (defined as in part (A)). Is Crazy Horse guilty of conspiracy to commit arson?

45. Penguin intends to rob the Gotham City Bank. He asks Joker to help him out. Joker agrees to go through with the plan — although secretly Joker intends to inform the police of Penguin's plan. No one else is involved in the planning. Shortly before the scheduled robbery, Joker informs the police of the plan, and Penguin (but not Joker) is charged with conspiracy to commit bank robbery. May Penguin properly be convicted, under the modern/M.P.C. approach?

46. Boris Badenov, Snidely Whiplash, and Natasha Fatale conspire to kill Dudley Doright. They draw elaborate diagrams of the proposed murder, and plan the act to the last detail. To insure that all the parties

remain silent, they execute a blood oath not to reveal their plans. In the end, their plans are never acted upon because Doright gets a job on a daytime soap opera and moves to another state. Are Boris, Snidely and Natasha guilty of conspiracy to commit murder ...

(A) under the common-law approach?

(B) under the Model Penal Code?

47. The Flying Albatrosses are a team of six circus aerialists. Five of the members hate the sixth, Alva. The five therefore decide that one of them should loosen the fastener on Alva's trapeze so that it will break when Alva grabs it. Accordingly, Ariel Albatross, the most mechanically-minded of the five, is given this task, and loosens the fastener. No other member of the team takes any physical action to help the plan. When Alva does the routine, due to his recent weight loss the trapeze does not break, and the routine goes flawlessly. The police learn of the plot, and arrest the five immediately afterwards, before they can try again. Are the four members of the Albatrosses other than Ariel guilty of conspiracy to commit murder? (Assume this all takes place in a jurisdiction that requires an overt act in furtherance of the conspiracy.)

48. Tarzan is planning to rob the Jungle and Vine Bank, and make off with a load of bananas. Jane offers to act as a lookout and driver of the getaway car. Jane knows that Tarzan will be armed, and that he's determined not to get caught no matter what (because he's terrified of being returned to the jungle.) When they get to the bank, Jane waits outside with the motor running. Tarzan goes in and meets Sheena, who (unbeknownst to Jane) has previously agreed to help him out. During the robbery, a bank guard, trying to stop the robbery and arrest the suspects, tackles Tarzan. Sheena, who knows how Tarzan feels about getting caught, takes Tarzan's gun and shoots the guard to death, so they can all escape. Alas, all three are apprehended outside the bank. Is *Jane* guilty of murder in the guard's death?

49. Blacque Jacques Shellacque, a criminal sort, makes $1 million in counterfeit money, and by pre-arrangement sells it all to Boodles at a steep discount. Boodles sells $50,000 of that money to Ken Gelt, who sells it all to Minnie Moolah. (Boodles sells the other $950,000 to a

variety of buyers.) Minnie does not know anything about any of the activities further upstream; she only knows that Gelt is a source of counterfeit currency. Minnie passes her $50,000 off as real money to stores and banks. A statute makes it a Class A felony to distribute, or conspire to distribute, in excess of $100,000 in counterfeit currency. Distribution or conspiracy to distribute less than $100,000 is a Class B felony. What is the highest felony of which Minnie can be convicted?

50. Winken, Blinken and Nod agree to work together to kill the Calico Cat. A few days later, about a week before the killing is to take place, Winken gets cold feet — he quits the conspiracy, telling the others he wants nothing further to do with the plan and asking them to abandon it. Blinken and Nod carry out the murder of Calico Cat anyway. Is Winken guilty of:

(A) conspiracy to commit murder?

(B) murder?

51. Bob is married to Carol. Alice is married to Ted. Bob and Alice have been attracted to each other for several years, but have not done anything about it. Finally, one day, Bob telephones Alice and asks her to meet him at the Ames Acres Motel, where they will conduct an assignation. Alice agrees. Unbeknownst to them, Carol is listening on an extension. She arranges to have the police meet her at the Motel at the appointed time. The police arrest Bob and Alice in their room, while they are in a state of partial undress but have not yet committed adultery. In the state of which Ames is a part, adultery is a substantive crime. The prosecutor charges Bob and Alice with conspiracy to commit adultery.

(A) If you are defending Bob or Alice, (i) what defense should you assert? and (ii) will it be successful?

(B) Same basic fact pattern as Part (A). Now, however, assume that the way Bob and Alice come to be together in the motel room is that Bob's friend Peter says to both Bob and Alice, "You know, you'd make a great couple, you should really try to get something going together." In a jurisdiction which would recognize the defense you

asserted in your answer to Part (A), may Peter, Bob and Alice all be charged with and convicted of conspiracy to commit adultery?

(C) Suppose that the jurisdiction follows the Model Penal Code approach to relevant issues. Assume that the facts of Part (A) (not Part (B)) apply. Will the defense you asserted in response to Part (A) succeed?

52. Abbot and Costello are charged with conspiracy to defraud retirees in a scheme to sell retirement homes in the Florida Everglades. Abbot is acquitted at trial, but Costello is found guilty.

(A) Assume for this part that Abbot and Costello are tried in a single, joint trial. On Costello's appeal on the grounds that the inconsistent verdicts should entitle him to acquittal, will the appellate court find for Costello?

(B) Assume for this part that Abbot and Costello are tried in separate trials. In Costello's appeal on the grounds of the inconsistent verdicts, will the appellate court find for Costello under: (i) the prevailing approach; and (ii) the Model Penal Code approach?

Answers

43. Probably not. To be guilty of conspiracy, the defendant must be shown to have *intended* to further a criminal objective — it's generally not enough that the defendant merely *knew* that his acts would or might enable others to pursue criminal ends. This rule applies to suppliers: the fact that the supplier knows or strongly suspects that the merchandise may be used for particular illegal purposes is generally not sufficient to make the supplier guilty of conspiracy. There are certain other factors that might change this result as to a particular supplier (e.g., that the supplier has agreed to be paid out of proceeds of the upcoming crime, or is charging much higher prices than are commonly charged in the absence of a criminal purpose, or is selling contraband), but none of these special factors applies here. Therefore, especially when one considers that Sam doesn't support left-wing politics, it's unlikely that a court would find

Sam to have had the requisite intent to help commit the overthrow.

44. (A) No. A party cannot be guilty of conspiracy to commit crime X unless he has the mental state required for crime X. Conspiracy to commit arson therefore requires the defendant to have the intent to burn the property of another without the other's consent. Here, Crazy Horse believed that the property belonged to Bull and was being burned with Bull's consent. Therefore, Crazy did not have an intent to burn the property without the owner's consent. (Note, by the way, that it wouldn't even matter if Crazy's belief about who owned the property was unreasonable — as long as the trier of fact believed that Crazy honestly, though stupidly, thought the property belonged to Bull, Crazy didn't have the requisite mental state for the completed crime and therefore can't be guilty of conspiracy.)

(B) No. The analysis is the same as for part (A): since Crazy's belief that Bull owns the farm prevents Crazy from having the mental state required for arson, he can't be guilty of conspiracy to commit arson. The fact that Crazy has agreed to commit some other crime (illegal possession of DXM) in preparation for their joint effort is irrelevant — Crazy may be convicted of illegal DXM possession, and even conspiracy to illegally possess DXM, but he can't be convicted of conspiracy to commit arson.

45. Yes. Under the traditional view, the definition of conspiracy required that there actually be an agreement between two or more people; under that approach, Penguin couldn't be convicted, because there was no one else who was in actual agreement with Penguin. But the modern and M.P.C. approach applies a ***"unilateral"*** standard: an individual is guilty of conspiracy if he makes an agreement with another person, even if the other person is merely feigning agreement. So under the modern/M.P.C. approach, it's enough that Penguin thought he had (and attempted to have) an agreement with someone else, and the fact that the someone else was secretly not agreeing at all doesn't make any difference.

46. (A) Yes. At common law, a conspiracy is complete once the agreement is made — no further act is required. (It's true that about half the states have *statutes* requiring, in some instances, that some

overt act in furtherance of the conspiracy must occur. But the question asks you about the common-law approach.)

(B) Yes. The M.P.C. does contain an overt-act requirement, but it applies only where the object crime is a relatively unserious one. If the object crime is a first- or second-degree felony (and murder certainly falls within that group), no overt act is required under the M.P.C. See Comment 5 to M.P.C. § 5.03(5).

47. Yes. In those states that require an overt act, an overt act committed by one member, in furtherance of the conspiracy that all have joined, will be attributable to all. So Ariel's act of loosening the trapeze (which is obviously an act in furtherance of the conspiracy) serves as the overt act for all, not just for Ariel.

48. Yes. Virtually all courts would agree with this result, but they might differ in how to get there. Some courts follow the approach of the Supreme Court in the *Pinkerton* case: under that approach, a member of a conspiracy is liable for *any substantive crimes* committed by his colleagues, as long as those crimes are committed in furtherance of the conspiracy's aims. Since Sheena was attempting to further one of the conspiracy's goals (escaping from the bank after the robbery) when she fired the fatal shot, under *Pinkerton* Jane as a co-conspirator will be guilty of the substantive crime of murder, even though she didn't have any interaction with Sheena or even know of her existence. (As long as all acts are properly viewed as being part of a single conspiracy, as they clearly would be here, the fact that one particular conspirator didn't know of or interact with another particular one won't make any difference.) Many other courts (and the Model Penal Code) reject the *Pinkerton* view that mere membership in a conspiracy, without more, makes each conspirator automatically liable for any substantive crime committed by any member in furtherance of the conspiracy's objectives. Instead, these courts say that liability for the substantive crimes must depend on the law of *accomplice liability* (aiding and abetting): if, and only if, a particular conspirator can be said to have aided and abetted — i.e., encouraged or facilitated — the substantive crime carried out by another can the former be convicted of that substantive crime. However, even under that rule Jane would almost certainly be on the hook. She has helped

bring about the entire conspiracy (it probably wouldn't have happened without a lookout/getaway-driver) and she has at least tacitly encouraged Tarzan's carrying of a gun to the scene and his willingness to use it. A court would therefore almost certainly say that Jane "aided and abetted" Sheena's act, even though she didn't know Sheena and had no direct interaction with her. Once the court decided that Jane aided and abetted the shooting, then ordinary principles of accomplice liability (discussed in the next chapter) make her liable for the substantive crimes carried out by her principal(s) in furtherance of the aided crime.

49. Class B, probably. The question is really whether Minnie will be deemed to have participated in the original $1 million conspiracy between Shellacque and Boodles. Here, this is an unlikely outcome: since Minnie never knew any of the details of the upstream transactions (indeed, never even knew that any upstream transactions occurred), she's unlikely to be found to be part of the overall conspiracy in which Shellacque and Gelt participated. Therefore, although Shellacque and Gelt might be found to have conspired with Minnie (since she furthered their plan of disseminating the counterfeits until they entered the stream of ordinary business), she won't be found to have conspired with them. (Under the modern/M.P.C. approach, upstream members can be part of a conspiracy extending far downstream even if the downstream members are not deemed part of that same conspiracy back to the top. In other words, there can be a "unilateral" approach to determining who the members of a given conspiracy are.)

50. (A) Yes. The traditional rule is that once a conspiratorial agreement occurred, no subsequent act of withdrawal or repudiation by a conspirator could prevent that conspirator from being guilty of conspiracy. The modern / M.P.C. approach recognizes a limited defense of "renunciation of criminal purpose," but even that defense requires that the renunciating conspirator voluntarily ***thwart*** the conspiracy — mere withdrawal is not enough. So since Winken did not prevent the conspiracy's aims from being fulfilled, he'll be guilty even under this more liberal modern view.

(B) No. Most courts hold that if a conspirator withdraws, the

withdrawal alone is enough to prevent the withdrawer from being guilty of any substantive crimes committed by the others in furtherance of the conspiracy. That's true even if the withdrawer doesn't try to thwart the conspiracy — however, the with-drawer must bring home to the remaining members that he is in fact withdrawing. So here, once Winken let the other two know he was no longer part of the team, any substantive crime they later committed may not be attributed to him.

51. (A) (i) Wharton's Rule; (ii) yes, probably. Wharton's Rule provides that where a substantive offense is defined so as to necessarily require more than one person, a prosecution for the substantive offense must be brought, rather than a conspiracy prosecution. The Rule is commonly applied to adultery, and thus provides that where a man and woman would be guilty of adultery if they had intercourse, they may not be prosecuted for conspiracy to commit adultery (whether they have sex or merely prepare to have it). Many states would apply Wharton's Rule as a substantive rule on these facts; therefore, regardless of whether the legislature intended to allow a prosecution for conspiracy-to-commit-adultery, in these states the prosecution would not be allowed. In other states, on these facts Wharton's Rule would be treated as a rebuttable *presumption* as to legislative intent; in that situation, the prosecution could try to rebut the presumption by showing (perhaps by legislative history) that the legislature in fact intended to allow conspiracy-to-commit-adultery prosecutions. However, it's unlikely that the prosecution could make that rebuttal showing in an adultery case, because the legislature is unlikely to have even thought about the issue. So all in all, in a state accepting any form of Wharton's Rule the prosecution would probably not be allowed to proceed.

(B) **Yes.** One well-established exception to Wharton's Rule is that there is no bar to a conspiracy conviction when there are *more participants* than are logically necessary to complete the crime. Here, we have three participants, not merely the two who were logically necessary to commit the crime. Therefore, all three may be convicted even in a jurisdiction that recognizes Wharton's Rule.

(C) **No.** The Model Penal Code basically rejects Wharton's Rule.

See Comment 3 to §5.04(2). The M.P.C. does bar "cumulative" punishment, so that if Bob and Alice had consummated their liaison, neither could have been punished for ***both*** adultery and conspiracy to commit adultery. But the M.P.C. does not prevent a conspiracy conviction merely on the grounds that both parties would be necessary to the substantive crime, had that crime been committed.

52. (A) Yes. Where two conspirators are tried together in a single trial, and they are the only ones accused of conspiring, all courts agree that if one is acquitted the other must be. (Note, however, that if the conspiracy involves at least three parties and one is acquitted, the others can still be convicted, even if this occurs in the same trial as the acquittal.)

(B) (i) Probably not; and (ii) No. Where the conspirators are tried in separate trials, the community's sense of injustice at inconsistent verdicts is not nearly as great as where the inconsistency occurs in a single trial. Therefore, most courts will not overturn the guilty verdict. M.P.C. § 5.03 agrees that inconsistent verdicts in separate trials do not necessitate overturning the guilty verdict.

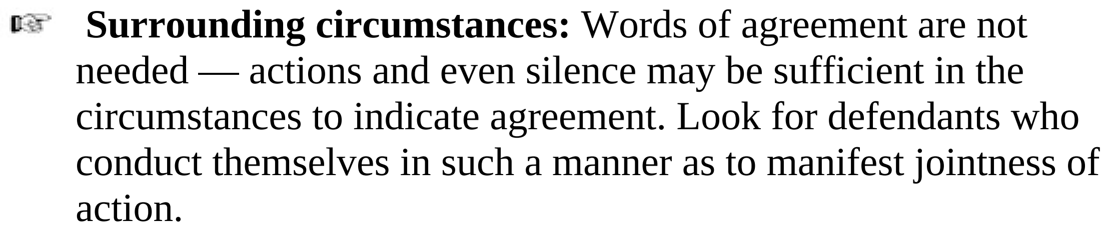
Exam Tips *on*
CONSPIRACY

This topic is heavily tested. Some key aspects to keep in mind: **Agreement and Intent.**

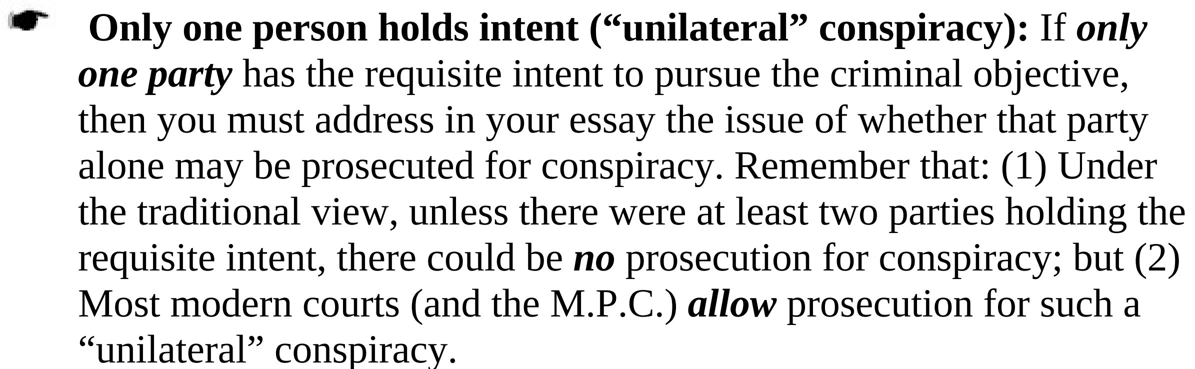
☛ **Agreement required:** Remember that the co-conspirators must somehow ***agree*** to pursue a joint objective.

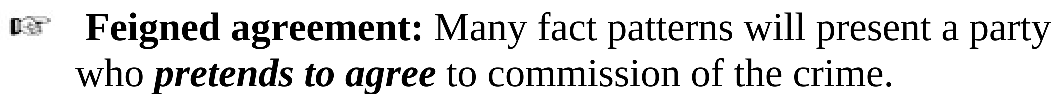
- ☞ **Agreement without active participation:** But a party may make the necessary agreement without doing so explicitly, and without formally committing to do any specific thing. It's usually enough if the party somehow (by word, by silence, by deed, or whatever) ***encourages*** the project to move forward. ***"Aiding and abetting,"*** for instance, is usually enough.

Example: Z operates a store across the street from, and competitive to, Y’s store. Because of Z’s unfair business practices, Y worries that Z may force him out of business. Y tells X in a half-jesting manner that if X were a real friend he would “take care” of Z. As a result of Y’s remark, X plans for another party to break into Z’s store and destroy Z’s merchandise. When X tells Y of his plan, Y says, “Sounds great, but don’t ask me to do anything to help.” X replies, “All you have to do is sit back and let it happen.” Because Y made it clear to X that he and X shared a common goal, his actions indicate an agreement and he is guilty of conspiracy to vandalize the store.


☞ **Surrounding circumstances:** Words of agreement are not needed — actions and even silence may be sufficient in the circumstances to indicate agreement. Look for defendants who conduct themselves in such a manner as to manifest jointness of action.

Example: X and Y are suspected of having committed a series of recent robberies. P, an undercover police agent, invites X and Y to her home for drinks and mentions to them that she is impressed with the perpetrators of the recent robberies in the neighborhood. X then suggests that a neighborhood drugstore would be an easy target for a robbery. Y says nothing. P decides to pretend to join in the robbery, in order to obtain evidence of X’s and Y’s past crimes. All three immediately drive to the store. X is about to enter the store to rob it (with Y waiting in the car) when P arrests both X and Y. Y can be found to have agreed on the robbery plan with X — although Y never verbally agreed to participate in the robbery, his silence plus his driving to the site and waiting is enough to show that he agreed with X to pursue the robbery plan. Therefore Y (as well as X) can be found guilty of conspiracy to rob.


☛ **Only one person holds intent (“unilateral” conspiracy):** If ***only one party*** has the requisite intent to pursue the criminal objective, then you must address in your essay the issue of whether that party alone may be prosecuted for conspiracy. Remember that: (1) Under the traditional view, unless there were at least two parties holding the requisite intent, there could be ***no*** prosecution for conspiracy; but (2) Most modern courts (and the M.P.C.) ***allow*** prosecution for such a “unilateral” conspiracy.

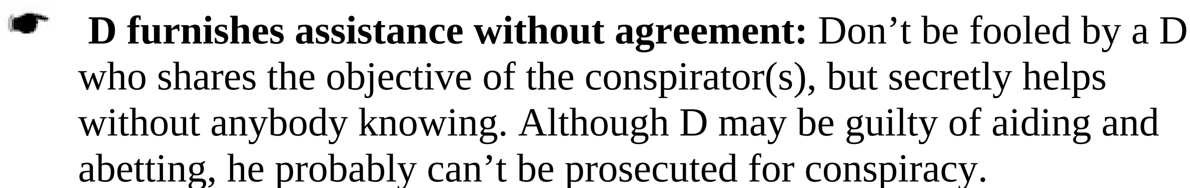

☞ **Feigned agreement:** Many fact patterns will present a party who ***pretends to agree*** to commission of the crime.

Example (undercover agent): U, an undercover agent, pretends to agree with D, a professional thief, that the two will rob a drugstore. D really intends to cooperate with U in the crime. They drive together to the crime scene, at which point D is arrested before either enter the store. Under the modern view, D is guilty of conspiracy — he had the requisite mental state (agreement to commit a

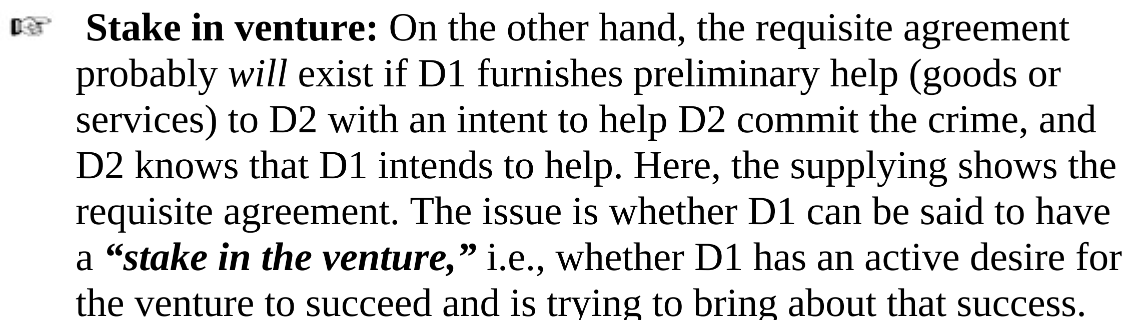
crime with a third person's help), and the fact that U's apparent agreement was fake doesn't change this result.

☞ **Other "conspirator" is member of protected class:** Remember that if one of the two alleged conspirators is a member of a ***class*** whom the underlying statute is designed to ***protect,*** that person can't be guilty of conspiracy. Therefore, at common law ***the other person can't be guilty either,*** because there would be only one conspirator.

Example: Boy, who is 19, and Girl, who is 15, have consensual sex. The age of consent in the jurisdiction is 16. Boy is charged with conspiracy to commit statutory rape. Since Girl can't be convicted of conspiracy (she's a member of the class whom the statutory-rape provision is designed to protect), under the common-law approach Boy can't be convicted either (since there can't be a single conspirator).


☛ **D furnishes assistance without agreement:** Don't be fooled by a D who shares the objective of the conspirator(s), but secretly helps without anybody knowing. Although D may be guilty of aiding and abetting, he probably can't be prosecuted for conspiracy.

Example: X and Y, summer campers, decide to kill V, a camp counselor who has punished them. To accomplish their plan, they agree to steal V's asthma medicine. Z, another camper, overhears their conversation and decides to help them without letting them know. He goes to V's room, searches for the medicine, and puts it on V's night table so that X and Y will find it. Several minutes later, X and Y find the medicine on the night table and throw it away. Because he is unable to find the medicine later, V dies. Z would not be liable for conspiracy, because he never made an actual agreement with any other conspirator. (But Z *could* be found guilty of murder as an accomplice.)


☞ **Stake in venture:** On the other hand, the requisite agreement probably *will* exist if D1 furnishes preliminary help (goods or services) to D2 with an intent to help D2 commit the crime, and D2 knows that D1 intends to help. Here, the supplying shows the requisite agreement. The issue is whether D1 can be said to have a ***"stake in the venture,"*** i.e., whether D1 has an active desire for the venture to succeed and is trying to bring about that success.

Example: X asks Y to join him in robbing a bank. When Y refuses, X says that he will rob the bank himself if Y will provide a hiding place for him to use after the robbery. Y agrees, if X will pay him $200 from the robbery proceeds. Since Y has a stake in the criminal enterprise, his advance agreement to furnish services may constitute a conspiracy. (The same would be true if Y agreed, in return for similar profit-sharing, just to drive X to the crime scene, or just to act as lookout, or just to

drive the getaway car).

Overt act

- ☛ **States split:** Remember that states are split about whether the conspiracy can be complete even though no conspirator has committed an overt act in furtherance of the conspiracy. So on any fact pattern where there doesn't seem to be an overt act, mention that states may or may not recognize a conspiracy as already existing.
  - ☞ **Act of one attributable to all:** Also, remember that even in states requiring an overt act, the overt act of *any* individual conspirator will be deemed an act by *all* conspirators.

Vicarious liability for substantive crimes by other conspirators

- ☛ In almost any fact pattern involving a conspiracy, you'll have to deal with whether each conspirator is guilty of the substantive crimes carried out by other conspirators. This is especially likely where D1 doesn't expect that D2 will carry out some particular crime as part of the conspiracy, but D2 does so anyway, in order to help the conspiracy succeed.

- ☛ Remember that in this situation, courts are ***split*** between two positions, with the second being the modern, and probably majority, view:
  - □ **View 1 (traditional):** Under this traditional *"Pinkerton"* view, the *mere fact* that D is part of a conspiracy ***automatically*** makes him ***liable for any substantive crime committed by other conspirators in furtherance of the conspiracy,*** at least if the crime was a foreseeable outcome of the conspiracy.
  - □ **View 2 (modern):** Under the modern / M.P.C. view, D1 is only liable for substantive crimes by a co-conspirator (call him D2) if D1 meets the standards for ***aiding-and-abetting*** that crime (i.e., D1 was an "accomplice" to that substantive crime). Usually, if a substantive crime was in furtherance of the conspiracy, D1 will be found to have aided-and-abetted (encouraged or helped) the substantive crime, but this won't always be true.
  - ☞ **Physically absent:** Especially be on the lookout for situations

where one of the co-conspirators is ***not physically present*** when his fellow co-conspirator perpetrates the crime — this is the situation most likely to present the automatic-liability-for-substan-tive-crimes problem. So look for co-conspirators who ***get cold feet,*** and also those that are absent for other reasons, such as they're in prison or they're asleep.

> *Example:* D1 and D2 agree to commit a burglary by entering V's house to steal her diamonds. They break in, but D1 rapidly gets discouraged when they can't find the diamonds, and leaves. Shortly thereafter, D2 finds the diamonds, and is putting them in his pocket when he is confronted by V. D2, in an attempt to escape with the diamonds, pushes V down stairs, seriously injuring her. (Assume that D2's conduct constitutes battery.) In a "traditional" state, D1 will be liable for the battery committed by D2, since the battery was in furtherance of the objectives of the conspiracy (getting the diamonds), and the traditional rule is that a conspirator is automatically guilty of any substantive crime foreseeably committed by another conspirator in furtherance of the conspiracy's aims. But in a modern / M.P.C. state, D1 will not be liable for battery unless he's found to have "aided and abetted" the battery, which he probably didn't.

Abandonment

- ☛ When a party ***withdraws*** his participation before the substantive crime is completed, keep in mind these rules:
  - ☞ **Liability for substantive crimes:** To avoid guilt for the ***substantive crimes*** committed by the co-conspirators (in a state where being part of the conspiracy is automatically enough to make one guilty of the crimes committed in furtherance of it) it's ***not necessary*** that the withdrawing D try to ***thwart*** the success of the conspiracy. All D has to do is to ***give notice*** of withdrawal (prior to the substantive crime) to each of the co-conspirators, or, alternatively, notify the police that the conspiracy is going on.
  - ☞ **Liability for conspiracy itself:** But the withdrawal does ***not*** avoid guilt for the ***conspiracy itself,*** according to the traditional view (since as soon as the agreement is made, the crime of conspiracy is complete).
    - ☞ **M.P.C. gives renunciation defense:** But the M.P.C. *does* recognize a defense of ***renunciation*** in this case, if the conspiracy was ***thwarted*** *and* the renunciation was ***voluntary.***

Wharton's rule, and Members of Protected Classes

☛ **Wharton's rule summarized:** Keep Wharton's Rule in mind at all times: When a substantive offense is defined so as to require two or persons, the Rule says that there can't be conspiracy to commit that crime unless at least one extra person (i.e., one more than the logically required minimum for the substantive crime) is involved. Watch for this especially on fact patterns involving ***bribery.*** (But remember that many jurisdictions, and the M.P.C., ***reject*** the Rule, or treat it as merely a rebuttable presumption).

Example: A statute provides: "Any person who shall give or accept a fee not authorized by law as consideration for the act of any public employee is guilty of bribery," a felony. Contractor needs a building permit that normally takes 30 days to issue. Clerk, a clerk in the buildings department, offers to create a false entry in the department's records indicating that the required permit was already issued, if Contractor will pay Clerk $500. They agree to meet the next morning to consummate the transaction. When Contractor arrives with the money, he finds that Clerk has been fired. In a jurisdiction following Wharton's Rule (and treating it as a substantive rule rather than just a presumption about what the legislature intended), neither Contractor nor Clerk can be convicted of conspiracy to bribe, because bribery requires two parties and here, only the minimum two parties were involved.

☛ **Member of protected class:** Where the purpose of a statute is to ***protect members of a particular class,*** remember that a member of that class normally can't be convicted of conspiracy to violate that statute. Most-ofted tested: ***statutory rape*** — the underaged person can't be convicted of conspiracy to commit statutory rape.

Example: D is a 15-year-old girl. She asks her boyfriend, X, who is 23, to meet her at a secluded location, and tells him she'll have sex with him there. They meet, and are about to have sex when they are arrested. The age of consent in the jurisdiction is 16, and common-law rules of conspiracy apply. D can't be convicted of conspiracy to commit statutory rape, because the purpose of the statutory rape provision is to protect members of the class (underaged persons) to which D belongs. (Also, in a common-law jurisdiction, X can't be convicted of conspiracy either, since at common law there can't be single conspirator.)

Conspiracy vs. the Substantive Crime

☛ Distinguish a prosecution for conspiracy from a prosecution for the substantive crime.

- ☞ **Success not needed:** Don't be fooled by a fact pattern where the conspirators ***never actually accomplish*** what they conspired to

do — this ***doesn't matter,*** because a conspiracy is committed ***as soon as the agreement is made*** (except in jurisdictions requiring an overt act).

☞ **No merger:** Remember that a defendant can be convicted of *both* conspiracy *and* the substantive crime the conspirators agreed to commit — these ***don't merge*** together. Even the crime of *attempt* does not merge with conspiracy. So make sure to analyze each possible charge separately.

CHAPTER 8
ACCOMPLICE LIABILITY AND SOLICITATION

Introductory note: This chapter examines two ways in which one person can become criminally liable for exhorting another to commit a criminal act. If one encourages or aids another to perform a criminal act, and the latter does so, the former will be liable for the latter's substantive crime; he is said to be, in modern terms, an ***"accomplice."*** If, on the other hand, one encourages another to do a criminal act, and the latter declines, the former is guilty of the crime of ***"solicitation."*** We also consider the circumstances under which a ***corporation*** may be convicted of a crime based on acts by the corporation's employees.

I. PARTIES TO CRIME

A. Various parties: The common law developed a fairly complex scheme for labeling parties according to their relationship to a criminal act. The labels were "principal in the first degree," "principal in the second degree," "accessory before the fact" and "accessory after the fact." Although the first three of these categories are no longer of great significance, it is worthwhile to understand how they have been used, so that one may comprehend older cases.

1. **"Principal in first degree":** The person who personally performed the *actus reus* of the completed substantive crime was called, in the common-law scheme, a ***"principal in the first degree."*** Thus if A and B plan to shoot C to death, and A is the one who actually pulls the trigger, A is the principal in the first degree. Every completed substantive crime must have at least one first-degree principal. It is possible for a crime to have more than one, if two or more people each commit an act forming a part of the *actus reus* (e.g., A shoots C in the leg for the purpose of immobilizing him, so that B can then shoot to kill).

2. **Principal in second degree:** A ***principal in the second degree*** is one who is present at the crime's commission, and aids and abets its commission, but does not personally perform any acts that constitute the *actus reus.* Thus if A and B decide to murder C, and B is present when A does the shooting, B is a second-degree principal.

   a. **Constructive presence:** Although the second-degree principal must be "present" at the commission of the crime, this requirement may be satisfied by what is sometimes called ***"constructive"***

presence. For instance, if B, acting as ***look-out,*** stays outside the building within which A is murdering C, B is probably "constructively present" at the crime, and is therefore a second-degree principal. See L, p. 616.

3. **Accessory before the fact:** An ***accessory before the fact,*** like a principal in the second degree, aids and abets the crime rather than committing the *actus reus* himself. He differs from the second-degree principal, however, in that he is ***not present*** when the crime is carried out. The accessory before the fact may either be the "brains" who organizes the whole operation, or merely one who furnishes slight assistance. L, pp. 616-17.

4. **Accessory after the fact:** An ***accessory after the fact*** is one who does not participate in the crime itself, but who furnishes post-crime assistance to the perpetrator, in order to prevent him from being arrested. See the fuller discussion *infra,* p. 230.

B. Procedural effects of classification: The common law attached great significance to the category within which a particular defendant fell. The classification was of greatest significance in the following respects: (1) an accessory could not be tried before his principal, and could not be acquitted if the principal was convicted; and (2) if the indictment charged the defendant with being an accessory, he could not be convicted of being a principal (and vice versa). See L, pp. 618.

1. **Categories merged or abolished:** Virtually all states have ***abolished*** the distinction between a second-degree principal and an accessory before the fact. Thus if one has aided and abetted the commission of a crime, one's punishment is not dependent on presence or absence at the crime scene. The person who assists the crime, but does not commit the *actus reus,* is generally referred to today as an ***"accomplice,"*** and the person committing the *actus reus* is called the ***"principal."*** The two are said to have a relationship of ***"complicity. "***

2. **Some consequences remain:** There remain some respects in which one who has not committed the *actus reus* is treated differently from one who has. For instance, it is still generally true that an accomplice may not be convicted unless it is proved that his principal is guilty of the substantive crime in question; see *infra*, p. 224. Similarly, an

indictment charging the defendant with being an accomplice and acting only prior to the crime may not be sufficient to support a conviction if evidence at trial shows that the defendant in fact carried out the *actus reus.* By and large, however, the only distinction that has to be made is between responsibility for one's own acts and responsibility for the acts of others. It is with this latter sort of responsibility that this chapter is concerned.

II. ACCOMPLICES — THE ACT REQUIREMENT

A. Aiding and abetting: The fundamental principle of accomplice liability is that one who ***aids, abets, encourages*** or ***assists*** another to perform a crime, will himself be ***liable for that crime.***

1. Words may be enough: ***Words***, by themselves, may be enough to constitute the requisite link between accomplice and principal. The test is whether the words constituted encouragement and approval of the crime, and thereby assisted it.

a. Fight scenario: One scenario in which "words alone" may well be sufficient for accomplice liability is the group ***fight*** scenario. If *A* encourages *B* to commit acts constituting, say, battery or murder, and *B* commits those acts, that's enough to make *A* an accomplice, and thus to make *A* substantively liable for B's completed crime of battery or murder.

Example: Joe and Jerry are members of the Jets gang, and Steve and Sue are members of the rival Sharks gang. One day, all four happen to gather on the town square without any pre-arrangement. Steve shouts an insult at Jerry. Jerry shouts back, but does not take any other immediate action. Joe whispers in Jerry's ear, "Kill that [expletive deleted]!" Jerry pulls out a knife he happens to be carrying, and stabs Steve to death. (Assume that Jerry's conduct constitutes murder rather than voluntary manslaughter.) Joe takes no other action, nor makes any other comment, during the entire episode.

Joe is an accomplice to the killing by Jerry, and is therefore guilty of murder. This is so because Joe rendered assistance or encouragement to Jerry (he "aided and abetted" him) in Jerry's commission of the murder. The fact that Joe's involvement consisted of "words alone" doesn't lessen his accomplice liability.

2. Mere presence not sufficient: On the other hand, ***mere presence*** at the scene of the crime is ***not,*** by itself, enough to render one an accomplice. It must also be shown that the defendant was at the crime scene for the ***purpose of approving and encouraging*** commission of

the offense.

Example: On the facts of the above Joe-and-Jerry example, suppose that Joe did not whisper anything in Jerry's ear, or otherwise encourage Jerry to kill or attack Steve. Joe will not have accomplice liability for the stabbing — neither Joe's mere presence at the killing scene, nor his friendship with Joe, nor any enmity he might have had towards Steve, would create accomplice liability for Joe.

a. **Presence as evidence:** Although the defendant's presence at the crime scene will not by itself be enough to make him an accomplice, that presence can of course constitute ***evidence*** that the defendant intended to give aid, encouragement, etc. Furthermore, D's presence can be ***combined*** with other evidence of his involvement, to show the requisite intent to give aid.

i. **Presence as "look-out':** For instance, if other evidence suggests that D's presence at the crime was for the purpose of serving as ***"look-out,"*** this would certainly be enough to allow him to be convicted as an accomplice.

3. **Failure to intervene:** Normally, the mere fact that the defendant ***failed to intervene*** to prevent the crime will ***not*** make him an accomplice, even if the intervention could have been accomplished easily. Nor will the fact that he failed even to speak out against the crime usually be sufficient. (Failure to intervene or speak out is, however, conduct which may be ***evidence*** of other assistance given by the defendant, such as encouragement before the crime.)

Example: Once more on the facts of the above Joe-and-Jerry gang-fight example on p. 214. Now, let's suppose that Joe remained silent throughout the encounter, including after Jerry pulled the knife. Assume further that Joe (1) knew that Jerry would likely stab Steve; (2) desired that Jerry stab Steve; and (3) failed to hold Jerry back or dissuade him from attacking Steve, even though Joe knew that he could safely and effectively do that. Nothing in these facts would give Joe accomplice liability for Jerry's act of killing. Active encouragement or assistance, not mere failure-to-intervene (even if accompanied by the requisite mental state for the underlying crime) is required for accomplice liability.

a. **Duty to intervene:** There are some situations, however, in which the defendant has an ***affirmative legal duty to intervene.*** If he fails to do so, this *will* be enough to make him an accomplice. For instance, if a father were to physically abuse his child, and the child's mother failed to intervene or speak out, she would probably be held to be an accomplice to the father's crime of battery, on the

grounds that she had a legal duty to protect her child.

i. **Duties rarely found:** However, recall that there are relatively few situations in which a duty to take affirmative action will be imposed *(supra,* pp. 20-21).

B. Aid not crucial: It will sometimes be the case that the defendant gives assistance in furtherance of a crime, but that the assistance turns out ***not to have been necessary.*** In this situation, is the defendant saved from being an accessory?

1. **Not a defense:** The general answer seems to be "no." That is, as long as the defendant intended to aid the crime, and made its commission easier or more probable in any way, he is an accomplice. The classic illustration of this principle is the case set forth in the following example.

Example: X has seduced the sister-in-law of D (a judge). Her brothers, A and B, pursue X to the nearby town of Stevenson, in order to kill him. One of X's relatives sends X a telegram warning him of the danger. D, learning of this, sends his own telegram to the Stevenson telegraph operator (whom he knows) telling him not to deliver the warning telegram. The warning telegram is not delivered, A and B catch up with X, and kill him. D is charged with being an accomplice in the killing.

Held, it is irrelevant that A and B might have caught up with X and killed him even if the warning telegram had been delivered. "It is quite sufficient if [D's act] facilitated a result that would have transpired without it. It is quite enough if the aid merely renders it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it." *State ex rel. Attorney General v. Tally,* 15 So. 722 (Ala. 1894).

2. **Attempted aid:** Suppose that the defendant's acts are not only not necessary to the resulting crime, but ***do not influence it at all.*** In this situation, which might be termed that of ***"attempted assistance",*** most courts would probably ***not*** treat the defendant as an accomplice to the completed crime. This situation could be compared with that in which the defendant secretly intends to give assistance to another's criminal plans if it turns out to be necessary, but it does not so turn out. See L, p. 624.

   a. **Model Penal Code view:** But the Model Penal Code would make the defendant an accomplice in this "attempted assistance" situation. M.P.C. § 2.06(3)(a)(ii) makes a person liable as an accomplice if, with the purpose of "promoting or facilitating the

commission of the offense," he "...attempts to aid such other person in planning or committing it." Thus if, in the *Tally* case, *supra*, the telegraph operator had delivered the warning message anyway, but A and B had nonetheless been able to kill X, D would have been liable as an accomplice to murder under the Code.

3. **Attempts to aid where no crime occurs:** If the assistance attempted to be given by the defendant is unsuccessful, not in the sense that it fails to assist a crime which occurs anyway, but rather, in the sense that the crime sought to be furthered ***never takes place,*** it is not clear whether the defendant is criminally liable, and if so, for what.

   a. **Crime attempted by principal:** If the principal ***attempts*** the crime, but fails, it seems reasonable to hold the defendant guilty of ***aiding and abetting the attempt.*** He would thus be an accomplice to attempt, and would be punishable the same way as if he had made the attempt himself.

   b. **Crime not attempted by principal:** If, on the other hand, the principal does not even attempt the crime, it is not possible to hold the defendant guilty of any crime on accomplice theory, since accomplice liability must be founded upon a crime by the person sought to be aided. (See *infra*, p. 224, regarding the requirement that the principal be guilty.) In many jurisdictions, the defendant would, however, be guilty of the crime of "solicitation" (see *infra*, p. 231).

      i. **Attempt liability:** Additionally, under the Model Penal Code, the defendant might be liable for ***attempting*** to commit the crime. Thus Comment 7 to M.P.C. § 5.01(3) states that if the judge in *Tally* had sent his telegram, but X was nonetheless able to escape before A and B could try to kill him, the judge would be guilty of attempted murder.

C. **"Crime for hire" scenario:** Accomplice liability will often figure in ***"crime for hire"*** scenarios. Thus where D1 conceives of a crime, and ***hires an intermediary,*** D2, to carry out the crime, D1 is an "accomplice" even though she is the moving force and originator of the crime. If the crime is carried out by D2, D1 will be substantively liable for the crime just as D2 will be.

Example: Wife desires to have her husband, Hubby, die so that Wife can collect his life insurance. Wife advertises on the Internet for a hired killer. Ken answers the ad. Wife agrees to pay Ken $10,000 if Hubby is killed. Ken shoots Hubby to death. Wife is an "accomplice" to the murder. By virtue of that accomplice status, Wife is guilty of murder.

D. Conspiracy as meeting the act requirement: Courts sometimes hold that if the defendant is found to have been in a ***conspiracy*** with another, he is automatically liable for any crimes committed by that other in furtherance of the conspiracy. See, e.g., the discussion of *Pinkerton v. U.S., supra,* p. 191.

1. Insufficient under modern view: However, the modern view seems to be that the act of joining a conspiracy is ***not, by itself, enough*** to make one an accomplice to all crimes carried out by any conspirator in furtherance of the conspiracy; see *supra,* p. 192. But such membership will, of course, frequently have extremely great evidentiary value in showing that the defendant granted the relevant assistance, encouragement, etc. to the commission of the substantive crimes by other conspirators.

III. ACCOMPLICES — MENTAL STATE

A. General confusion: There is great confusion about what ***mental state*** is required for one to be an accomplice to the crimes of another. In most situations, what is required is that the defendant ***intentionally*** aid or encourage another's criminal act, and that the defendant also have the mental state necessary for the crime actually committed by the other. In some situations, however, it may be sufficient that the defendant acts with knowledge that the person being assisted will or may commit a criminal offense, but without a purpose that that person do so.

B. Intentional aid: The defendant's conduct in rendering assistance or encouragement must generally be intentional in two respects: (1) first, the defendant must intend to commit the acts which in fact give aid or encouragement; and (2) secondly, by committing those acts, the defendant must intend to ***help bring about*** the other party's criminal act.

1. Must have purpose to further crime: Thus it is not enough that the defendant intends acts which have the effect of inducing another person to commit a crime, if it was not the defendant's purpose to help bring that crime about. For instance, in *Hicks v. U.S.*, 150 U.S.

442 (1893), D was charged with being an accomplice to murder, on the grounds that he spoke words to his friend X that had the effect of encouraging X to shoot Y to death. The Supreme Court reversed D's conviction, on the grounds that the trial judge's charge to the jury did not make it clear that it was not enough that D intended to speak the words that he spoke, and that it also had to be proved that D's words were "used by the accused with the intention of encouraging and abetting [X]."

2. **Knowledge not usually enough:** Thus under the most common view, even if the defendant ***knows*** that the other party intends to commit a crime, and the defendant's conduct is shown to have assisted or encouraged that criminal conduct, the defendant will not be liable unless he ***intended*** to help bring that crime about. (See the fuller discussion of knowledge without intent *infra,* p. 219).

3. ***Mens rea* of underlying crime:** One way courts have expressed this principle is by holding that the defendant must, in addition to intending to engage in acts which have the effect of assisting or encouraging criminal conduct, have the ***mens rea for the crime committed*** by the other person.

   a. **Ulterior motives:** Thus if the defendant's purpose in rendering aid or encouragement is not to bring about the criminal result, but to accomplish ***some other objective,*** the defendant might not be liable as an accomplice. This may be true, for instance, where the defendant's purpose is ***to trap*** the person being "assisted."

      Example: D, after spending an evening drinking with X, discovers that his watch is missing. He accuses X of stealing it, but X denies it. The two then agree to pull off a burglary together. D boosts X through a transom; while X is inside, D telephones the police. He returns to receive bottles of whiskey that X hands him through the transom. The police arrest both D and X, and D explains that he never planned to steal the whiskey, but merely wanted to get even with X for stealing his watch.

      Held, D is not an accomplice to burglary, because he did not have the mental state required for burglary (i.e., *inter alia,* the intent to permanently take the store's property). *Wilson v. People,* 87 P.2d 5 (Col. 1939).

      Note: But it should be recognized that it was not D's desire to trap X, *per se,* that prevented him from being an accomplice. Rather, it was the coincidental fact that this desire *prevented D from having the mental state required for burglary* (in this case, the intent to permanently deprive the store of its goods) that exculpated him.

A mere intent to trap the other will not always be sufficient to do this. For instance, suppose that D's scheme to trap X was to encourage X to murder Y. If D then turned in X after the murder, D would not be able to defend on the grounds that he bore no particular ill will against Y; he would still have had the requisite *mens rea* for murder (intent to take another's life).

C. Knowledge, but not intent, as to criminal result: Suppose that the defendant ***knows*** that his conduct will encourage or assist another person in committing a crime, but the defendant does not particularly ***intend or desire*** to bring about that criminal result. Is this enough to make the defendant liable as an accomplice to the crime?

1. Supplying goods or services: The "mere knowledge" issue usually arises where D ***supplies goods or services*** with ***knowledge*** that his supplies may enable others to pursue a criminal objective. As with conspiracy (see *supra*, p. 187), mere knowledge of the criminal objective is not ***not*** enough for accomplice liability. Instead, the supplier must be shown to have ***desired*** to further the criminal objective.

a. Model Penal Code in agreement: The Model Penal Code agrees that ***mere knowledge*** by the defendant that the person he is aiding intends to commit a crime is ***insufficient*** to make the defendant liable as an accomplice. M.P.C. § 2.06(3)(a) allows accomplice liability *only* where the defendant has acted "with the ***purpose*** of promoting or facilitating the commission of the offense... "

b. Recommendation of source for drugs: The sufficiency of "mere knowledge" arises frequently in cases where the defendant ***recommends a source for illegal drugs,*** and is then charged with being an accomplice to the resulting illegal sale. Courts are almost ***never*** willing to make the defendant an accomplice without evidence that the defendant actively desired to further the sale.

2. Circumstantial evidence: On the other hand, D's desire or intent to aid the principal's criminal objective can be shown by ***circumstantial*** evidence, just as in the case of conspiracy.

a. "Stake in venture": For instance, the supplier's desire to further the criminal objective can be shown circumstantially by the fact that the supplier acquired a ***"stake in the venture"*** (e.g., that the supplier was ***promised a bonus*** expressed as a percentage of the

profit from the crime).

b. Inflated charges: Similarly, the fact that the supplier charged his criminal purchasers an ***inflated price*** compared with the cost of the items if sold for legal purposes is evidence of intent to further the criminal objective.

c. Serious crime: The more ***serious*** the underlying crime (as known to the supplier), the more likely it is that the supplier's participation will be found to make him an accomplice to that crime.

Example of (b) and (c): Jill visits a gun store owned by Dave, and explains to him that she needs a small pistol to use in an upcoming bank robbery. Dave answers, "You shouldn't blab about your criminal plans to someone like me. Now, I'll have to charge you a lot extra because of the risk you've put me under." He charges her five times the market price for the revolver. Jill then uses the gun in the bank robbery, by pointing it at V, a cashier. The gun accidentally goes off, killing V. Dave is charged with murder, in a state that applies felony-murder.

Dave can be convicted. Although a supplier of a good or service normally will not become liable as an accomplice to a crime merely because he knows the customer intends to commit that crime with the supplied item, additional factors may change this outcome. The fact that the supplier charges a very inflated rate, and the fact that the proposed crime is (as the supplier knows) a very serious one, are both factors that dramatically increase the chance that the supplier will be found to be an accomplice. So here, the presence of both of these factors means that a court would likely find that Dave was an accomplice to Jill's announced bank robbery. In that event, Dave becomes substantively liable for the robbery, and for the felony-murder that was part of that robbery. (For more about the use of felony-murder to convict accomplices to the underlying felony, see *infra,* p. 261.)

D. Assistance with crime of recklessness or negligence: As noted, the generally-accepted *mens rea* requirement for accomplice liability is that the defendant have the same mental state as is needed for the crime committed by the principal. If that crime is not one that requires intent, but merely ***recklessness or negligence,*** can the defendant be liable as an accomplice upon a mere showing that he was reckless or negligent (as the case may be) concerning the risk that the principal would commit the crime? The answer given by most courts seems to be **yes**.

1. Lending car to drunk driver: The issue arises most frequently where the defendant ***lends his car to one that he knows to be drunk.*** If the drunken driver then kills, or wounds, a pedestrian or other driver, is the car owner liable as an accomplice to manslaughter or battery? Most courts that have considered the matter have ***found***

accomplice liability in this situation. Such a result can be defended on the grounds that it does not violate the general rule that an accomplice must have at least the same mental state as would be needed to convict him of the crime if he were the principal.

2. **"Depraved-indifference" murder:** In fact, most courts that have considered the matter have extended this type of reasoning to impose accomplice liability on D where X commits a killing with ***reckless indifference*** to human life, and D (acting with the same reckless indifference) encourages X in the conduct leading to the death. This result is consistent with M.P.C. § 2.06(4), which says that "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."

   a. **Drag races and gun battles:** Thus if D and X engage in joint activity of an extremely dangerous sort — such as a ***drag race*** on a city street, or a ***gun battle*** while bystanders are nearby — D may well be held liable as an accomplice to depraved-heart murder if X's act results in a bystander's death. That may be true even if D and X are ***opposing each other*** — even trying to kill each other — instead of being allied in a cooperative activity.

   b. **No proof of who was principal:** The majority view that D can be liable as an accomplice for depraved-indifference murder if he acted with merely a recklessly-indifferent state of mind can help the prosecution enormously in situations where ***two defendants each behave recklessly*** — such as by firing their weapons at a crowd – but it cannot be proved beyond reasonable doubt ***whose*** conduct directly caused the killing. The case in the following example, though it involved only the issue of assault since the victims did not die, illustrates how the prosecution can benefit from this majority view.

Example: D1 and D2 open fire on a group of people socializing near a bonfire. Two of the people are seriously wounded, and both Ds are charged with first-degree assault (recklessly causing serious physical injury by means of a dangerous instrument). The prosecution is unable to prove whether the wounding shots came from D1's gun or

D2's. The trial judge instructs the jury that it can find D1 guilty as an accomplice if it concludes that he acted recklessly. The jury convicts, and D1 appeals on the grounds that under state-law precedents he can be guilty of being an accomplice to assault only if is proved that he *intended* that his principal inflict serious injury rather than that he merely behaved recklessly with regard to the risk of such injury.

Held, for the prosecution. A prior case holding that accomplice liability for assault requires a showing of intent to inflict injury rather than recklessness should be overruled. The state's old rule, if extended to a homicide scenario, would have prevented the state from getting a conviction of either D1 or D2 for even manslaughter on these facts if one of the victims had died (since neither D intended to produce a death), an unreasonable result. Proper interpretation of M.P.C. § 2.06(4) — on which the state statute here is based — is that when a crime is defined in terms of causing a particular result, all that is required for accomplice liability is that the defendant have acted with the ***same level of culpability as would be required for conviction as a principal.*** In the case of assault, since recklessness about the danger of serious bodily injury is enough for conviction as a principal, it should also be enough for conviction as an accomplice. *Riley v. State,* 60 P.3d 204 (Alaska 2002).

c. Carrying dangerous weapons: Another scenario that's likely to involve accomplice liability for depraved-indifference murder is where multiple defendants all ***carry very dangerous weapons into a robbery*** or other crime scene, and then a gunfight breaks out that leads to death. Even in a jurisdiction that does not apply the felony-murder doctrine *(infra,* p. 256), D1's act of assisting D2 in carrying out the armed robbery may impose on D1 accomplice liability for the resulting depraved-indifference murder.

Example: D1, D2 and D3 all agree to carry loaded fully-automatic machine guns for a robbery of the First National Bank. To terrify the tellers and customers and make sure that they don't summon the police, D1 shouts, "Nobody move," and then fires a sustained burst of bullets (about 20 in all) at the ceiling. A bullet ricochets off the marble that lines the ceiling, then strikes and kills a teller. D1, D2 and D3 are all charged with murder. Assume that the jurisdiction does not apply felony-murder.

D2 and D3 can be convicted of murder on an accomplice-liability theory. D1 acted with depraved indifference to the value of human life by firing the weapon in circumstances where there was a large risk of just the sort of ricochet that occurred. D2 and D3 aided and abetted D1 in the commission of the underlying robbery, and in the carrying by all Ds of the loaded machine guns. Therefore, D2 and D3 (not just D1) probably had the requisite depraved-indifference mental state. Consequently, D2 and D3 are accomplices to the killing, making them substantively guilty of depraved-indifference murder.

E. Strict liability: Suppose the defendant's conduct has the effect of encouraging or aiding another to commit a ***strict-liability offense.*** If the defendant not only had no intent to bring about the offense, but neither knew nor should have known that the offense would occur, should the

defendant be liable as an accomplice? Such liability would not violate the rule that the accomplice's mental state must be that which would be necessary for commission of the crime as a principal, since, by hypothesis, a strict-liability offense requires no mental state.

1. **Liability rejected:** Nonetheless, most courts have ***refused*** to impose such accomplice liability.

   a. **Lack of knowledge about attendant circumstances:** The most interesting question arises when *A* encourages *P* to commit an act X that is criminal ***only if certain attendant circumstances exist.*** If *P* is made strictly liable for X without regard to whether he knew that the attendant circumstances existed, should *A* be strictly liable as an accomplice if he was unaware that those attendant circumstances existed? Most courts have answered ***"no,"*** reasoning that while there may be good reasons to take away the "I didn't know about the attendant circumstances" defense from the principal, those reasons generally do not exist as to prosecution of the accomplice. See L, § 6.7(f), p. 632 ("[T]he special circumstances which justify the imposition of liability without fault on certain persons who themselves engage in the prohibited conduct are not likely to exist as to those rendering aid.")

Example: A federal statute, 18 U.S.C. § 922(g)(1), makes it a crime for any felon (one convicted of a crime punishable by imprisonment for more than a year) to possess a firearm. The offense is a strict-liability one with regard to the fact of felon status — that is, once the prosecution shows that X knowingly possessed a firearm, the requisite mental state on X's part is established even without proof that X knew that he was a felon (i.e., that X knew that the crime of which he was convicted could have been punished by a term of more than one year). D is charged with aiding and abetting a violation of § 922(g)(1), in that he helped his brother Franklin, a convicted felon, obtain a firearm. The prosecution does not show that D knew that Franklin had been convicted of a felony.

Held, D's conviction is reversed. "[T]here can be no criminal Iiability for aiding and abetting a violation of § 922(g)(1) without knowledge or cause to believe the possessor's status as a felon." This conclusion is buttressed by the fact that in a separate statutory provision, § 922(d), Congress made it a crime to sell or give a firearm to a convicted felon, but only if the defendant had knowledge or reason to believe that the recipient was a felon. Allowing a strict-liability conviction for aiding and abetting a violation of § 922(g)(1) would defeat Congress' intent in imposing a scienter requirement in § 922(d). *U.S. v. Xavier,* 2 F.3d 1281 (3d Cir. 1993).

2. **Vicarious liability:** However, the legislature is always free to

establish, by statute, that one person is ***vicariously liable*** for the acts of another, at least where the offense is of a "public welfare" type (i.e., one that does not carry with it great social opprobrium or severe punishment; see *supra*, p. 37). In this situation, the person made vicariously liable is not really an "accomplice to crime." Rather, he is made accountable under a regulatory scheme.

Example: Suppose a state makes the owner of any vehicle automatically liable for any parking violation committed by one who borrows the car from the owner. The owner is not really being held liable "as an accomplice" — instead, the state is simply imposing vicarious liability on car owners for parking violations by drivers, regardless of whether the owner was at fault.

IV. ACCOMPLICES — ADDITIONAL CRIMES BY PRINCIPAL

A. Results that are "natural and probable" but not intended: Suppose that the defendant has assisted or encouraged his principal to commit a particular offense (call it the ***"target"*** crime), but that the principal commits not only this offense, but ***others as well*** (call them ***"non-target"*** crimes). To what extent is the defendant liable, as an accomplice, for these additional non-target crimes which he did not intend to assist or encourage?

1. Majority rule: Courts vary on how they handle this problem. But the majority approach seems to be as follows: If the non-target offenses are the ***"natural and probable"*** (even though unintended) consequences of the target crime that the defendant *did* intend to assist, the defendant is ***liable as an accessory*** for the non-target crimes as well. The case in the following example represents this majority approach.

Example: D1 agrees to help two other Ds burglarize a tavern. D1 waits in a car outside the tavern while the other two Ds, at this time unarmed, go inside to commit the burglary. While they are inside, they are surprised by the owner; one of them picks up a gun from the bar and shoots the owner, wounding him. D1 is convicted of being an accomplice not only to the burglary, but to attempted murder.

Held, D1's conviction affirmed. The statute makes one accountable for another's conduct "during the commission of an offense," if one aided or abetted that offense. Since D1 aided and abetted the offense of burglary, and since the attempted murder occurred during the course of, and in furtherance of, the burglary offense, he is liable as an accomplice for that attempted murder. *People v. Kessler,* 315 N.E.2d 29 (Ill. 1974).

2. Model Penal Code rejects extended liability: The Model Penal

Code ***rejects*** the principle allowing an accomplice to be held liable for "natural and probable" crimes beyond those which he intended to aid or encourage. As the Code drafters state, "Probabilities have an important evidential bearing on these issues [of intent to aid or encourage]; to make them independently sufficient is to ***predicate the liability on negligence*** when, for good reason, more is normally required before liability is found." Comment 6(b) to M.P.C. § 2.06(3).

3. **Felony-murder and misdemeanor-manslaughter:** Wherever the additional consequence is a ***death,*** the accomplice may end up being guilty *not* because of the "natural and probable consequences" rule, but because of two specialized doctrines, the ***felony-murder*** and ***misdemeanor-manslaughter*** rules.

   a. **Felony-murder:** Under the felony-murder rule (discussed *infra,* p. 256), if in the course of certain dangerous felonies the felon kills another, even ***accidentally,*** he is liable for murder. So let's suppose an accessory helps a principal commit dangerous-felony X, and an unintended death directly results. In a felony-murder jurisdiction, ***the accessory ends up being liable for murder,*** on the theory that the accessory is ***guilty of the dangerous felony*** by operation of the accomplice-liability principles, and that guilt then makes the accessory directly guilty of felony-murder. This result occurs even if the jurisdiction does *not* make an accomplice automatically liable for ***"natural and probable" consequences*** of other crimes by the principal.

Example: In a jurisdiction applying felony-murder, D1 and D2 agree to commit an armed robbery together, with D2 carrying the only gun. D1 does not desire that anybody be shot. D2 points his gun at V and asks for money; the gun accidentally goes off, killing V. D1 is probably guilty of murder on these facts. However, this is not because V's death was a "natural and probable consequence" of armed robbery.

Instead, it is because under the felony-murder doctrine, even an accidental death that directly stems from the commission of a dangerous felony such as armed robbery will constitute murder. Since D1 was D2's accomplice in the armed robbery, D1 is liable for armed robbery. Since the killing occurred in the furtherance of the robbery *by D1* (even though he was not the shooter), and since D1 had the mental state required for felony-murder (intent to commit a dangerous felony), D1 is liable for murder *without any use of the "natural and probable consequences" rule.*

   i. **Principal commits murder intentionally:** But now suppose *A* aids or abets *B* to commit one of the enumerated dangerous

felonies (e.g., robbery), and *B* ***intentionally*** kills the robbery victim. Here, it's not so clear that *A* should be liable as an accomplice to murder, based on the felony-murder theory. *B* is obviously liable for ordinary intent-to-kill murder. If the murder can be said to be ***"in furtherance of"*** the robbery, *A* is liable as an accomplice (whether or not *A* specifically intended or contemplated that the robbery might require use of lethal force by himself or *B).* But if the murder is not directly in furtherance of the robbery, but committed during its course, the courts are ***split.*** For more about this scenario where *A* helps *B* commit a dangerous felony and *B* then commits an intentional murder that may or may not have been in furtherance of the underlying felony, see *infra,* p. 262.

b. Misdemeanor-manslaughter: The ***misdemeanor-manslaughter rule*** *(infra,* p. 279) may similarly lead a court to impose liability on an accomplice for an unintended consequence. For instance, suppose *A* assists *B* in performing an unlawful late-term abortion (a misdemeanor) on *C,* and *C* dies as a result. If the jurisdiction applies the misdemeanor-manslaughter rule and thereby makes *B* guilty of manslaughter solely because he participated in a misdemeanor that caused a death, it is not unfair to hold *A* liable for manslaughter as an accomplice. A's mental state (intent to assist a misdemeanor) is no less culpable than *B*'s, and is the same mental state that would be required for B's conviction of manslaughter as a principal.

V. GUILT OF THE PRINCIPAL

A. Principal must generally be guilty: Since the theory behind accomplice liability is that one is made accountable for the crimes of another, it is logical to require the prosecution to prove that the person being aided or encouraged (the principal) is ***in fact guilty*** of the crime to which the defendant is being charged with being an accomplice. As is discussed below, there are now a few situations in which a court might hold the accomplice liable for a crime as to which the principal did not have the requisite mental state; nonetheless, as a general rule the principal's guilt must be shown.

Example: D and a companion named Bose burglarize a house. Shortly thereafter, when only Bose is in the getaway car, the police stop the car. Bose starts to shoot at the police, in an attempt to escape. The police return fire, and Bose is killed. D is charged with murder, on the theory that he was an accomplice of Bose, and that Bose's death occurred as part of the burglary that they performed together.

Held, D's conviction reversed. Accomplice liability can exist only where the principal could be liable for the crime in question. Here, although Bose may have had one kind of *mens rea* sufficient for murder (reckless indifference to human life, shown by his initiation of the gun-battle), he could not have been convicted of murder because murder is the taking of the life of ***another.*** Since Bose obviously couldn't be guilty of murdering himself, D cannot be liable as an accomplice. (Nor can D be liable under the felony-murder doctrine, because in California that doctrine does not apply where one of the felons, rather than an innocent person, is killed; see *infra,* p. 261). *People v. Antick,* 539 P.2d 243 (Cal. 1975).

1. **Principal's conviction not necessary:** But it is not necessary that the principal be ***convicted.*** For instance, if A is charged with assisting B to commit a robbery, and B is never arrested or brought to trial, A can nonetheless be convicted of being an accomplice to the robbery. The prosecution will have to show, in its case against A, that B committed the robbery, but there does not have to be an independent verdict against B.

2. **Inconsistent verdicts in same trial:** Suppose, however, that the principal and accomplice are tried in the same trial, and the principal is acquitted. May the accomplice be convicted? The generally-accepted rule is that the accomplice must ***also be acquitted.*** See L. § 6.6(e), p. 620, n. 87: "The prevailing view is to require acquittal of the accomplice if a simultaneous verdict acquits the person charged with the actual commission of the crime."

3. **Acquittal of principal before accomplice's trial:** Although it is not necessary that the principal be convicted prior to the trial of the accomplice, what happens where the principal is ***acquitted*** prior to the accomplice's trial? May the accomplice use this fact to automatically foreclose his own liability, or must he relitigate the issue of the principal's guilt? Courts are split on the issue: some make the accomplice relitigate, but a few allow the accomplice to use the doctrine of ***collateral estoppel*** to prevent his prosecution. L., § 6.6(e), p. 619.

B. Principal without required mental state: It is generally held that the accomplice cannot be convicted unless the principal is shown to have

had the ***required mental state*** for the crime in question.

> **Example:** D and Hill agree to burglarize a general store. D opens the window and helps Hill climb through into the building, but does not go into the building himself. Hill passes out merchandise to D, and the police arrive shortly thereafter. It turns out that Hill is a relative of the storeowners, that he never had any intention of committing a burglary, and that he feigned acquiescence merely to trap D. *Held,* for D: since Hill, as principal, did not have the mental state for burglary, D cannot be convicted of being an accomplice. (Nor can D be convicted as a principal, since he himself did not enter the store.) *State v. Hayes,* 16 S.W. 514 (Mo. 1891).

1. **Criticism of *Hayes* reasoning:** Observe that if Hill had helped D enter the store, instead of vice versa, D would have been liable as a principal notwithstanding Hill's complete lack of criminal intent. It seems unfair to convict or acquit D based solely upon the fortuity of which role in the plan he occupied, since his culpability is roughly the same in either case. See K&S, pp. 701-02.

2. **Abandonment of *mens rea* requirement:** But a minority of courts have simply ***abandoned*** the requirement that the principal have the required mental state, at least where he performs the *actus reus* and the accomplice does have the *mens rea* for the crime.

   a. **Lesser offense:** For example, the California Supreme Court has now taken this step with respect to ***homicide*** cases: as long as the person charged with being an accomplice has a mental state that suffices for a particular homicide offense, and the "principal" carries out the homicide, the fact that the principal may have had only the mental state needed for a lesser degree of homicide (or for no homicide offense at all) ***will not shield the accomplice.*** See *People v. McCoy*, 24 P.3d 1210 (Cal. 2001).

      i. **Hypothetical from *McCoy:*** The court in *McCoy* posed the following hypothetical based upon Shakespeare's Othello: Iago falsely tells Othello that Othello's wife Desdemona is having an affair; Iago hopes that Othello will kill her in a fit of jealousy. Othello does so, without further involvement by Iago. Othello would be guilty only of voluntary manslaughter, assuming that he acted in the heat of passion. Yet, the *McCoy* court concluded, Othello's guilt of manslaughter rather than murder "should not limit Iago's guilt if his own culpability were greater." Therefore, the court said, "If ... Iago acted with

malice, he would be guilty of murder even if Othello, who did the actual killing, was not."

ii. **Facts of *McCoy:*** The facts of *McCoy* illustrate how the issue can arise in real-life circumstances. McCoy and Lakey were tried together, and convicted, of firstdegree murder arising out of a drive-by shooting in which McCoy fired the shot that killed V. McCoy claimed self-defense. McCoy was then granted a new trial on appeal, on the theory that the trial judge had mis-instructed the jury on the selfdefense issue. The question then became, did this reversal automatically entitle Lakey, too, to a new trial? The California Supreme Court's answer was "no." As the Court summarized its holding, "when a person, with the mental state necessary for an aider or abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all of the participants as well as ***that person's own mens rea.*** If that person's *mens rea* is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator."

b. Use of innocent dupe: This minority approach of saying that only the accomplice's mental state matters would mean that if the accomplice manipulates a completely ***innocent dupe*** into performing the *actus reus* for a given crime, the accomplice could still be guilty of that crime.

Example: Suppose that Accomplice prepares false documents showing that Accomplice is the owner of certain cases of valuable liquor kept in a public warehouse. Accomplice gives the documents to Dupe, a truck driver, with instructions to Dupe to present the documents to the warehouse and pick up the liquor. Dupe believes the documents are genuine. Dupe goes to the warehouse, presents the documents, picks up the liquor (which belongs to some other customer of the warehouse), and turns it over to Accomplice. Under the minority approach, Accomplice can be liable for being an accomplice to larceny, even though Dupe did not have the mental state needed for larceny (since Dupe did not believe that he was taking possession of property belonging to another without consent). Cf. *U.S. v. Bryan,* 438 F.2d 88 (3d Cir. 1973), so holding on roughly these facts.

c. Complete defense: In courts abandoning the requirement that the principal have the required mental state, the accomplice might be convicted while the principal is acquitted in situations where the

principal has a ***complete defense*** that the accomplice does not share. For example, assume that the principal is able to show that he was ***entrapped*** into committing the offense in question by government agents, but his companion was not entrapped, and participated completely of his own volition. Under these facts, the companion could be convicted of aiding and abetting, notwithstanding the principal's acquittal.

3. **Model Penal Code's attempt theory:** The Model Penal Code has a different way of sometimes making the accomplice guilty when his "principal' is not. M.P.C. § 5.01(3) provides that "a person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 [accomplice liability section] if the crime were committed by such other person, is guilty of an ***attempt*** to commit the crime, although the crime is not committed or attempted by such other person." Thus D would be liable, on the facts of *Hayes, supra,* p. 226, for ***attempted burglary.***

4. **Conviction of principal for use of innocent agent:** Keep in mind that in some "guilty accomplice but innocent principal" cases, it may be possible to charge the "accomplice" with being ***himself a principal.***

   a. **Model Penal Code:** For instance, M.P.C. § 2.06(2)(a) makes one person liable for the acts of another when "acting with the kind of culpability that is sufficient for the commission of the offense, he causes an ***innocent or irresponsible*** person to engage in such conduct."

Example: Consider the facts of the above Example involving warehoused liquor. The prosecution could proceed on the theory that Dupe (the truck driver) was an innocent party who believed the documents were valid, and that Accomplice (the mastermind and false-document-preparer) was really the principal. Accomplice could then be convicted of larceny as *principal* (not as an aider-and-abetter), even though Dupe cannot be convicted of anything. This would simply be an application of the well-accepted rule that one may commit the *actus reus* of a crime through the conduct of an innocent person (e.g., a child).

VI. WITHDRAWAL BY THE ACCOMPLICE

A. Withdrawal as defense: Just as one charged with *conspiracy* may sometimes raise the defense that he withdrew *(supra,* p. 196), so one

who has given aid or encouragement prior to a crime may, if he changes his mind, be able to ***withdraw*** and thus avoid *accomplice* liability.

1. Model Penal Code: The Model Penal Code's approach to accomplice-withdrawal gives a good idea of what most states require in order for the accomplice to be deemed to have withdrawn sufficiently to avoid liability. Under M.P.C. § 2.06(6)(c), a person avoids accomplice liability if he ***stops participating*** before the underlying crime occurs, and then *either* ***undoes the effect*** of his prior actions, or else makes an ***effort to thwart*** the crime, typically by ***warning*** the authorities.
Here's the text of the M.P.C. accomplice-withdrawal provision (§ 2.06(6)(c): A person will ***not be liable as an accomplice*** if he ...

> ***"terminates his complicity prior*** to the commission of the offense ***and***
>
> "(i) wholly ***deprives it*** [the complicity] of ***effectiveness*** in the commission of the offense; or
>
> "(ii) gives timely ***warning*** to the law enforcement authorities or otherwise makes ***proper effort to prevent the commission*** of the offense."

a. Verbal withdrawal sometimes sufficient: If the defendant's aid has been only ***verbal*** (e.g., ***encouragement*** or strategic ***suggestions),*** he may be able to withdraw merely by ***stating to the other party*** that he now withdraws from the project and disapproves of it. In terms of the M.P.C. test, D's statement to the principal that he is now withdrawing and no longer approves of the plan will probably be enough to "wholly deprive" D's prior encouragement of its "effectiveness." (D doesn't have to render the overall *criminal plan* ineffective; he merely has to render his own *assistance* ineffective.)

i. Tangible assistance: But if D's assistance has been more ***tangible,*** he may have to take ***affirmative action*** (not just indicate to the principal a change of mind) to undo the effect of the assistance. For instance, if D has ***supplied weapons,*** the court may very well hold that he has not rendered his assistance ineffective unless he has ***gotten the weapons back.*** See Comment 9(c) to M.P.C. § 2.06(6)(c).

b. Warning to authorities: Alternatively, the defendant can almost always make an effective withdrawal by ***warning the authorities*** prior to commission of the crime. Thus subsection (ii) in the above-quoted M.P.C. test grants D a defense of withdrawal where he has given ***"timely warning to the law enforcement authorities*** or otherwise ***makes proper effort to prevent*** the commission of the offense."

2. **Not required that crime be thwarted:** Regardless of the means used to withdraw, courts generally do ***not*** require that the crime actually be ***thwarted.***

3. **Effect of aid must be undone:** But is ***not*** enough that the defendant has a ***subjective change of heart,*** and gives no further assistance prior to the crime. Most states agree with the M.P.C. that the defendant must either ***undo the effect*** of his prior assistance, or make other reasonable efforts, even if not successful, to ***thwart the crime*** (e.g., by warning the authorities).

Example: D, a high school student, enters the school with some friends after hours, and encounters a group of other students who say they want to steal math exams from the third floor. At the thieves' request, D and his friends agree to serve as a lookout during the theft — they will go to the second floor, wait there, and then yell something like "Did you get your math book?" to alert the thieves if someone is coming. D and his friends go to the second floor, look around, and then decide that acting as lookouts is the wrong thing to do. Without saying anything to the thieves (who are on the third floor), D and friends exit the school and wait in the parking lot until the thieves emerge with the exam questions. Later, D is charged with being an accomplice to the theft. He defends on the grounds that he withdrew from the plan prior to the theft, and therefore has no accomplice liability.

Held, for the prosecution. New Hampshire follows the M.P.C. approach to accomplice withdrawal. Since D concedes that he didn't warn the authorities, he can avoid accomplice liability only if he "wholly deprived his complicity of effectiveness in the commission of the offense." Where the accomplice's role consists of encouragement, the accomplice cannot deprive his assistance of its effectiveness unless he makes some *affirmative act.* Here, D did not communicate his withdrawal to the principals, warn the custodians of the plan, or do anything else to deprive his complicity of its effectiveness. Therefore, the mere fact that D left the scene before the theft occurred was not enough to undo his liability for having encouraged the thieves. *State v. Formella*, 960 A.2d 722 (N.H. 2008).

VII. VICTIMS AND OTHER EXCEPTIONS TO ACCOMPLICE LIABILITY

A. Defendant who could not be liable as principal: Many crimes are defined in such a way that they can only be committed by members of a

certain class. For instance, statutory rape is defined so that it can only be committed by a male. Does it follow from this that a defendant charged with accomplice liability for such a crime may defend on the ground that he could not be liable as a principal, since he is not part of the class which can commit the crime? The answer is that there is clearly ***no general defense*** based on these lines. Thus if it were shown that D, a woman, assisted her brother in having intercourse with a girl below the age of consent, D could be liable as an accomplice to statutory rape, even though she could obviously not be guilty of that crime as principal.

B. Exceptions for certain classes: Nonetheless, there are certain classes of persons as to whom a court will conclude that no accomplice liability should be imposed.

1. **Victims:** The most obvious such class is composed of ***victims*** of the crime in question. Even though the victim may, in a significant sense, have helped bring about the crime, the court will conclude that it would be illogical and unfair to impose accomplice liability.

   a. **Statutory rape:** Thus it is universally held that a ***female below the age of consent*** will not be liable as an accomplice to statutory rape of herself, even though she may have given extensive assistance or encouragement to the male.

   b. **Kidnap victims and persons extorted from:** Similarly, a businessman who meets the demands of an extortionist or blackmailer, or a parent who pays a ransom to a kidnapper of his child, will not be liable as an accomplice. See Comment 9(a) to M.P.C. § 2.06(6).

2. **Crime logically requiring second person:** A second class of persons who will generally not be liable as accomplices exists where a crime is defined so as to logically require participation by a second person, as to whom ***no direct punishment has been authorized*** by the legislature. For instance, an abortion cannot be performed without a pregnant woman, nor an act of prostitution without a customer, nor an illegal drug sale without a purchaser. If the legislature has not specifically authorized punishment for the pregnant woman, the prostitute's customer or the purchaser, these persons will generally not be punished as accomplices to the principal crime.

a. **Rationale:** Such non-liability is usually justified on the grounds that the legislature must have known that these persons would inevitably be part of the crime, and if it chose not to impose punishment, courts should not do so by the indirect means of accomplice theory. See M.P.C. § 2.06(6)(b), making the defendant not liable as an accomplice if "the offense is so defined that his conduct is inevitably incident to its commission."

b. **Legislature's right to impose specific punishment:** But as a corollary, the legislature is of course free to authorize particular punishment of the person whose participation is inevitable. For instance, New York's so-called "John law" makes it a misdemeanor to "patronize a prostitute." N.Y. Penal Law § 230.02.

VIII. POST-CRIME ASSISTANCE

A. **Accessory after the fact:** One who knowingly gives assistance to a felon, for the purpose of helping him ***avoid apprehension*** following his crime, is an ***accessory after the fact.*** Under present law, the accessory after the fact is not liable for the felony itself as an accomplice would be. Rather, he has committed a distinct violation, based upon the obstruction of justice, and his punishment will not depend upon the penalty attached to the felony committed. See L, pp. 645-46.

B. **Elements of the offense:** For one to be guilty as an accessory after the fact, the following elements must be shown:

1. **Commission of a felony:** A completed felony must have been committed. It is not enough that the defendant ***mistakenly believed*** that the person he was assisting had committed a felony. (But it is not necessary that the person aided have been formally charged with the felony, or even that the felony have been discovered.) See L, p. 643.

2. **Knowledge of felony:** The defendant must be shown to have ***known,*** not merely suspected, that the felony was committed. Also, he must be shown to have had an understanding of the ***essential elements*** of the crime.

Example: Suppose D finds a gun, and knows that the gun was illegally in the possession of X, a person known to D to be a felon. (D knows that for a felon to possess a gun is itself a felony.) However, D does not know that X has recently used the gun in a murder. D helps X destroy the gun. D could not be charged as an accessory after the fact to murder, because

he did not know the essential elements of the underlying crime, i.e., that the gun had been used in a murder. (However, he *could* be charged as an accessory after the fact to the gun-control violation, since he knew the essential elements of that violation.)

3. Knowledge of the felon's identity: The assistance must be given to the ***felon personally.*** (But it is probably not necessary that the defendant have known the ***name*** of the felon; one who sees a robber escaping and who helps him do so is probably an accessory even if he never learns the robber's name.)

4. Failure to inform not sufficient: The accessory must be shown to have taken ***affirmative acts*** to hinder the felon's arrest. It is not enough that the defendant ***refuses to give information to the authorities.***

a. False information: But suppose D gives ***false information*** to the authorities, rather than merely refusing to answer their questions. In many states the act of giving false information with the intent of diverting suspicion will be enough for accessorial liability. (But a mere failure to report the felon to the police will not be enough in any jurisdiction.)

C. Misprision of felony: At common law, one who simply failed to report a known felon was guilty of ***misprision of felony.*** However, as a statutory offense the crime is virtually non-existent in the U.S.

D. Compounding crime: A number of states make ***compounding crime*** an offense. The offense typically consists of an agreement not to prosecute what one knows to be a crime, in return for ***payment of consideration*** by the criminal. See L, pp. 648-50 and fn. 82 thereto.

IX. SOLICITATION

A. Solicitation defined: The common-law crime of ***solicitation*** occurs when one ***requests or encourages another*** to perform a criminal act, regardless of whether the latter agrees. If he does agree, both parties will generally be guilty of conspiracy; if he goes on to commit the crime, both will be liable for the substantive offense (one as accomplice and the other as principal). Therefore, the practical utility of punishing the offense of solicitation is in those cases where the person who is requested to commit the crime ***refuses.***

Example: D desires to have his wife V killed, so that he can inherit $5 million. He locates X, who he believes is a professional hit man. He offers to pay X $20,000 for killing V. X appears to accept D's offer. Unbeknownst to D, however, X is wearing a wire, which transmits D's offer to the police. D is immediately arrested. D can be convicted of solicitation. Furthermore, since in most states merely trying to persuade another person to commit a crime is not enough for attempt (see *supra*, p. 160), solicitation is probably the only crime that D *can* be convicted of on these facts.[1]

1. Under the common-law definition of conspiracy, D cannot be convicted of that crime either, since there is only one willing participant. See *supra*, p. 189.

B. No overt act required: Unlike conspiracy, the crime of solicitation is never construed so as to require an ***overt act.*** As soon as the defendant makes his request or proposal, the crime is complete.

C. No corroboration required: It is not generally necessary for the solicitee's testimony to be ***corroborated.*** This had led some people to feel that making solicitation a crime raises a great risk of convicting the innocent, and also a risk of blackmail. Suppose, for instance, that X, a married woman, tells the police that D, a man, has proposed that she commit adultery with him. If X's testimony is not required to be corroborated, there is a substantial risk either that: (1) X has misinterpreted ambiguous words spoken by D (e.g., "Why don't we go out and have a good time") or (2) X is lying to get even with D for something else (e.g., jilting her). Alternatively, it would be easy for X to blackmail D by merely threatening to make such a complaint.

1. **Some statutes require corroboration:** For this reason, some solicitation statutes require either corroborative testimony from someone other than the solicitee, or some other indication that the offense really occurred. See L, p. 528-29.

D. Mental state: As is the case with accomplice liability (see *supra*, p. 218), it is generally required that the defendant have ***intended*** to induce the solicitee to perform the crime, not merely that he spoke words which he knew might bring about the crime.

1. **Must have requisite mental state:** Furthermore, the defendant must be shown to have had the ***mental state required for the completed crime.*** For instance, if A requests that B commit a breaking and entering of a dwelling, A is not guilty of solicitation of burglary unless he is shown to have had the desire not only that B break and enter, but also that he commit a felony within.

E. Solicitation of accomplice: Normally the solicitor intends that the solicitee perform the crime as principal. But it is theoretically sufficient for the crime of solicitation if the solicitor intends that the solicitee be an ***accomplice*** to a third person. Thus if A says to B "find a paid assassin to kill my wife," A will be guilty of solicitation even though under the proposed plan B would be an accomplice to the murder, rather than a principal. See L, p. 530.

F. Communication not received: Suppose the defendant attempts to communicate his criminal proposal, but is ***unsuccessful*** in doing so (e.g., the proposal is contained in a letter which is lost in the mail). It is not clear whether the defendant may be held liable for the completed crime of solicitation. Some jurisdictions will probably allow only a conviction of "attempted solicitation" in this situation.

1. **Model Penal Code:** The Model Penal Code, however, expressly makes it irrelevant that the defendant "fails to communicate with the person he solicits," if his conduct was designed to make such a communication. M.P.C. § 5.02(2). The defendant is thus guilty of the completed crime of solicitation under the Code even if the solicitee never learns of the proposal.

G. Defenses: Defenses similar to those raised in cases of attempt, conspiracy, and accomplice liability are often raised in solicitation cases.

1. **Renunciation:** It is not clear whether a ***voluntary renunciation*** by the solicitor is sufficient to purge him of liability. The Model Penal Code, in § 5.02(3), allows the defense of renunciation provided that the defendant prevents the commission of the object crime, under circumstances showing that the renunciation is "complete and voluntary."

2. **Crime requiring two parties:** Some crimes are defined so as to require the participation of two persons. As we saw, it will frequently be a defense in a prosecution for conspiracy or accomplice liability that the legislature chose ***not to impose punishment*** on one of the necessary parties. A similar defense should be allowed in a solicitation prosecution. For instance, suppose that D solicits a prostitute to have intercourse with him, but she refuses. Assuming that the legislature has not expressly authorized punishment for either

soliciting a prostitute or having intercourse with one, D will normally not be held liable for solicitation (any more than he would be liable for being an accomplice to prostitution if he consummated his proposal). See L, p. 533.

3. **Impossibility:** There is no general defense of "impossibility" to a charge of solicitation. That is, it is irrelevant that, unbeknownst to the defendant, the facts are such that the solicitee could not commit the crime.

H. Solicitation as an attempted crime: In a state which does not have a comprehensive solicitation statute, the prosecution may argue that the defendant's act of solicitation constituted a criminal ***attempt.*** Virtually all courts agree that if nothing more than "bare" solicitation (i.e., the proposal itself) occurs, the defendant has not attempted to commit the object crime.

1. **Must go beyond mere preparation:** Some courts have held that for attempt liability, either the defendant or the solicitee must take acts that amount to more than "mere preparation," so that if the solicitor were acting alone, he would have met the requirements for an attempt. See, e.g., *State v. Davis,* 6 S.W.2d 609 (Mo. 1928), in which D not only encouraged X to kill D's mistress's husband, but paid X $600 to carry out the plans; the court held that nothing had been done beyond mere preparation, and that D was thus not guilty of attempted murder.

X. CRIMINAL LIABILITY OF CORPORATIONS

A. Corporations can commit crimes: So far in this book, we have considered only the criminal liability of *human beings.* But most state and federal penal statutes are drafted in a way that makes them also applicable to artificial entities, including ***corporations.*** Therefore, corporations may be — and not infrequently *are* — convicted of crimes.

1. **Actions by individuals:** Obviously, the only way a corporation can be said to "act" is through the actions of individual humans who are associated with the corporation. Therefore, except in the special case of crimes that are committed by a ***failure to act*** (see *supra,* p. 19), the question is, *which* actions, by *which* persons, will be attributable to the corporation for purposes of holding it criminally liable?

2. Two main approaches: Most American courts follow one of two main approaches to the issue of what types of human acts may give rise to corporate criminal liability:

[1] a relatively wide-sweeping approach based on the tort concept of ***"respondeat superior,"*** under which actions taken on the corporation's behalf even by relatively ***low-ranking employees*** may give rise to corporate criminal liability; and

[2] a narrower approach adopted by the Model Penal Code, under which in most instances only acts committed or approved by a ***"high managerial agent"*** of the corporation may give rise to corporate liability.

We consider each of these two approaches in turn.

3. The *"respondeat superior"* approach: Many courts approach the problem of corporate criminal liability by applying a variant of the tort concept of ***"respondeat superior."*** As you likely learned in *Torts*, an employer — whether human or corporate — is normally liable for torts committed by an employee who is acting within the scope of her job. In courts applying the criminal-law analog to the doctrine, a corporation is, similarly, often ***guilty of crimes committed by an "agent"*** (typically an employee) acting on behalf of the corporation.

a. Three requirements: Most courts that apply the *respondeat superior* approach to corporate criminal liability impose ***three requirements*** that have to be satisfied before the corporation will be guilty of a crime committed by its human agent (whether the agent is an employee or an independent contractor):

[1] The agent's ***own conduct*** meets the ***statutory requirements for the crime,*** in terms of ***actus reus*** and ***mens rea;***

[2] the agent was acting within the ***"scope of employment";*** and

[3] the agent, in committing the crime, was ***intending to benefit the corporation*** in some way.

See KSS&B, p. 785, quoting 92 Harv. L. Rev. 1227, 1247-1251.

b. Two requirements are easy to satisfy: But as the *respondeat superior* doctrine is construed in most courts that apply it, "the ***latter two*** requirements [[2] and [3] above] are ***almost***

meaningless." See 75 Minn. L. Rev. 1095, 1102-05 (quoted at D&G, p. 883). Here's why:

i. "Within the scope of employment": First, the ***"within the scope of employment"*** requirement is interpreted in a way that is easy to satisfy. As long as the employee was somehow acting ***"in connection with"*** the job, courts tend to deem her conduct as being within the scope of that job "even if the conduct was ***specifically forbidden by a corporate policy*** and the corporation made ***good faith efforts to prevent*** the crime." Id. at 883. (And notice that as the *respondeat* approach is usually formulated, the fact that the employee is a very ***low-level one,*** with no power to make policy decisions, ***makes no difference.)***

ii. "Intent to benefit": Second, courts tend to hold that the employee acted with the requisite ***"intent to benefit the corporation"*** even if the corporation ***ended up receiving no actual benefit.*** *Id.*

iii. Ratification: Furthermore, even if the "within the scope of employment" and "intent to benefit the corporation" requirements wouldn't otherwise be met by the employee's action, courts following the *respondeat superior* doctrine often apply the concept of post-crime ***ratification*** by the corporation to satisfy these two requirements after the fact.

(1) Financial benefit kept by corporation: So, for instance, consider the common scenario of a low-level employee's criminal act that results in ***extra dollars being paid*** into the corporation's treasury. The mere fact that the corporation's upper management ***does not voluntarily disgorge the funds*** after discovering the act will likely ***count as ratification.*** And that's true even if the worker's conduct wouldn't otherwise meet the "intent to benefit the corporation" requirement because she was acting mainly to ***benefit herself*** by, say, hoping to get a bigger bonus on account of the increased corporate profits.

c. Illustration of *respondeat* approach: The *respondeat superior*

approach, when it is applied, gives prosecutors a great chance to obtain a conviction, even if the acts in question were committed by low-level employees, and were directly contrary to the express written policies of the corporation. Indeed, as the *Hilton Hotels* case (discussed soon below) demonstrates, a conviction of the corporation is quite possible ***even where the company's upper management shows that it tried hard to prevent the very conduct in question.***

i. **Rationale:** Why, then do courts often decide to apply *respondeat superior* even to acts by subordinates that ***violate express corporate policies?*** The usual rationale is that a contrary approach will ***incentivize the corporation's upper management*** to behave as follows: (1) management issues vague proclamations that all employees should "obey the law," without making any real attempt to enforce these "rules"; (2) management then turns a blind eye to evidence that the subordinates are violating the rules and the law for the corporation's financial benefit; and (3) in this state of "ignorance is bliss," management stands passively by while the corporation harvests the financial benefits from the supposedly-forbidden lower-level wrongdoing.

Example: Section 1 of the federal Sherman Antitrust Act prohibits all "combinations in restraint of trade." In Portland, Oregon, most restaurant operators, hotel operators, and restaurant- and hotel-supply companies organize an association (the "Association") to attract conventions to Portland. Association members are asked to pay variable dues; in the case of hotel suppliers, the dues are set at 1% of the supplier's sales to all hotels. The federal government alleges that D (the Hilton Hotels chain) and other hotel members of the Association have boycotted suppliers that refused to pay their Association dues; the government says that this boycotting by D constitutes a criminal violation of Section 1. D defends on the grounds that the manager of its one Portland hotel expressly instructed the hotel's purchasing agent (let's call the agent "X" — he isn't named in the opinion) that he was not to take part in the boycott. X himself testifies that he received these instructions from the manager but disregarded them, and instead threatened a supplier with the loss of the hotel's business if he didn't pay his Association dues; X says that he did this because of "anger and personal pique towards" the supplier. D argues that since X was a low-level employee who was acting against the instructions and policies of the hotel's management, X's unauthorized actions cannot be the basis for a conviction of D, the corporation. The government argues the contrary.

Held (on appeal), for the government. What matters is whether Congress ***intended*** to impose Sherman Act liability even on businesses whose employees

commit acts that are contrary to express upper-management instructions. The text of the statute does not resolve this issue of intent. But the ***purposes*** of the statute are best served by making a corporation "liable for acts of its agents within the scope of their authority even when done against company orders." Sherman Act violations are commercial offenses, usually motivated by a desire to enhance profits. Corporate owners and high-level managers tend to impose on their subordinates pressure to maximize profits. That being the case, "generalized directives" to obey the Sherman Act (and to forego maximizing profits) are ***not likely to be taken seriously by the subordinates.*** Furthermore, if a violation does occur, "the corporation, and not the individual agents, will have realized the profits from the illegal activity."

Therefore, Congress intended (and rationally so) to make a corporation liable under the Sherman Act for the acts of its agents taken within the scope of the employment, even if the acts were directly contrary to the corporation's policies and express instructions. Here, X, although low-level, was authorized to buy all of the hotel's supplies from any supplier who met the specifications. X was also in a "unique position to add [D's] buying power to the force of the boycott." Therefore, D "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions[.]" ***U.S. v. Hilton Hotels Corp.,*** 467 F.2d 1000 (9th Cir. 1972).

4. **The Model Penal Code's "high managerial agent" approach:** The other major approach, that of the ***Model Penal Code,*** reflects the view that the traditional *respondeat superior* approach to corporate criminal liability ***casts too wide a net,*** by unfairly making the corporation criminally liable for actions by low-level employees, even where those acts are contrary to express corporate policies.

   a. **"High managerial agent":** Section 2.07 of the M.P.C. says that except for two special categories that don't often occur,[2] a corporation will be criminally liable *only* if the commission of the offense was ***"authorized,*** requested, commanded, performed or ***recklessly tolerated*** by the ***board of directors*** or by a ***high managerial agent*** acting in behalf of the corporation within the scope of his office or employment." § 2.07(1)(c).

      i. **Significance:** So where a low-level employee commits an action that constitutes an ordinary crime under the M.P.C., if neither the Board of Directors nor any "high managerial agent" knows about or approves the action (or is found to have "recklessly tolerated the action" after the fact), the corporation ***cannot be convicted of that crime.***

      ii. **"High managerial agent" defined:** In states adopting the

M.P.C. approach, a lot turns on what sort of person is considered a "high managerial agent." The M.P.C. itself defines this term to mean "an officer of a corporation . . . or any other agent . . . having duties of ***such responsibility*** that his conduct may fairly be ***assumed to represent the policy of the corporation."*** § 2.07(4)(c).

2. These categories are (1) instances where a ***legislative purpose*** to punish the corporation even for the conduct of a low-level employee ***"plainly appears"*** (which typically occurs only in the case of "regulatory" offenses, for which specific intent is not normally required — see *supra,* p. 34); and (2) instances where the legislature has ***placed an affirmative duty*** on corporations to act, and the Corporation has ***omitted*** to take the required action. In these two situations, the M.P.C. makes the corporation liable even though no higher-level employee has been involved in the conduct or inaction. See 19 Rutgers L.J. 593, 596-598, quoted in KSS&B, p. 795.

Example: Had the M.P.C. been in force in the federal court that decided the *Hilton Hotels* case, the result would probably have been different. X (the purchasing agent for a single hotel) would probably not be found to have been given such heavy responsibilities that his conduct could "fairly be assumed to represent the policy" of Hilton Hotels Corp., the owner-operator of hundreds of hotels around the world. Therefore, as long as the trier of fact believed the testimony of the manager of that particular hotel that he had ordered X not to participate in the boycott, it would be unlikely that the corporation would be convicted. (But federal courts construing most federal statutes — like the antitrust statute in *Hilton Hotels* — usually do *not* subscribe to the M.P.C.'s "high managerial agent" approach.)

B. Punishing the corporation: Suppose that a corporation is convicted of a crime, under whatever the applicable standard is. What ***type of punishment*** can or should the court impose?

1. Incarceration impossible: Obviously, a corporation cannot be "imprisoned." So this common method of criminal punishment is not available as to a convicted corporation.

2. Fine: A common means of punishing the convicted corporation is to impose a ***fine*** on it. Sometimes these fines are quite large, sizeable enough to likely affect the future behavior of even a huge and rich corporation.

Example: In 2014, the French bank BNP pled guilty to federal criminal charges of violating U.S. sanctions against trading with American enemies such as Sudan, Iran and Cuba. BNP agreed to pay a fine of $8.9 billion. See U.S. Dept. of Justice News Release issued June 30, 2014.

a. Shareholders suffer: But corporate fines are often criticized on the grounds that they end up penalizing not just the guilty corporation

but ***innocent*** parties as well. For instance, in the case of a publicly-traded corporation, the net economic burden of the fine is likely to be borne mostly by innocent ***shareholders*** who had nothing to do with the wrongdoing. KSS&B, pp. 799-800.

3. **Regulation via DPAs and NPAs:** In part because of this problem of "punishing the innocent," prosecutors are increasingly deciding not to try to obtain a criminal conviction of the corporation, but to instead ***negotiate changes in the corporation's future behavior.*** A common way for prosecutors to do this is by negotiating either a ***"deferred prosecution agreement" (DPA)*** or a ***"non-prosecution agreement" (NPA).***

    a. **Nature of DPA:** In a DPA, the government files charges but agrees not to go forward with the prosecution of the corporation in return for the company's concessions regarding its future behavior. For instance, the corporation might agree to appoint and pay for an independent ***"corporate monitor"*** who will guard against future infractions, or to make certain public ***disclosures*** not otherwise required by law. If the corporation fulfills the DPA over a certain period of time, the government dismisses the charges. KSS&B, pp. 788, 801-02.

    b. **Nature of NPA:** An ***NPA*** works essentially the same way as a DPA, except that the government doesn't file criminal charges at the outset. Instead, the government waits to see whether the corporation lives up to the agreement; if it doesn't, the government files criminal charges. Id. at 788, 801-02.

    c. **Federal use:** DPAs and NPAs "have become the ***preferred course*** for ***federal prosecutors."*** *Id.* at 788.

Quiz Yourself on
ACCOMPLICE LIABILITY AND SOLICATION *(ENTIRE CHAPTER)*

53. Dan Hicks sees that the famous outlaw, Ned Kelly, is about to enter the Provincial Bank. Since Ned is wearing a mask and carrying a gun, Dan deduces that Ned plans to rob the bank.

(A) For this part only, assume the following: Without saying anything to Ned, Dan stands watch outside the bank, ready to warn Ned if the police appear. As it turns out, Dan's help is not necessary, and Ned makes a clean getaway without ever realizing that Dan was standing watch. Ned is later apprehended on robbery charges. The police learn that Dan stood watch. May Dan be convicted of the substantive crime of bank robbery?

(B) For this part, assume the same facts, except for the following: As Ned was about to enter the bank, Dan called out, "I'll give you a heads-up if any cops come by." Ned said, "That'd be great," and went in to the bank to commit the robbery. As it turned out, however, Ned made a clean getaway without needing Dan's services. When Ned is later apprehended on robbery charges, will Dan be liable for bank robbery?

54. Czar Nicholas wins tickets to a "Tchaikovsky and the Destroyers" concert from a local radio station. Lenin and Trotsky want the tickets, and decide to steal them from Nicholas. Trotsky is not armed, and thinks that Lenin is unarmed. The two hide behind some bushes and jump Nicholas when he walks by. While Trotsky holds Nicholas down, Lenin, instead of grabbing the tickets, whips out his Swiss Army knife and slits Nicholas' throat. Lenin then runs off and leaves the tickets behind. Is Trotsky liable as an accomplice in Nicholas' death?

55. Captain Hook, a pharmacist, fills Peter Pan's prescription for fairy dust, a mild hallucinogen, knowing that Peter intends to sell the dust illegally to Wendy. Peter then sells the dust illegally to Wendy.

(A) Assume that Captain Hook charges Peter his regular price, and that all other terms and conditions of the sale are the same as Hook would impose if he did not know that any illegal use was planned. Is Hook an accomplice to Peter's illegal sale to Wendy?

(B) Now, assume that the facts are the same, except that Hood charges Peter three times the amount that he would ordinarily charge for filling such a prescription. He does so because he fears that he might be arrested in connection with Peter's plot if things go wrong, and it's simply not worth it to Hood to run that kind of risk for his

ordinary prescription-filling rate. Is Hook an accomplice to Peter's illegal sale to Wendy?

56. Wellington gives Robespierre some dynamite and encourages him to blow up Josephine's house in order to kill her. Robespierre blows up the house. The explosion kills not only Josephine, but several passersby as well, including Napoleon Bonaparte. Clearly Wellington is an accessory to Josephine's killing. Is he also an accessory to *Bonaparte's* death?

57. King Arthur is charged with murder in the first degree for killing Childric. Merlin is charged as an accomplice for supplying Arthur with the murder weapon, the singing sword, Excalibur, and for urging Arthur to use the sword on Childric.

(A) Assume that Arthur and Merlin are tried in the same trial. Arthur is acquitted by a jury, whose members conclude that the slaying was justified. May Merlin be convicted?

(B) Same facts as above, except that King Arthur is acquitted because he was entrapped into committing the crime. No government agents were involved in Merlin's part of the crime. Can Merlin be convicted as an accomplice under these facts?

58. A state statute makes it a crime to sell narcotics. Neither that statute, nor any other state statute, makes it a crime to buy narcotics. Sherlock Holmes asks Moriarty to sell him some cocaine. Moriarty does so, and is charged with selling narcotics. Holmes is charged as an accomplice to the sale. Can Holmes be convicted?

59. Juliet, age sixteen, seduces Romeo, age twenty-two. A statute makes it statutory rape for a person to have sex with another who is under the age of seventeen, if the defendant is more than four years older that the underage person. Romeo is charged with statutory rape under this statute. Juliet is charged as an accomplice. Can Juliet be convicted?

60. Butch and Sundance rob a bank. They tell Etta Place about the robbery. Etta does not report it to the police. Is Etta an accessory after the fact?

61. Dostoevsky and Raskolnikov have the same landlady, whom

Dostoevsky hates. Dostoevsky urges Raskolnikov to murder the landlady by waiting until she is asleep, and then sticking her nose and mouth shut with Crazy Glue so that she'll suffocate. Raskolnikov thinks that Dostoevsky is a dangerous criminal who must be stopped before he causes someone's murder. Therefore, he says, "No way — you're nuts," and tells the police about Dostoevsky's request. The police arrest Dostoevsky, but need something to charge him with. Because Raskolnikov never even pretended to agree to do what Dostoevsky urged, the police can't charge Dostoevsky with conspiracy.

(A) What common-law crime offers the prosecution's best charge against Dostoevsky?

(B) Can the prosecution get a conviction on the offense you listed in part (A)?

62. The state of Erewhon has enacted the following statute: "Any person who gives or offers any money or value to a public official, with the corrupt purpose to influence such official in the performance of the official's public duty, is guilty of the felony of bribery in the first degree." Eats Corp. is a multinational corporation that owns and operates 10,000 fast-food restaurants in the U.S. and abroad. The CEO of Eats sends to all of its managers, at least once a year, a letter stating that "Eats is a law-abiding corporation, and I hereby specifically order all of our employees to refrain from bribery or any other crime, and to report any violations of this policy immediately to headquarters." Cheryl is the manager of a single relatively small Eats restaurant, located in Columbus, the capital of Erewhon. One day, during an inspection conducted by Ike, an employee of the Columbus Health Department, Ike begins to write a health-deficiency summons for the restaurant on account of unsanitary conditions he has just found. As he is writing, Cheryl hands him a $50 bill, saying "I hope this will persuade you to tear up that summons." (The $50 comes from the restaurant's cash register.) Cheryl takes this action mainly out of fear that if the summons is issued, she will be fired; however, she also fears that the company will suffer a loss of business if the summons is issued and publicized. Ike arrests Cheryl for violating the bribery statute. The prosecutor then charges not only Cheryl but also

Eats Corp. with a criminal violation of the statute. Assume that (1) Erewhon follows the Model Penal Code approach to all relevant issues; (2) the judge (sitting without a jury) is persuaded beyond a reasonable doubt that Cheryl satisfies all elements of the crime of bribery; and (3) the judge believes, based on evidence offered by Eats, including the above “Don’t bribe anyone” letter, that no person in Eats’ management ordered, approved, or ratified Cheryl’s act of bribery. Should the judge convict Eats of the crime of bribery?

Answers

53. (A) Probably not. The only way Dan could be guilty of robbery is on an accomplice theory. One who aids and abets another (the principal) in the commission of a substantive crime becomes an accessory, and as such is equally guilty of the crime. However, where a person merely stands ready to give assistance that turns out to be unneeded, and his participation does not in any way encourage or facilitate the crime, the potential assistance will generally not be considered aiding and abetting.

(B) Yes. A person will be considered an accomplice (and therefore substantively liable for the crimes that he aids and abets) if he in any significant way encourages or facilitates the crime. That’s true even if the crime would probably have been successfully completed without the aid. Here, the fact that Dan encouraged Ned by letting Ned know he was there for Ned would almost certainly be found to be encouragement and facilitation. (For instance, Ned might have changed his mind about going through with the robbery had he not known that Dan was serving as lookout).

54. No. For a person to be liable as an accomplice to a crime (call it the “target crime”) committed by a principal, the accomplice must have the mental state required for the target crime. So for Trotsky to be liable for the intentional murder of Nicholas, Trotsky would have needed a mental state that suffices for murder. Since Trotsky had no intent to kill or seriously injure, he did not have any of the required mental states for murder.

It's conceivable that Trotsky could be guilty on an alternate theory. An accomplice is guilty of additional crimes (i.e., "nontarget" crimes that the accomplice did not expressly aid and abet) committed by his principal if those are a "natural and probable consequence" of the commission of the target crime. However, there are two reasons why this theory probably wouldn't apply here: (1) it's not clear that Lenin committed the nontarget crime of murder *in addition to* robbery, because probably Lenin didn't commit robbery at all (and the theory probably applies only to crimes that are "added-on" to the target crime, not ones substituted for that target crime); (2) more important, it seems very unlikely that a cold-blooded murder would be found to be a "natural and probable consequence" of a robbery like this one, given that the accomplice didn't think the principal was armed and had no reason to think that the principal might commit such a killing, and further given that the killing doesn't even seem to have been in furtherance of the original robbery motive.

55. (A) No. A person will only be liable as an accomplice if he ***intends to assist*** the principal in carrying out the target crime. Mere knowledge that the principal will engage in the crime, even when coupled with some degree of assistance, won't by itself be enough. Therefore, one who as part of an ordinary-course transaction supplies an item to another that he knows will be used by the other in a particular crime won't thereby become guilty as an accomplice to that crime.

(B) Yes, probably. Mere knowledge of a buyer's criminal purpose won't, as explained in part (A), by itself be enough to convert a supplier into an accomplice of the buyer. But if the supplier in some sense takes a "stake" in the buyer's criminal enterprise, this will be enough to cross the supplier over into accomplice territory. The fact that the supplier charges a much higher price on account of the buyer's criminal purpose is likely to be interpreted by a court as his having taken such a stake in the venture.

56. Yes. Where an accomplice aids and abets a principal in the commission of one particular crime (call it the "target crime"), the accomplice will also be guilty of any additional crime that is a "natural and probable consequence" of the commission of the target

crime. Here, the other deaths were a natural and probable consequence of the intended explosion. Therefore, since Wellington aided and encouraged Robespierre to blow up the house, all the ensuing deaths will likely be deemed within the scope of Wellington's liability as an accomplice.

57. (A) No. Most courts apply the rule that if the principal is acquitted, the accomplice must be acquitted as well. This rule certainly applies where, as here, the two are tried in the same trial — the accomplice cannot be guilty unless the principal committed the target crime, and the verdict here shows conclusively that the principal was not guilty.

(B) Yes, probably. Although the general rule is that the accomplice must be acquitted if the principal is acquitted, there is an exception where the principal has a complete defense to the crime that the accomplice does not share. That is the case here, so Merlin is out of luck.

58. No. Where an offense is defined so as to logically require two participants, but the statute specifies a punishment for only one of those participants, the other may not be convicted of being an accomplice. See, e.g., M.P.C. § 2.06(6)(b), making D not liable as an accomplice if "the offense is so defined that his conduct is inevitably incident to [the offense's] commission." That's the case here: a "sale" of narcotics can't take place without a buyer, and the state has chosen not to impose specific punishment on buyers; therefore, buyers can't be made accomplices to sales.

59. No. Where a statute is intended to protect a certain class, a member of the protected class is immune from prosecution as an accomplice. In the case of statutory rape, the underaged person is universally considered to be a victim who is in need of protection. Therefore, Juliet cannot be convicted. Note that the same rule would apply to one who pays ransom to a kidnapper, or pays blackmail money to an extortionist.

60. No. The crime of accessory-after-the-fact is committed where a person knowingly gives assistance to a felon, for the purpose of helping the felon avoid apprehension following the crime. The accessory must be shown to have taken affirmative acts to hinder the

felon's arrest — it's not enough that the defendant merely fails (or even refuses when asked) to give information to the authorities. So Etta's off the hook. (But if Etta took affirmative steps to help the boys — if, for instance, she gave a phony alibi or gave false info about where the boys had gone when they left town — then she *would* be guilty of being an accessory after the fact.)

61. (A) Solicitation. This crime occurs when one requests or encourages another to perform a criminal act, with the mental state required for that criminal act. The crime is complete at the moment of the request or encouragement.

(B) Yes. The fact that Raskolnikov never agreed with Dostoevsky's proposal (thus making a conspiracy charge not feasible) is no bar to a solicitation charge. Indeed, the scenario of the immediately-unsuccessful request — as well as the scenario of the request which the requestee appears to accept but secretly disagrees with — are the situations in which solicitation is most often charged.

62. No, because Cheryl is not a "high managerial agent." Ordinarily, there is nothing about the corporate status that prevents a corporation from being held criminally liable. And a court (whether under the Model Penal Code or not) would likely conclude that the statute here, when it makes "any person" liable, was intended by the legislature to cover corporations as well as humans. However, § 2.07(1)(c) of the M.P.C. says that except for two special categories not relevant here, a corporation will be criminally liable for the acts of its employee *only* if the commission of the offense was "authorized, requested, commanded, performed or recklessly tolerated by the ***board of directors*** or by a ***high managerial agent*** acting in behalf of the corporation within the scope of his office or employment." And the M.P.C. defines the term "high managerial agent" to mean "an officer of a corporation . . . or any other agent . . . having duties of ***such responsibility*** that his conduct may ***fairly be assumed to represent the policy of the corporation."*** § 2.07(4)(c).

Here, Cheryl, as the manager of one of thousands of Eats Corp. restaurants, would not be considered to have such high-level duties that her conduct would "fairly be assumed to represent the policy" of

Eats. So she herself would not be a "high managerial agent." And there is no evidence that either the board of directors of Eats, or any true high-level managerial agent of Eats (like the CEO), approved of either Cheryl's particular act of bribery, or bribery by Eats employees in general. Therefore, the judge should acquit Eats, even though Cheryl can be plausibly said to have been acting "within the scope of [her] employment." (However, it's perfectly proper for the judge to convict Cheryl herself, since she satisfies both the *mens rea* and the *actus reus* for bribery.) Note that this result is contrary to the result that would be reached under the ***"respondeat superior"*** test used by many courts: under *that* test, since Cheryl was acting within the scope of her job, and acted in part in order to achieve what she believed was a benefit to the corporation, a conviction of Eats would be proper even though Cheryl was violating express instructions from higher management. (See, e.g., *U.S. v. Hilton Hotels,* where under the *respondeat superior* test the defendant multinational hotel company was convicted based solely on the contrary-to-policy conduct of a purchasing manager who worked at one of the defendant's many hotels.)

***Exam Tips** on*
ACCOMPLICE LIABILITY AND SOLICITATION

<u>Accomplice Liability, Generally</u>

☛ **Summary:** Remember that D is liable as an accomplice if he intentionally acts or encourages another (call her X) to commit a "target" crime. Accomplice liability means that D will be liable for the target (substantive) crime committed by X. So D must satisfy two requirements — act and mental state — before he'll have accomplice liability:

- □ **Act:** D must commit an ***act*** that ***aids or encourages X*** to commit the "target" crime; and
- □ **Mental state:** He must have the ***mental state*** required for the target

crime. Typically, this means that D must ***intend*** to assist X in committing the target crime. (But if the underlying crime requires only ***recklessness*** or ***negligence,*** most courts say the accomplice needs only this lesser mental state.)

☛ **Act requirement:** The most testable area is whether the act element has been fulfilled. Therefore, look for:

- ☞ **Silent observer:** Just ***knowing*** that a crime is being committed and ***silently observing*** is ***not*** considered to be aiding and abetting. (But if X *knows* that D stands ready to assist if needed, and this fact encourages X, then D *does* meet the act requirement.)

  - ☞ **Trap:** Don't be fooled by a fact pattern that indicates merely that D was present and had criminal intent. Mere presence and intent are not sufficient.

  Example: Y and Z agree to set fire to their neighbor's home because they suspect that drugs are being trafficked there. They start pouring gasoline around the house. A crowd of onlookers begins to gather. X, an onlooker, hopes that Y and Z will burn the house down (and decides to help them if they can't get the fire burning by themselves), but says and does nothing. Y and Z aren't aware that this is how X feels. Z lights a match and the house is burned. X cannot be prosecuted as an accessory, because although he had the requisite intent (desire to have the house be burned) he did not commit the requisite act (aiding or encouraging Y and Z).

- ☞ **Supplying goods or services:** Remember that if all D did was to ***supply goods or services*** with knowledge that they might be used by others to commit crimes, that's ***not enough*** to make D an accomplice to those crimes.

  - ☞ ***Circumstantial evidence:*** But keep in mind that in this supply scenario, the required intent to aid the principal's criminal objective can be shown by ***circumstantial evidence*** (e.g., D charged ***inflated prices,*** or took a stake in the venture such as an ***extra bonus*** payable out of proceeds from successful completion of the crime).

- ☞ **Verbal encouragement:** Generally, ***verbal encouragement satisfies*** the act requirement.

  Example: Suppose that on the facts of the above example, as Y and Z are

trying to get the fire started, X shouts to them, “Burn that baby down.” At least if Y and Z hear and are encouraged to continue, X has committed the required act, and can be held liable for arson as an accomplice.

☞ **Actions:** Other kinds of actions that are likely to suffice:

□ By pre-arrangement, D operates a ***getaway car*** for X after X commits the substantive crime;

□ D agrees in advance to ***provide a safe harbor*** for X after he commits the crime, and then does so. (Actually, the advance agreement *alone*, if it encourages X to go ahead and commit the crime, will suffice, even if D then changes his mind after the crime is over.)

☞ **Trap based on after-the-fact involvement:** Be on the lookout for a party who does not have a stake in the commission of the crime and becomes involved ***only after the basic crime has been committed.*** This is likely ***not*** to be enough for accomplice liability, just for the lesser crime of ***“accessory after the fact.”***

Example 1: X, Y, and Z drive to a liquor store to purchase liquor. X stays in the car while Y and Z enter the store. Just before entering, Y and Z realize they have no money. Subsequently they commit a robbery in the store. They run from the store with Z waving a bottle of whiskey and Y holding a gun. As they jump into the car, Y says to X, “Step on it before the cops get here.” X drives off. X probably does not have accomplice liability for the robbery (and is therefore not guilty of robbery), because he did not encourage or assist the commission of the crime, which was complete as soon as Y and Z left the store with the money. X has at most accessory-after-the-fact liability.

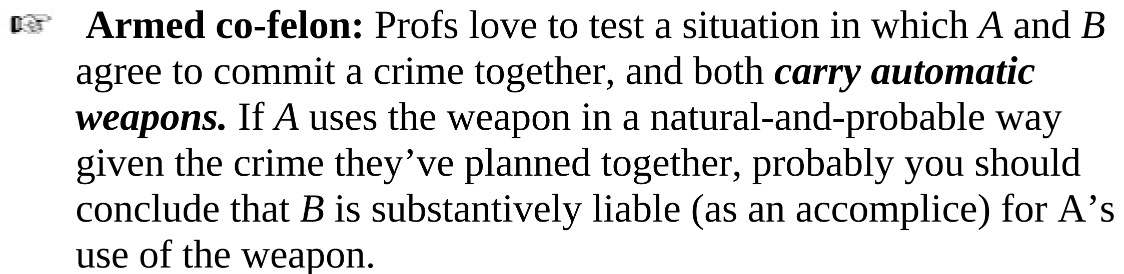
Example 2: D, X and Y are members of a gang. While riding in a car together (driven by D), they collide with a car driven by V, an elderly woman. D gets out of the car, gets in an argument with V about who was responsible, and beats V with his fists. X and Y stand silently by, then urge D to flee once V falls to the ground. V dies from the beating. D is convicted of manslaughter.

X and Y should not be convicted of being accomplices to manslaughter, because there did not assist or encourage D to commit the beating — neither the fact that they stood by silently while the beating occurred, nor the fact that they urged D to flee afterwards, was enough to give them the kind of stake in the commission of the crime required for accomplice liability. (But X and Y are guilty as accessories after the fact for urging D to flee.)

☛ **Other crimes:** Courts disagree about whether D is substantively liable for additional crimes that are ***“natural and probable”***

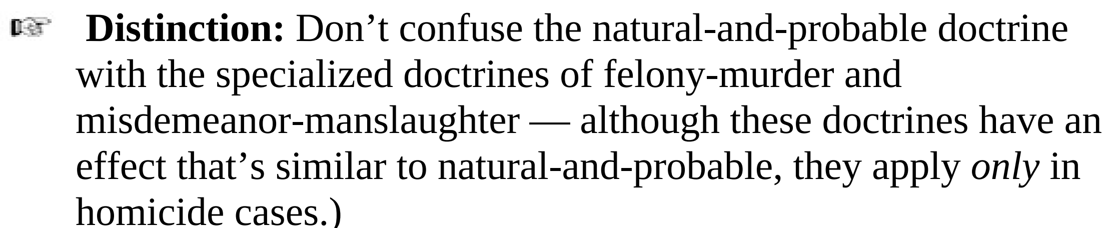
consequences of the target crime, but that D did not intend to bring about. Most courts make D liable in this situation.

> *Example:* D agrees to drive X to a store so X can rob it with X's gun. They say nothing about whether X will use the gun. In the store, the owner, V, resists giving the cash, and X shoots him, injuring him. If it was a "natural and probable" consequence of the robbery that X would use the gun if the owner resisted, most (though not all) states would hold D guilty of being an accomplice to battery. If the shooting was *not* a natural and probable consequence of the robbery, no court would hold D guilty of being an accomplice to battery.

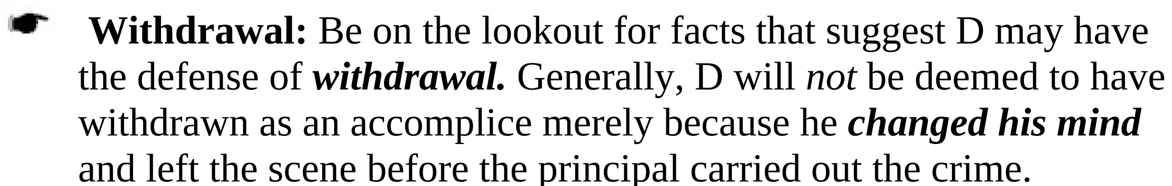


Armed co-felon: Profs love to test a situation in which *A* and *B* agree to commit a crime together, and both ***carry automatic weapons.*** If *A* uses the weapon in a natural-and-probable way given the crime they've planned together, probably you should conclude that *B* is substantively liable (as an accomplice) for A's use of the weapon.

> **Example:** *A* and *B* agree to rob Bank. They both carry loaded automatic weapons into the lobby of Bank. *A* fires a long burst of shots into Bank's ceiling, hoping to scare the employees into cooperating. As both *A* and *B* can easily see, Bank's lobby has lots of stone throughout. One of the shots fired by *A* ricochets, killing *V*, an employee, by accident. (Assume that the felony-murder doctrine doesn't apply.) *A* has clearly acted with reckless disregard of human life, making *A* have one of the mental states for murder (a "depraved heart" — see *infra*, p. 252). Is *B* guilty of depraved-heart murder too?
>
> Since it was fairly "natural and probable" that *A* might use his loaded automatic weapon in this way, probably *B* will be held responsible for this depraved-heart murder as well. (Also, *B*, by carrying a loaded automatic weapon, has manifested the same reckless disregard as *A*, meaning that *B*, too, has the requisite mental state for depraved-heart murder. Remember that *B* must, to be an accomplice to underlying crime X, have the mental state required for that crime X.)



Distinction: Don't confuse the natural-and-probable doctrine with the specialized doctrines of felony-murder and misdemeanor-manslaughter — although these doctrines have an effect that's similar to natural-and-probable, they apply *only* in homicide cases.)



Withdrawal: Be on the lookout for facts that suggest D may have the defense of ***withdrawal.*** Generally, D will *not* be deemed to have withdrawn as an accomplice merely because he ***changed his mind*** and left the scene before the principal carried out the crime.

☞ **What's needed:** To withdraw and thus escape accomplice liability, in most states D has to either (i) ***completely deprive*** his prior complicity of its ***effectiveness*** (e.g., if he merely "encouraged, then he can tell the principal that he no longer thinks the crime is a good idea), or (ii) make reasonable efforts to ***prevent commission*** of the crime (e.g., by warning the authorities).

Example: *A* agrees to drive *B* to a 7/11 so *B* can rob it, to serve as lookout, and to drive *B* away afterwards. *A* drops *B* off, loses his nerve, and drives away without serving as lookout or getaway driver. *B* robs the store and is immediately arrested. *A* did not successfully withdraw, because he did not undo the effects of his prior encouragement and assistance (which he could have done, say, by calling the authorities just before *B* entered the store, even if the police couldn't get there in time to stop the robbery.) So *A* is guilty of the robbery as an accomplice.

☛ **Use of innocent agent:** Look out for the possibility that what appears to be accomplice liability may really be a principal using an ***"innocent agent."*** If X (who carries out the main harmful act) has been duped by D, D can be guilty as a principal even though X is not guilty of *any* crime.

Example: D is baby-sitting for 10-year-old X. D suggests that they play a game, in which X is to go next door to V's house, and take a stereo that D says V borrowed from D and forgot to return. X does so, and carries the stereo out the front door of V's house. D is guilty of larceny as a principal — she duped X (who does not have a guilty state of mind) into committing the physical act (taking and carrying away the property of another) needed for larceny. The fact that X does not have the mental state for any crime is irrelevant.

Solicitation

☛ **Generally:** Watch for a party ***requesting or encouraging another to perform a criminal act,*** where the ***other party refuses.*** This is likely to be the crime of solicitation, defined as: the requesting or encouraging of another to commit a crime, done with an intent to persuade the other to do the completed crime.
(It can still be solicitation if the other party *agrees*, but then it's also conspiracy, which is the more serious crime. So only worry about solicitation if the other party refuses, or there's some other obstacle to its being conspiracy.)

☞ **Surrounding circumstances:** Analyze the surrounding

circumstances in order to determine whether the requisite intent (intent to induce the other to commit the underlying crime) can be proven. So evidence that the speaker was ***joking,*** or intended ***some other result*** than completion of the target crime, will tend to show that the required intent was not present.

Example: Z has opened a competing store across the street from X's store and, because of unfair business practices, will likely force X out of business. X, in a half-jesting manner, tells Y that if Y were a real friend he would "take care" of Z. As a result, Y breaks into Z's store and destroys Z's merchandise. Given that X's statement was made in a half-jesting and casual manner (and that X had no reason to believe that Y was likely to engage in criminal behavior), it is unlikely that a court would find that X intended to encourage or persuade Y to commit any crime, in which case X can't be guilty of solicitation.

Corporate liability:

☛ **Corporate liability generally:** Remember that most statutes are interpreted so as to allow a conviction of a ***corporation*** in at least some instances, if its ***employee*** commits a crime. So if you're given a fact pattern in which a corporate employee meets the *mens rea* and *actus reus* requirements for a particular crime, and the employee seems to have acted while "on the job," mention the possibility that the corporation might be convicted as well as the employee.

☞ **Two approaches:** Mention the ***two main approaches*** to corporate criminal liability:

[1] the wide-sweeping ***"respondeat superior"*** approach, under which the corporation can be convicted based on the conduct of even a ***low-level employee*** who acts (a) ***within the scope*** of her employment and (b) for the supposed ***benefit*** of the corporation. (And that's true even if the highers-up expressly ***forbade*** the type of conduct in question.)

[2] the Model Penal Code's more-limited ***"high managerial agent"*** approach, under which the employee's act ***won't*** be attributable to the corporation unless some high-level official (one who is fairly regarded as ***setting the corporation's policies)*** has requested or approved the act.

CHAPTER 9
HOMICIDE AND OTHER CRIMES AGAINST THE PERSON

Introductory Note: This chapter examines crimes that may be committed against the person, with a main focus on the various types of homicides. Assault, battery, mayhem, rape, and kidnapping are also discussed. Within the category "homicide," the main one is of course ***murder,*** with the two other most important ones being ***voluntary manslaughter*** and ***involuntary manslaughter.*** Within the category "murder," keep in mind that there are ***multiple mental states,*** any one of which may suffice (e.g., intent to kill; intent to seriously injure; reckless indifference to the value of life; and intent to commit a dangerous felony).

I. HOMICIDE — INTRODUCTION

A. Different grades of homicide: Any unlawful taking of the life of another falls within the generic class "homicide." The two principal kinds of homicide are ***murder*** and ***manslaughter***.

1. Degrees of murder: In many jurisdictions, murder is in turn divided into first-degree and second-degree murder. Generally, first-degree murder is limited to murders committed with "premeditation and deliberation," and to killings committed during the course of certain felonies. See *infra*, p. 266.

2. Two kinds of manslaughter: Similarly, manslaughter is in nearly all jurisdictions divided into ***voluntary*** manslaughter (in most cases, a killing occurring in the "heat of passion") and ***involuntary*** manslaughter (an unintentional killing committed recklessly, grossly negligently, or during commission of an unlawful act.)

3. Other statutory forms of homicide: Additional forms of homicide exist by statute in some states. Many states have created the crime of ***vehicular homicide*** (i.e., an unintentional death caused by the driver of a motor vehicle); this crime is generally defined so as to require a lesser degree of culpability than involuntary manslaughter. Similarly, the Model Penal Code creates the crime of "negligent homicide." See *infra*, p. 278.

II. MURDER

A. Taking of life: Murder, like other forms of homicide, exists only where a life has been taken. Therefore, it is sometimes important to know: (1) whether a particular life has begun; and (2) whether a particular life has

ended prior to the defendant's act.

1. **When life begins:** Everyone would agree that a baby that has been born is a human being, whose killing can give rise to a murder prosecution. But it is not clear whether a life exists ***prior to the moment of birth.***

   a. **Birth process begun:** If the ***birth process*** has ***begun,*** but not yet finished, most courts would probably regard the baby as being alive for purposes of a homicide prosecution.

   b. **Fetus:** But where the birth process has ***not even begun,*** the courts are reluctant to consider the ***fetus*** a human being for homicide purposes. Thus in the well-known case of *Keeler v. Superior Court,* 470 P.2d 617 (Cal. 1970), D learned that his estranged wife was pregnant by another man, accosted her, said "I'm going to stomp it out of you," and shoved his knee into her abdomen. The baby was delivered stillborn, with a severely fractured skull. Medical evidence indicated that at the time of D's attack, the fetus was more than 28 weeks old, and that it was "viable" (i.e., that if it had been born prematurely at that point, it would have had a 75% to 96% chance of survival).

      i. **Holding:** The California Supreme Court held that despite the fetus' viability, it was ***not a "human being"*** as that term was used in the state homicide statute. The court stated that when the legislature passed that statute (in 1850), it did not intend to encompass the crime of feticide within the ambit of homicide. To bring the death of a fetus, even a viable one, within the homicide statute would also, in the court's view, violate due process, in that there would not have been "fair warning of the act which is made punishable as a crime."

      Note: Most states have agreed with California, that the killing of a fetus (even a viable one) should not be considered to fall within the state's general murder statute. But a few states have reached the opposite result, concluding that the general murder statute covers the killing of a viable fetus.

   c. **Changed by statute:** Of course, the state legislature is always free to amend the murder statute to explicitly cover the killing of a viable fetus. Alternatively, the state is free to enact a new crime

called "murder of a fetus," and even to punish this crime as seriously as the state punishes the killing of a born-alive person (though it is unclear whether the state may enact the death penalty for this crime of feticide). At least seventeen states have enacted statutes essentially making it a form of murder to kill an unborn. One of these states is California; after *Keeler, supra,* the California legislature amended its murder statute to include the killing of a fetus (but to exclude, as most such statutes do, an abortion performed with the mother's consent).

i. **Not limited to viable fetus:** Of the 17 states just mentioned, 13 create liability only if the fetus was "viable" at the moment it was killed. However, there are apparently no serious constitutional problems with a state's decision to punish as murder even the killing of a ***non-viable*** fetus.

d. **Fetus born alive:** If the infant is ***born alive,*** the defendant can be guilty of commonlaw murder even though his acts may have taken place ***before the birth.*** Thus if, in the *Keeler* case, the attack by D had taken place when it did, but the baby lived for a few moments outside the womb before dying, D could have been convicted of murder.

2. **When life ends:** One can obviously not murder a person who is already dead. Therefore, it is important to be able to pinpoint the moment at which ***death occurs.*** The problem is particularly likely to occur where a physician ***performs an organ transplant*** from a donor which he believes to be a corpse. If a vital organ is taken, and the patient was not dead at the time of the transplant, the physician could be prosecuted for murder.

a. **Brain death vs. heart death:** The problem is a difficult one because there are conflicting opinions about what physical signs should be sufficient to indicate death. Patients in comas, for instance, frequently continue to have a ***heart beat*** (at least while on a respirator) and breathing activity, even though they no longer produce ***brain waves.*** Is this ***"brain death"*** sufficient? If it is not, the utility of organ transplants may be drastically diminished, since transplants have a significantly greater success rate when they

occur prior to or immediately after the cessation of breathing and heart activity.

B. Elements of murder: The prosecution in a murder case must show the following four elements:

- ☐ ***actus reus*** (conduct by the defendant);
- ☐ ***corpus delicti*** (proof of a death);
- ☐ ***mens rea*** (a culpable mental state);
- ☐ ***proximate cause*** (a causal link between the defendant's act and the death).

Let's review each of these in turn.

1. Actus reus: There must be conduct by the defendant (i.e., an *"actus reus")*, either an affirmative act or an omission where there was a duty to act.

a. Participating in events leading up to assisted suicide not sufficient: One situation in which the issue of *actus reus* comes up is ***assisted suicide.*** Most modern courts have held that providing another with ***the means for that person to kill herself*** does ***not*** constitute a sufficient *actus reus* to sustain a murder charge.

Example: D (the famed "Dr. Death," Dr. Jack Kevorkian) provides the Vs, two terminally ill women, with a poison-delivery machine they can use to kill themselves. (D is acting at the women's request.) Although D provides the mechanisms, helps hook the Vs up to them, and explains what the Vs need to do to make the machines work, the actual act of introducing the deadly poison into each woman's body is under the exclusive control of the woman herself.

Held, D is not guilty of murder. "[W]here a defendant merely is involved in the events leading up to the death, such as providing the means, the proper charge is assisting in a suicide," not murder. *People v. Kevorkian,* 527 N.W.2d 714 (Mich. 1994).

2. *Corpus delicti:* A ***death*** must, of course, be shown to have occurred. But the *corpus delicti* (i.e., the "body of the crime") of murder does not absolutely require that a ***corpse be found.*** Like any aspect of any crime, existence of death may be proved by circumstantial evidence.

Example: D is known to be on bad terms with V, his grandmother, who has cut him out of her will. V's ranchhouse burns down one day, and neither V's corpse nor any bone fragments are found in the rubble. D is convicted of her murder.

Held, conviction affirmed. The fact of V's death was adequately established by numerous items of circumstantial evidence, including the facts that: none of V's friends or associates ever heard from her again, the strained relationship between D and V, and D's actual knowledge of the fire several hours before anyone informed him of it. *State v. Pyle,* 532 P.2d 1309 (Kan. 1975).

3. ***Mens rea:*** There must be an accompanying ***mental state.*** This mental state is often called ***"malice aforethought."***

   a. **"Malice aforethought" is term of art:** However, for the defendant to have "malice aforethought," it is not necessary either that he have "malice" towards his victim, in the usual sense of that word, or that he have thought about the killing before committing it. Instead, the phrase is a term of art, and can be satisfied by a number of quite distinct mental states. These states, discussed in sequence below, include (depending on the jurisdiction): (1) intent to kill; (2) intent to commit grievous bodily injury; (3) reckless indifference to the value of human life; and (4) intent to commit any of certain non-homicide felonies.

4. **Proximate cause:** There must also be a ***causal relationship*** between the defendant's act and the victim's death. The defendant's conduct must be both the "cause in fact" of the death and also its "proximate" cause. The existence of the necessary causal relationship is determined in substantially the same way in murder cases as in other sorts of criminal cases; see the chapter on Causation, *supra,* p. 55.

   a. **Year-and-a-day rule:** One special rule of proximate cause that applies only in murder cases is the requirement, still imposed in many jurisdictions, that the victim die within ***a year and a day*** of the defendant's conduct. This rule dates back to a time when the quality of medical care was so poor and the usual life expectancy so short, that if the victim lived more than a year and a day from the attack, it could not be said with reasonable certainty that intervening causes (e.g., some unrelated disease) were not more to blame for the death than the defendant. Although the rule is often condemned as being obsolete, it continues on the books of most states. See L, p. 660.

C. **Intent-to-kill murder:** The most common state of mind that will suffice for murder is the ***intent to kill.*** The requisite intent exists, of

course, when one has the ***desire*** to bring about the death of another.

1. **Substantial certainty of death:** But the requisite intent also probably exists where one does not actively desire to bring about another's death, but knows that death is ***substantially certain*** to occur.

Example: D, who is in financial straits, owns a famous painting. He has a fake version of the painting made up, and he sends it as cargo on a commercial plane. In order to collect on his insurance, he puts a bomb aboard the plane and detonates it, killing all passengers. Even if D can show that he did not desire to kill any of the passengers, he will be guilty of their murder; he knew that, if his plan was successful, they were all substantially certain to die.

2. **Ill will not needed:** It follows from the above example that the requisite intent to kill may exist even where D ***does not bear any ill will*** towards his victim. For another illustration, consider the case of ***mercy killing,*** set out in the next example.

Example: D's beloved wife, V, is dying of incurable and very painful bone cancer. V begs D to kill her. Soon thereafter, as V is sleeping, D smothers her with a pillow. This is murder. The fact that D acted from humanitarian motives will not make any difference. (But if D had merely given V the means to kill herself, most states would say that D had committed only the lesser crime of assisted suicide, not murder. See *People v. Kevorkian, supra*, p. 249.)

3. **Intent proved by circumstantial evidence:** Intent to kill, like any other element of a crime, may be proved by ***circumstantial evidence.*** Such evidence is particularly useful in proving intent, since it is only seldom that there will be direct evidence (e.g., a statement by D that "I intended to kill him") on this issue.

   a. **"Deadly weapon" doctrine:** One kind of circumstantial evidence of intent to kill is embodied in the ***"deadly weapon"*** doctrine. By this doctrine, if a death occurs as a result of a deadly weapon used by the defendant, the jury is ***permitted to infer*** that the defendant intended to bring about the death. The jury is ***not required*** to make this inference, and the defendant is of course free to rebut it (e.g., by testifying that he intended to shoot over the victim's head in order to frighten him). But the point is that use of a deadly weapon may, even in the absence of other evidence, be sufficient to allow the jury to find the requisite intent to kill. See L, pp. 661-63.

      i. **What is "deadly weapon":** A "deadly weapon" for this

purpose is presumably the same kind of weapon that would constitute "deadly force" for purposes of the rules on self-defense *(supra,* p. 115). That is, force which is ***likely to cause*** death or serious bodily harm is deadly. On the other hand, an instrument that usually does not cause such death or serious harm (e.g., one's fists) will not generally suffice.

4. **Voluntary manslaughter:** Not all cases involving a death brought about by an intent to kill will be murder. For instance, most cases of ***voluntary manslaughter*** (generally, a killing occurring in a "heat of passion"; see *infra,* p. 271) will be ones in which the defendant intended to kill. Similarly, most cases of ***self-defense*** are intentional killings. Thus in a prosecution for intent-to-kill murder, the mental state is an intent to kill not accompanied by other redeeming or mitigating mental or external factors.

5. **Degrees of intent-to-kill murder:** In most states intent-to-kill murder is divided into two categories, first-degree and second-degree. The former usually consists of murders committed with deliberation and premeditation. Degrees of murder are discussed further *infra,* p. 266.

D. Intent to do serious bodily injury: In most states, the *mens rea* requirement for murder is satisfied if the defendant intended not to kill, but to do ***serious bodily injury*** to the victim. The typical application of this principle is a case in which the defendant savagely beats the victim, with his intent limited to doing so, and the victim dies from his injuries. The sufficiency of this intent has been approved, on the grounds that "[s]uch conduct may appear at least as dangerous to life as that required for depraved-heart murder" (discussed *infra,* p. 252). L, p. 665.

1. **Knowledge that injury is highly likely:** Just as one may be deemed to have the intent to kill by virtue of one's knowledge that death is substantially certain to ensue (see *supra,* p. 250), so one may be deemed to have had the intent to commit serious bodily injury if one knew that such injury was ***highly likely*** to occur.

   Example: D is a jealous woman who wishes to break up a relationship between her lover and another woman, Mrs. Booth. D pours gasoline through the letter-slot of Mrs. Booth's front door, and then inserts a lighted newspaper. Mrs. Booth escapes, but two of her children are killed in the blaze. D is charged with murder, and testifies that her motive was merely to "frighten" Mrs. Booth.

Held (by the House of Lords), so long as D knew that serious harm to the inhabitants of the house was highly likely, she can be held to have intended that harm. Consequently, she can be convicted of "intent to cause serious bodily harm" murder. *Hyam v. Director of Public Prosecutions,* [1975] A.C. 55 (Eng. 1974).

2. **Standard is generally subjective:** Suppose the defendant, perhaps because he is stupid, does not realize that serious bodily harm is highly likely to ensue. Can he be liable for murder if a ***reasonable person*** would have realized the extent of the danger? Most jurisdictions would probably answer "no," that it must be shown that the defendant himself realized the high likelihood of serious harm.

3. **What constitutes "serious bodily injury":** Indeed, an intent to injure is not necessarily an intent to commit serious bodily harm. Some courts hold that only conduct which is likely to be ***"life threatening"*** will suffice.

4. **Model Penal Code rejects:** The Model Penal Code does ***not*** recognize an intent to do serious bodily harm as sufficing for murder. The Code draftsmen suggest that the standards of "recklessness" and "extreme indifference to the value of human life." are adequate to handle such cases. See Comment 5 to M.P.C. § 210.2. Thus under the Code, one commits murder if one acts "recklessly under circumstances manifesting extreme indifference to the value of human life," and manslaughter if one acts recklessly, but without such "extreme indifference." See M.P.C. § 210.2(1)(b) and 210.3(1)(a).

E. **Reckless indifference to value of human life ("depraved heart"):** If the defendant knows that death is "substantially certain" to result from his conduct, most jurisdictions, as noted, will treat him as having "intended" that result. But suppose the defendant realizes merely that there is a "very high" risk of death, i.e., a risk short of substantial certainty. Nearly all courts are nonetheless willing to hold the defendant liable for murder in this situation. As the idea is put in some statutes, the defendant, by his reckless conduct, has manifested a ***"depraved heart."*** Or, as the Model Penal Code puts it, the defendant is guilty of murder if he has acted ***"recklessly*** under circumstances manifesting ***extreme indifference to the value of human life"*** M.P.C. §201.2(1)(b).

Example: D drives his Nissan Pathfinder 70 mph northbound in a 35 mph zone. He crosses into the opposing (southbound) traffic lane in order to pass a driver, which requires the southbound drivers to move out of his way. Continuing at 70 mph, he

approaches an intersection where a Toyota is crossing perpendicular to D. D sees the Toyota, and sees that the traffic light is red against D, but doesn't try to stop, because he is going too fast. D's Pathfinder hits the Toyota, causing the Toyota to hit a third car and killing a passenger in the Toyota. D does not stop to check on the victims, but continues to drive well over the speed limit, with smoke or steam pouring from the Pathfinder's front end, until he is finally arrested. After his arrest, the police ask him whether he knew that someone was dead after the crash, and he answers, "Yeah man. I cut them in half, dude. It's a wonder I survived." D is charged with the California version of depraved heart murder, which requires "implied malice." "Implied malice" is defined as acting with a "wanton disregard of the high probability of death," where the defendant had a subjective awareness of that risk. The jury convicts. D argues on appeal that the jury's conclusion that he had the requisite implied malice is against the weight of the evidence.

Held, for the prosecution. The question of whether D acted with the required "implied malice" is to be decided "in light of all the circumstances." Here, the fact that D was not intoxicated (a factor present in various other California cases finding the required implied malice), and the fact that D was not fleeing at high speed from pursuing officers (also found in some California cases) makes no difference — under all the circumstances here, the jury's verdict was reasonable. *People v. Moore,* 187 Cal. App. 4th 937 (Cal. App. 2010).

1. **Illustrations:** Here are some additional illustrations of the necessary recklessness and depravity required for reckless-indifference murder:

   a. D, under arrest, is riding in the back seat of a police vehicle. He stands up, lunges across the front seat, grabs the steering wheel, and makes the car swerve across the center of the highway. The car smashes into an oncoming vehicle and the driver of D's vehicle is killed. D is guilty of murder, even though he did not desire to bring about the driver's death, since his conduct manifested a "depraved mind, regardless of human life." *Gibson v. State,* 476 P.2d 362 (Ok. Crim. App. 1970).

   b. D, a 17-year-old boy, plays a game of "Russian Roulette" with V, age 13. D places one bullet in a five-chamber pistol, spins the chamber, and pulls the trigger three times while the gun is pointed at V. It goes off the third time, killing V. D is guilty of murder, based upon his "wicked disposition," even though he may not have intended to kill V. *Commonwealth v. Malone,* 47 A.2d 445 (Pa. 1946).

   c. D shoots into a passing passenger train, without an intent to kill any particular person, and his bullet happens to strike and kill V. D is guilty of "depraved-heart" murder. See L, p. 668.

d. D, in order to guard the marijuana plants he is growing, buys a pit bull, which he knows to have been bred and trained to be a fighting dog. D keeps the dog chained but not fenced. V, a 2 1/2-year-old neighbor, wanders into the marijuana patch, and is attacked and killed by the dog. There is evidence that D knew that the dog was dangerous, knew that V lived next door, and knew that anyone who wandered into the marijuana plants could be attacked by the dog. A jury could properly find that D committed murder of the "wanton disregard for life" variety. *Berry v. Superior Court*, 256 Cal.Reptr. 344 (Cal.Ct.App. 1989).

e. D, a bank robber, enters the lobby of a bank, which as D knows contains lots of marble and stone. D fires an automatic weapon into the ceiling, hoping to scare the patrons and employees of the bank so they won't resist. A bullet ricochets, killing V, a patron. D would probably be guilty of "reckless indifference" murder, since the firing of an automatic weapon in these circumstances — even when the shots are directed at the ceiling — is obviously extremely dangerous.

2. **Great recklessness required:** For depraved-heart murder, the risk of death or serious bodily injury must be so great that D can be said to have behaved with ***great recklessness.*** If D is merely ***"negligent"*** — even "grossly negligent" — in imposing risk on others, that ***won't*** suffice (for depraved-heart murder or any other form of murder except, possibly, felony-murder).

Example: D goes deer hunting by himself, in an area frequented by other hunters. He sees a flash of orange behind a bush, and quickly fires without checking to see if it's really a deer. The movement turns out to be another hunter, who is killed.

D is not guilty of depraved-heart murder. While his behavior may have been negligent, it probably does not rise to the level of extreme recklessness.

3. **Omission to act:** Recall (*supra*, p. 19) that there are some exceptions to the general rule that D has ***no affirmative duty to act.*** In a situation falling within one of these exceptions, and leading to V's death, there will be an issue of whether D's failure to act can result in his conviction for depraved-heart murder. While this is logically very possible, it's an ***unlikely*** result, at least where D is a ***non-relative*** of V, and has a statutory rather than deep moral duty to act (e.g., a

physician or teacher with a duty to notify authorities of cases of suspected child abuse).

Example: D is a pediatrician who notices that V, a two-year-old, has bruises that D suspects may have been caused by child abuse on the part of V's mother's boyfriend. D has a statutory duty to report cases of possible abuse to child-welfare authorities, but decides not to report the case to the authorities because he thinks V might be taken from the mother and would fare worse in foster care. Shortly thereafter, V is beaten to death by the boyfriend. D is prosecuted for murder.

D is unlikely to be convicted. The only possible theory for conviction is depraved-heart murder. But that requires extreme recklessness. D is unlikely to be found to have acted with extreme recklessness, even though his violation of the statute almost certainly consists of (in tort terms) negligence per se.

4. Awareness of risk: Does the requisite "reckless indifference to the value of human life" or "depravity" exist where the defendant is ***not aware of the risk*** involved in his conduct?

a. Courts split: Courts are ***split*** on this issue.

i. Objective standard: Some courts have indicated that so long as a ***"reasonable* man"** would have recognized the extreme danger inherent in the conduct, the defendant is guilty of murder even though, because of his stupidity, he was ***not aware*** of the risk. This is an ***"objective"*** standard.

ii. Subjective standard: But most courts impose liability only where D ***actually realizes*** the danger, a ***"subjective"*** standard. See Dressler Csbk, p. 302. Thus the Model Penal Code, by defining "recklessly" to cover only situations where the defendant "consciously disregards a substantial and unjustifiable risk," requires actual awareness of the risk. M.P.C. § 2.02(2)(c).

(1) California view: ***California*** applies this subjective approach: a defendant will be found to have acted with "wanton disregard of the high probability of death" (California's formulation of the depraved-heart standard) only if the defendant was subjectively aware of that risk. Cf. *People v. Moore, supra,* p. 252.

(2) Circumstantial evidence of awareness: In a state following the subjective standard, it might sound difficult

for the prosecution to satisfy its burden of proving, beyond a reasonable doubt, that the defendant was aware of the very high probability of death. But the task is often not in fact very difficult for the prosecution. That's because the defendant's subjective awareness of the great danger, like any other element of a crime, can be proved by ***circumstantial evidence.*** Thus if the fact pattern that is apparent to the defendant is one that would ***cause almost any ordinary person to be aware of the risk,*** the jury is entitled to ***infer*** that the defendant, too, "must have been aware" of the risk.

Example: Recall *People v. Moore*, *supra*, p. 252, where D drove 35 mph over the speed limit, crossed into the opposing lane, caused oncoming drivers to swerve to avoid him, and then knowingly ran a red light because he was traveling too fast to stop. The appeals court acknowledged that under California law, D was required to be "subjectively aware" of the risk. But the court found that the jury properly found the required awareness: "[W]hether [D] was subjectively aware of the risk is best answered by the question: ***how could he not be?*** It takes no leap of logic for the jury to conclude that because ***anyone*** would be aware of the risk, [D] was aware of the risk."

iii. Intoxication: If the defendant fails to appreciate the risk of his conduct because he is ***intoxicated,*** even courts that would ordinarily impose a subjective standard are likely to ***allow a conviction.*** "The person who unconsciously creates a risk because he is voluntarily drunk is perhaps morally worse than one who does so because he is sober but mentally deficient." L, p. 670. Thus M.P.C. § 2.08(2) provides that where a defendant's unawareness of a risk is due to his voluntary intoxication, the unawareness is irrelevant. See *supra*, p. 93, for a further discussion of the relevance of intoxication to *mens rea*.

b. Awareness of risk of serious bodily injury: Suppose that, in a state following the majority rule that D must be subjectively aware of an actual risk, D is aware of the risk of serious ***bodily harm,*** but *not* aware of the risk of ***death.*** Is that mental state enough for depraved-heart murder? Most states would probably agree with the California Supreme Court, which in the case set forth in the following Example answered ***"no,"*** and required a subjective

awareness of the risk of ***death,*** not just of serious injury.

Example: D and her husband own two Presa Canario fighting dogs. One of the dogs, Bane, weighs 150 pounds. D has been warned by a veterinarian that these are huge and aggressive warrior dogs that have never been trained or disciplined, and would be a “liability in any household.” D keeps the dog in her San Francisco apartment building. There occur 30 incidents in which the two dogs get out of control or threaten humans. When neighbors complain, D responds callously if at all (e.g.: Neighbor: “Your dog just bit me.” D: “How interesting.”) One day, Bane, unmuzzled, sees V come out of her apartment across the hall, and savagely attacks V, causing 77 different injuries from head to toe. V bleeds to death on the spot. D is convicted of depraved-heart murder (defined under California law as murder “with implied malice,” where the circumstances show “an abandoned and malignant heart.”) The issue on appeal is whether the prosecution was required to prove that D acted with a conscious disregard of the danger to human life, or whether it’s enough that D consciously disregarded the risk of “serious bodily injury.”

Held (on this point) for D. The mental state for implied-malice murder in California requires an awareness of the risk that the defendant’s conduct will result in the *death* of another; an awareness of the risk of serious bodily *injury* to another is not enough. (On the other hand, the prosecution was *not* required to prove that D was aware of a *“high degree of probability”* that death would result from D’s conduct; it was enough that D was subjectively aware of *some* probability of death, as long as the conduct was, viewed objectively, conduct that posed a high probability of causing death.) *People v. Knoller,* 158 P.3d 731 (Cal. Sup. 2007).

III. FELONY-MURDER

A. Felony-murder generally: The various states of mind discussed so far are frequently difficult to prove, since they can usually be shown only by circumstantial evidence. Partly for this reason, courts and legislatures have long recognized various forms of a doctrine called the ***felony-murder rule,*** by which the ***intent to commit a felony*** (a felony unrelated to homicide) is sufficient to meet the *mens rea* requirement for murder. In its broadest form, the felony-murder rule provides that ***if the defendant, while he is in the process of committing a felony, kills another (even accidentally), the killing is murder.***

B. Dangerous vs. non-dangerous felonies: Every state today has numerous statutory felonies which were unknown to the common law. Many of these statutory felonies pose virtually no unusual threat of death or bodily harm to anyone. It would therefore be unfair and illogical to hold that one who commits an accidental killing during the commission of such a felony is automatically guilty of murder.

1. Illustration: For instance, suppose that it is a felony knowingly to file

a false income tax return. If the defendant prepares such a return, and while driving to the post office to file it accidentally (and non-negligently) runs over a pedestrian and kills him, there is no good reason to make the defendant automatically liable for murder. The fact that he was engaged in committing a felony when the accident occurred did not make the accident any more likely to happen than if he had been using his car for lawful purposes.

2. **Now limited to dangerous felonies:** Therefore, nearly all courts and legislatures now restrict application of the felony-murder doctrine to ***certain felonies.*** There are three related schemes for identifying those felonies to which the doctrine should apply: (1) those felonies which are ***inherently dangerous*** to life or health; (2) those felonies which were felonies at ***common law*** (i.e., rape, sodomy, robbery, burglary, arson, mayhem and larceny); and (3) those felonies which are ***"malum in se"*** rather than ***"malum prohibitum."*** See L, pp. 672-73.

   a. **"Inherently dangerous" is preferred test:** Most courts have used the ***"inherently dangerous"*** test. This has the advantage of making the felony-murder doctrine available for such crimes as kidnapping, which would not be included within the common-law-crimes test.

      i. **Judged in abstract vs. judged on particular facts:** Courts have been sharply in dispute, however, about how this "inherently dangerous" test should be applied: should the "inherent dangerousness" of the felony be judged in the ***abstract*** (i.e., whether, say, larceny is in general a dangerous crime), or should the felony be evaluated in each case ***based on the facts of that case*** (so that if the particular larceny in question were committed in a patently dangerous manner, felony-murder could be applied even though most other larcenies might not pose such danger)? Courts are split on the issue.

         (1) **Judged in abstract:** The courts that have tested the felony in the ***abstract*** have apparently done so principally out of their dislike of the felony-murder rule, and their reluctance to expand its application.

Example: D, a chiropractor, treats V, an 8-year-old girl with fast-growing cancer

of the eye. D dissuades V's parents from having the eye removed, saying that he can cure her without surgery by "building up her resistance." The treatment, for which the parents pay $700, lasts six months, but V dies at that time. D is charged with murder, and convicted on a felony-murder theory.

Held, D's conviction reversed. The only independent felony committed by D was grand larceny. Since the felony-murder doctrine applies only to "inherently dangerous" felonies, the status of grand larceny must be determined. This must be measured by looking to "the elements of the felony in the abstract, not the particular 'facts' of the case." Thus the mere fact that, in this case, D's conduct may have posed a danger to life, will not suffice for application of the felony-murder rule. Otherwise, any time a defendant endangered life in the course of any felony at all, he would automatically be guilty of murder, and the felony-murder rule would be widened "beyond calculation." Since grand larceny is not normally dangerous to life, the felony-murder rule does not apply here. (However, on these facts D might be found to have had a depraved indifference to V's life, and could therefore be guilty of "depraved-heart" murder.) *People v. Phillips,* 414 P.2d 353 (Cal. 1966).

(2) Examine particular facts: Other courts, as noted, are willing to take the ***facts of the particular case*** into account in determining the dangerousness of the felony. If what is in the abstract not necessarily a dangerous felony is performed in an obviously dangerous manner, these courts would apply the felony-murder rule.

Example: D is the mother of a less-than-two-month-old infant, V. D goes on a crack binge for two or three days, during which she does not feed or care for V, who dies from dehydration. The state's child-neglect statute makes it a felony to permit a child under the age of 18 to be a "habitual sufferer for want of food and proper care." D is charged with felony-murder and convicted. She argues on appeal that the inherent dangerousness of child neglect should be viewed in the abstract, and that because child neglect does not always endanger human life, it should not be considered an inherently dangerous felony for felony-murder purposes.

Held, for the prosecution. "We believe that the better approach is for the trier of fact to consider the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed." For example, the crime of escape from a penal facility is not, in the abstract, inherently dangerous to human life — but escape may be committed or attempted in a manner in which human life is put in danger, and when this occurs the felony-murder rule should apply. The same is true of child neglect. *People v. Stewart,* 663 A.2d 912 (R.I. 1995).

ii. Policy reasons: The "examine particular facts" camp (represented by *Stewart, supra),* probably has the better logical argument. As Lafave points out, "If the purpose of the

felony-murder doctrine is to hold felons accountable for unintended deaths caused by their dangerous conduct, then it would seem to make little difference whether the felony committed was dangerous by its very nature or merely dangerous as committed in the particular case." L, § 7.5, p. 673. The contrary "judge in the abstract" view is best understood as an arbitrary way to limit the scope of the highly-artificial, and perhaps undesirable, felony-murder doctrine. *Id.*

C. Causal relationship: There must be a ***causal relationship*** between the felony and the killing. That is, it is not enough that the death merely occurs at the same time the felony is being committed. In some way or other, the felony must give rise to the killing. Furthermore, something more than a mere "but for" relationship between felony and killing must exist.

1. Illustration: For instance, suppose that D abducts V, brings her back to his house, and is in the process of raping her when lightning strikes the house, and V is killed in the ensuing blaze. It is unlikely that the felony-murder rule would be applied, although V would not have died except for the kidnapping and rape (she would not have been in D's house). A court would almost certainly conclude that the manner of death was so bizarre and unexpected that it is unfair to make D criminally responsible for it.

2. "Natural and probable" consequences: The requirement of proximate cause between the felony and the death is usually expressed by saying that D is only liable where the death is the ***"natural and probable consequence"*** of D's felonious conduct.

a. Broad reading: However, "natural and probable consequence" is given a quite ***broad*** (easy-to-satisfy) reading in felony-murder cases. For instance, if D carries a gun that ***accidentally discharges*** and kills the person against whom the underlying crime (e.g., a robbery) is directed, most courts would say that the death *was* the "natural and probable consequence" of D's conduct even though that death was completely accidental and undesired (and not very likely viewed from the starting-point of the underlying felony).

b. Substitute for proximate cause: So you should think of a

consequence as being the “natural and probable consequence” of D’s conduct as long as that conduct brought about the consequence without the intervention of any very ***bizarre additional events.***

3. **Arson cases:** Proximate cause questions frequently arise where the defendant’s underlying felony is ***arson.*** If a person is inside the building at the time the fire is started, and dies, the requisite causal relationship between the arson and the death is almost certain to be found; see, e.g., *Regina v. Serne,* 16 Cox Crim. Cas. 311 (Eng. 1887).

   a. **Firefighters:** Similarly, if a ***firefighter is killed*** while attempting to fight the blaze, the arsonist will generally be guilty of felony-murder.

   b. **Unlikely event:** But if a ***passer-by*** decided to run into the building to ***loot it,*** it is likely that the arsonist would not be liable under the felony-murder rule for such a person’s death. Such an act is probably sufficiently “abnormal” that a court would find it unfair to hold the defendant liable for murder. One way this might be expressed is by holding that a looter is not within the “class” of persons endangered by fires (a class which perhaps includes occupants, immediate neighbors and persons who fight the blaze).

4. **Robberies:** Proximate cause questions also frequently arise in the case of ***robberies.***

   a. **Robber shoots victim:** If the robber ***shoots his hold-up victim,*** even accidentally, this will obviously be a sufficient causal link for application of the felony-murder doctrine. Similarly, if the robber merely intends to ***temporarily disable*** his victim (e.g., he hits him on the head to stun him), and death accidentally results, the felony-murder rule will apply. Even in the absence of any physical impact at all, the rule might apply; see, e.g., *People v. Stamp, supra,* p. 63, in which V suffered a fatal heart attack as a result of a robbery of his store, and the robbers’ felony-murder convictions were upheld.

   b. **Robber kills bystander:** Similarly, if a robber accidentally ***kills a bystander,*** the felony-murder rule will apply. This might occur, for instance, if the robbers were attempting a high-speed escape and negligently (or perhaps even non-negligently) ran over a pedestrian.

c. Hold-up victim or police officer kills bystander: It may happen that the ***robbery victim,*** or a ***police officer,*** either in an attempt to protect himself, or to kill the robber, accidentally ***kills a bystander.*** Here, it is not so clear whether the robber will be liable for felony-murder.

- **i. California rejects liability:** California, with its hostility to the felony-murder doctrine, noted earlier, would apparently not allow felony-murder in this situation (or in any situation where the fatal shot comes from the gun of a ***person other than the robber).*** See *People v. Washington,* 402 P.2d 130 (Cal. 1965) (dictum).

- **ii. Robber initiates gun battle:** In other states, the result might depend on whether the robber ***fired the first shot.*** If he did so, then it would not seem unfair to hold him liable for a bystander's death from a subsequent shot fired by the robbery victim, or by police; one who starts a gun battle should certainly anticipate the likelihood that others will fire back, and that they may hit the wrong target.

d. One felon kills another: One robber may accidentally ***kill another.*** In this situation, the former has sometimes been held liable for felony-murder. But other courts have felt that the purpose of the felony-murder rule is to protect ***innocent persons,*** and that it should not be extended to cover the death of a co-felon.

e. Victim, police officer or other non-felon kills one robber: Where ***one robber*** is killed by a ***non-felon*** — such as by the robbery ***victim*** or by ***police officers*** attempting to make an arrest — this presents the ***weakest case*** for holding the other robbers liable for felony-murder. Courts disagree on whether to apply felony-murder in this situation.

- **i. Doctrine does not apply (agency theory):** The ***majority*** approach is that the felony-murder doctrine ***does not apply*** in this "death directly caused by an innocent non-felon" scenario. Dressler Hnbk, § 31.06[C][4][b]. Usually, courts reaching this conclusion do so by adopting an ***"agency"*** analysis. Under this analysis, the only way in a felony-murder scenario that *A*

could be legally responsible for a death directly caused by *B* is if *A* could be said to have been B's ***agent or accomplice*** in the ***underlying felony,*** so that *A* could also be said to be B's agent in causing the killing. Yet by definition here B, the innocent person, is *not A's principal* in any kind of agency relationship. As one case put it, "How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person?" *Commonwealth v. Redline,* 137 A.2d 472 (Pa. 1958).

(1) Statutory interpretation: Courts sometimes reach this conclusion — no felony-murder liability where the direct cause of the co-felon's death is a victim or police officer — on the grounds of ***statutory interpretation*** rather than common-law reasoning.

Example: D is one of four people who break into a house. The police are called, and the men flee. D is arrested, and placed in a police car. While D is in the car, X, one of the other burglars, is then arrested and placed face down on the ground. However, X turns around and shoots at the arresting officer, who responds by fatally shooting X. D is charged with felony-murder for X's death.

Held, D cannot be guilty of felony-murder. "[T]o impute the act of killing to [D] when the act was the lawful and courageous one of a law enforcement officer acting in the line of his duties is contrary to the strict construction we are required to give criminal statutes." (But a dissent argues that D "set in motion in acts which ... could have very easily resulted in the death of a law enforcement officer, and in my opinion this is exactly the type of case the legislature had in mind when it adopted the felony-murder rule.") *State v. Soph-ophone,* 19 P.3d 70 (Kan. 2001).

ii. Doctrine does apply (proximate-causation theory): The minority of courts that hold that felony-murder *can* apply to this death-caused-by-non-felon scenario typically apply what might be thought of as a ***proximate-causation*** approach. The idea is that if the defendant — by committing the underlying felony — can be said to have proximately caused the homicidal act by the innocent police officer or victim, this proximate causation, when coupled with the defendant's felonious state of mind, is all that should be required. The dissent in *Sophophone, supra*, by arguing that D had ***set in motion dangerous events*** that could easily have resulted in the

death of a police officer, was in effect applying the proximate-cause theory.

f. Co-felon accidentally kills self: Suppose that one co-felon accidentally ***kills himself*** during commission of the felony. May the other felon be convicted of felony-murder? In many situations (e.g., a terrorist bombing), the accidental death of a co-felon is not extraordinary or unforeseeable, any more than the death of an innocent bystander is. Thus a good case can be made for holding the surviving co-felons liable.

i. **Not applicable to co-felon:** But several states have held the felony-murder doctrine inapplicable where the death is that of one of the ***participants in the felony,*** and that this logic should extend to the "co-felon kills himself" scenario. Thus in *State v. Williams*, 254 So.2d 548 (App. Fla. 1971), one arson-conspirator was held not liable for the death of his colleague, even though the death occurred while they were trying to set the fire. The court reasoned that the felony-murder doctrine is "primarily designed to protect the ***innocent public."***

g. "Depraved heart" theory as alternative: Keep in mind that even where the felonymurder rule is held not to apply, the robber may be liable for a shooting by the victim or police based on a finding that the robber showed a "depraved heart," "reckless indifference to the value of human life," etc. This might be the case, for instance, if a robber ***initiated or provoked a gun-battle,*** even though he did not fire what turned out to be the fatal shot.

i. ***Taylor* case:** Thus in *Taylor v. Superior Court,* 477 P.2d 131 (Cal. 1970), D1 and V robbed a liquor store owned by X and Y (a husband and wife) while D2 waited in a getaway car. D pointed a gun at X, and made numerous threats to "blow his head off" if he didn't follow orders. Y used a hidden gun to kill V, and D2 (with D1) was charged with V's murder. The California Supreme Court first held that neither D could be liable on a felony-murder theory, since in California felonymurder applies only where the killing is in fact committed by one of the felons, not by a crime victim or the

police. (See *People v. Washington, supra*, p. 259.) However, the court then held that D1's conduct, not only the pointing of the gun but also the threats of execution, might be found to constitute "conscious disregard for life." Since these acts provoked the gun-battle, D1 could be liable for murder, even though he did not fire the first shot, or any shot. Consequently, D2 could be liable as an accomplice to murder.

ii. Dissent: A dissent in *Taylor* objected that it was illogical to distinguish between a robber who "merely" points a gun at his victim (in which case there would not necessarily be "conscious disregard for life" or provocation of a gun-battle) and a robber who points a gun, and makes an explicit threat to use it. To hold the latter liable for murder but not the former, the dissent said, is not a sensible punishment scheme.

D. Accomplice liability of co-felons: As many of the above cases show, robberies and other dangerous felonies are often committed by two or more felons working together. If one of these commits a killing of, say, a robbery victim, he himself will of course be guilty of felony-murder. But will the ***other co-felons*** also be guilty of felony-murder?

1. "Natural and probable" results: The answer is ***"yes," all*** the co-felons will be liable for a killing committed by one of them, if the killing satisfies two requirements:

[1] it was committed ***in furtherance of the felony;*** *and*

[2] it can fairly be viewed as a ***"natural and probable"*** consequence of the felony (see *supra,* p. 258).

These two requirements are dictated not by the felony-murder doctrine itself, but by the rules on ***accomplice liability,*** discussed *supra,* p. 223. We'll divide our discussion into two scenarios: the killing was intentional; and the killing was accidental.

a. Intentional killing: If the killing by one co-felon is an ***intentional act that the others co-felons did not expect or encourage,*** the case for holding the others liable is often somewhat weaker than in the accidental-killing case. But the co-felons will probably still be liable under accomplice principles *as long as* the killing was committed ***"in furtherance" of the felony*** and isn't wholly bizarre.

Example: D1 and D2, brothers, help their father Gary escape from prison, where he is

serving time on a murder conviction. D1 and D2 supply weapons and a getaway car to Gary, knowing of his willingness to use lethal force to escape. They help him lock up the guards, and flee with him into the desert. All three then flag down a car carrying a family of four; while D1 and D2 are getting water some distance away, Gary murders all four.

Held, D1 and D2 may be convicted of felony-murder. (In fact, they may be sentenced to *death,* without violating the Eighth Amendment's ban on "cruel and unusual" punishment. See *infra,* p. 267.) *Tison v. Arizona,* 107 S.Ct. 1676 (1987). (However, the result in *Tison* seems to have stemmed in part from the fact that D1 and D2 *knew* of their father's willingness to kill to escape. Thus D1 and D2 may *themselves* have been "recklessly indifferent to the value of human life," so that they could perhaps have been convicted of murder even without use of the felony-murder doctrine.)

i. **Not in "furtherance" of felony:** But if the other co-felons can show that the intentional killing was ***not*** committed for the purpose of furthering the felony, they may be able to escape accomplice liability. For instance, if the actual killer killed a robbery victim solely because of a ***prior grudge*** against him, the other robbers would probably ***not*** be liable for murder.

b. **Accidental killing:** What happens if one co-felon ***accidentally*** kills someone during the felony; is the other co-felon guilty? The answer will usually be **yes,** the non-killer (call her D1) is ***guilty*** of murder based on the accidental killing of V by another felon (call her D2) during the course of the felony they're committing together, as long as the accident meets the two requirements mentioned above (i.e., it occurred ***"in furtherance of the felony"*** and it can fairly be viewed as a ***"natural and probable"*** result of the felony).

i. **Express prior agreement doesn't matter:** That's true even if the way the accidental killing comes about is very much ***against the express prior agreement*** between D1 and D2.

Example: Bob wants to rob a bank. He asks Jill to serve as the driver of the getaway car, in return for 10% of the profits. Jill agrees, but says, "You know I'm a pacifist, so you have to promise me that you won't hurt anyone." Bob agrees, but brings a small pistol on the robbery, which he assures Jill he will never use. While Jill waits in a getaway car, Bob goes inside, pulls the gun, and tells V, a cashier, to hand over the money. Bob accidentally drops the gun, which when it hits the floor discharges, killing V. Can Jill be convicted of murder in a jurisdiction that follows common-law principles on all matters?

Yes. Jill is clearly an accomplice to the robbery (she aided and abetted its commission). So she, too, is substantively liable for robbery, since an accomplice is

liable for the substantive crime being aided (see *supra*, p. 214). Since V's death was proximately caused by the robbery, the robber(s) are automatically guilty of murder under the felony-murder doctrine whether or not the death was a reasonably foreseeable consequence of their initial decision to rob, as long as the gun-discharge is viewed as a "natural and probable result" of an armed robbery (which it probably would be). This means that even if Jill had no reason to foresee that Bob would disobey their agreement about using the gun, she's guilty of felony-murder.

E. "In the commission of" a felony: The felony-murder doctrine applies only to killings which occur ***"in the commission of"*** a felony. Therefore, it is important to have a way of determining the beginning and ending-point of a felony.

1. Mere coincidence not enough: First, keep in mind that this is not merely a question of whether the killing occurs at the same time and in the same place as the felony. There must be a ***causal relationship*** between felony and killing. See *supra*, p. 258.

2. Escape as part of felony: If the killing occurs while the felons are attempting to ***escape,*** it will probably be held to have occurred "in the commission of" the felony, at least if it occurred reasonably close, both in ***time and place,*** to the felony itself.

a. "Immediate flight": Thus the New York felony-murder statute explicitly applies to a killing committed while the felon is in ***"immediate flight"*** from the scene of the crime.

b. Possession of "booty": Where the defendant is attempting to escape with ***"booty"*** (e.g., proceeds of a robbery, or the ransom from a kidnapping), the court is likely to take a more extended view of what constitutes the felony itself. The theory behind this is that the robber's or kidnapper's object is not fulfilled until he gets the booty to a safe place, and anything before that is still part of the crime sequence.

c. V dies while trying to escape peril: Suppose V has been confined by D (while D commits, say, robbery or burglary), and dies while trying to ***escape the confinement.*** The death will generally be found to have occurred during the "commission" of the felony, even if the death occurs significantly after D completed the crime.

Example: D breaks into V's house, ties V up in a chair, and robs V's safe. After D returns home with the loot, V suffers a fatal heart attack while trying to remove his

bonds. This will be felony-murder, because a court will conclude that the death occurred "during the commission of" the robbery.

3. **Killing followed by a felony:** It may sometimes happen that the killing occurs ***before*** the accompanying felony. If the defendant has planned to commit the felony all along, and the killing happens during preparations for the felony, this will probably be felony-murder. For instance, if D intends to rape V, and in order to quiet her puts his hand over her mouth, thereby suffocating her, he will not escape liability for felony-murder even if he can show that she died before he committed intercourse.

   a. **Intent follows killing:** But if the killing occurs before the defendant even ***forms the intent*** to commit the felony, this will probably ***not*** be felony-murder. For instance, suppose D injures V in a street fight, and seeing V lying in the street helpless (and in fact dead), decides to rob him. LaFave and Scott suggest that the killing should not be considered as occurring "in the commission of" the robbery in this situation. L, pp. 686-87.

4. **No requirement that felony be completed:** As noted, the death has to happen in the "course of the commission" of a dangerous felony. But there's ***no*** requirement that D actually ***complete*** the underlying felon. So the fact that the death occurs before the felony is complete — and, indeed, even the fact that the felony is *never* completed — will not prevent D from being guilty of felony-murder.

Example D walks into Bank, points his gun at Tell, a teller, and says, "Give me all your cash." Tell gets so frightened that he has an immediate fatal heart attack. D is so stunned that he walks out of the bank without taking a dollar.

D has committed felony-murder, since Tell's death occurred during the course of the dangerous felony of robbery. The fact that this never became actual robbery (which requires a "taking" of another's property; see *infra*, p. 332) doesn't matter.

F. **Felony must be independent of killing:** It will frequently be the case that the carrying out of a homicide will also constitute the completion of ***lesser included offenses.*** Assuming that one of these offenses is a felony, the prosecution may argue that the case is converted to felony-murder. However, to prevent the felony-murder rule from making virtually any attack culminating in death into automatic murder, courts have generally required that, for application of the felony-murder

doctrine, the felony must be ***independent*** of the killing.

1. **Voluntary manslaughter:** This requirement is most clearly demonstrated where the defendant kills his victim in a "heat of passion," on facts which would justify only a conviction of ***voluntary manslaughter*** *(infra,* p. 271). Yet manslaughter is obviously a dangerous felony, so the felony-murder rule could theoretically be applied. But this would mean that voluntary manslaughter ceases to exist as a distinct crime; all such manslaughters would "automatically ride up an escalator to become felony-murders." L, p. 687. For this reason, ***manslaughter may not serve as the underlying felony for felony-murder*** (at least, where the manslaughter victim and the theoretical felony-murder victim are the same person.)

2. **Assault:** The "felony must be independent of the killing" rule is why it's ***not*** felony-murder when D commits an ***assault or battery*** against V (but doesn't intend to kill V), and V unexpectedly dies as a result.

   Example: D, without provocation, intends to punch V in the jaw, but not to seriously injure him or kill him. V, while falling from the blow, hits his head on the curb and dies. Even though D was committing the dangerous felony of assault or battery, the crime will not be upgraded to felony-murder, because the felony was not independent of the killing.

3. **Armed robbery:** Where the death occurs as part of ***armed robbery,*** courts generally ***permit*** application of the felony-murder doctrine. See, e.g., *People v. Burton,* 491 P.2d 793 (Cal. 1971).

G. Future of the felony-murder rule: Although all but about three states currently have some form of felony-murder on their books (L, p. 690), many states have limited the doctrine's use in recent years, through such means as the "inherently dangerous" requirement *(supra*, p. 257) and the "includible offense" rule just discussed. These limitations probably reflect an unhappiness with the rule itself, which has often been criticized as illogical.

1. **Illogicality of rule:** These criticisms stem from the belief that ***accidental*** killings probably do not happen appreciably more frequently in the course of dangerous felonies than in other circumstances. See, e.g., statistics cited in Comment 6 to M.P.C. § 210.2. Obviously ***intentional*** killings occur with some frequency during the course of other felonies, but such killings could

presumably be punished as intent-to-kill, or even "reckless indifference to life," murders.

a. **Illustration:** Justice Holmes pointed out the illogicality of punishing such accidental killings as murders by supposing the case of a person who, wishing to steal some chickens, shoots at them and thereby kills a man in the henhouse whose presence could not have been foreseen. Holmes stressed that the fact that the shooting is felonious does not increase the likelihood that people will be killed. "If the object of the [felony-murder] rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." (Quoted in L, p. 690.)

2. **Model Penal Code rejects rule:** The Model Penal Code, on similar reasoning, does not adopt the felony-murder rule *per se*.

a. **Presumption:** However, M.P.C. § 210.2(1)(b) establishes a ***rebuttable presumption*** of "recklessness ... manifesting extreme indifference to the value of human life" where the defendant "is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." Thus if an unintentional killing occurs during one of these crimes, the prosecution is presumably entitled to go to the jury on the issue of "indifference-to-the-value-of-human-life" murder.

i. **May be rebutted:** But the defendant is free to show that he was not recklessly indifferent to the value of human life, and that he should therefore not be guilty of murder. The Code provision should thus be contrasted with the usual felony-murder provision, by which the defendant is guilty of murder even if he can show that not only was the killing unintentional, but he was not even reckless with respect to the risk of death.

IV. THE DEATH PENALTY AS PUNISHMENT FOR MURDER

A. Death Penalty generally: At least 35 states presently authorize the

death penalty for some kinds of murder. Although a capital punishment statute was held by the U.S. Supreme Court to impose “cruel and unusual” punishment in violation of the U.S. Constitution’s Eighth Amendment in *Furman v. Georgia,* 408 U.S. 238 (1972), most or all of the present death penalty statutes pass muster under current Supreme Court holdings.

1. ***Gregg v. Georgia:*** The Supreme Court’s principal ruling on the constitutionality of present-day death penalty statutes is ***Gregg v. Georgia,*** 428 U.S. 153 (1976). In *Gregg,* the Court held that the death penalty is not necessarily “cruel and unusual,” at least where it is imposed for murder. The Court relied on post-*Furman* evidence that both the American people and state legislatures find capital punishment to be acceptable.

   a. **Statute upheld:** The Court, in *Gregg,* upheld the Georgia death penalty statute, which provides that a death sentence may be imposed only if one of ten statutory ***aggravating circumstances*** is found by the jury to exist beyond a reasonable doubt. This requirement, plus the statute’s ***bifurcated*** scheme (in which the jury is called upon to recommend death or life as part of a separate proceeding following rendition of its verdict), and the provision for ***automatic appeal*** of all death sentences to the state Supreme Court, were in the eyes of the Court sufficient guards against “arbitrariness and caprice.”

2. **Mandatory sentences not constitutional:** Many states, like Georgia in *Gregg*, have attempted to reduce arbitrariness and discrimination by requiring one of a series of statutory aggravating factors to be present before the death sentence may be imposed. But other states have tried to meet constitutional requirements by making a death sentence ***mandatory*** for certain crimes (e.g., killing of a police officer, or killing by one already under life sentence).

   a. **Unconstitutional:** Such mandatory-death-penalty schemes have generally been held to be ***unconstitutional*** by the Supreme Court, on the grounds that they do not solve the problem of unbridled jury discretion (since the jury may make an unguided decision about whether to convict or acquit, and the decision is a potentially

discriminatory one based on whether the jury desires imposition of death). See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

3. **Racial prejudice:** If a defendant could prove that the judge's or jury's decision to sentence him to death was motivated by ***racial*** considerations, presumably the Supreme Court would find that use of the death penalty in that situation violated either the defendant's equal protection or Eighth Amendment rights, or both. (For instance, testimony by a juror that several members of the jury voted to recommend the death sentence for D, a black man, because they hated blacks, would probably be enough to lead the Court to nullify the death sentence.) But the Court has made it clear that any proof of impermissible racial bias must be directed to the ***facts of the particular case,*** and not be proved by large-scale ***statistical studies.***

   a. ***McCleskey* case:** Thus in ***McCleskey v. Kemp,*** 481 U.S. 279 (1987), D, a black man accused of murdering a white man, was convicted of murder by a Georgia jury, which then recommended the death penalty.

      i. **D's statistical evidence:** D presented statistical evidence that the combination of defendant's race and victim's race heavily influences whether a jury recommends the death penalty in a Georgia trial: the death penalty is assessed in 22% of the cases involving black defendants and white victims, compared with 8% for white defendants/white victims, 1% for black defendants/black victims and 3% for white defendants/black victims.

      ii. **Statistical claim rejected:** The Supreme Court did not dispute these statistical findings. But the Court held (by a 5-4 vote) that the statistics ***made no constitutional difference:*** the fact that there was "some risk" that racial prejudice would influence the jury's decision in a particular criminal case was unfortunate, but the study "does not demonstrate a ***constitutionally significant risk*** of racial bias affecting the Georgia capital-sentencing process," so D's Eighth Amendment claim failed.

4. **Non-intentional killings:** Apart from the procedures that must be

followed before a defendant may be sentenced to death for murder, the Eighth Amendment seems to put ***some kinds of killings off-limits*** for the death penalty. The Supreme Court has held that the Eighth Amendment prohibits the use of the death penalty on a defendant ***"who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force may be employed."*** *Enmund v. Florida,* 458 U.S. 782 (1982).

a. **Getaway driver:** Thus in *Enmund,* the state was not permitted to use the death penalty on D, who had waited in a getaway car while two accomplices went into a farmhouse and murdered the elderly couple who lived there. Since D had not committed the killing or desired it (and was guilty of murder only by a combination of the ***felonymurder doctrine*** and the rules on ***accomplice liability),*** it would be cruel and unusual punishment for D to be treated the same as if he had caused the harm intentionally.

b. **Knowledge that principal may kill:** But where an accomplice ***knows*** that the principal may kill in furtherance of the joint plan, then apparently the Eighth Amendment does ***not*** prevent the death penalty from being imposed on the accomplice. See *Tison v. Arizona, (supra,* p. 262), in which the Ds, who were brothers, helped their father, Gary, escape from prison by supplying him with a gun and a getaway car; the Ds knew that Gary was willing to kill to carry out his escape. Even though the Ds were some distance away when Gary killed four victims, the Ds could be sentenced to death, the Supreme Court held: they had the requisite mental state for murder under state law, i.e., extreme indifference to the value of human life, so it did not violate the Eighth Amendment for them to be executed even though they did not directly carry out the killing.

c. **Summary:** So as the result of *Enmund* and *Tison* taken together, an accomplice to murder can be executed if he himself had the requisite mental state for murder, but not if he was merely an ***accomplice*** to some non-homicide crime (e.g., robbery) and did not desire that deadly force be used or that killing take place.

5. **Other limits:** Here are several other important limits on capital punishment:

a. **No felony-murder death penalty:** Where D's guilt of murder stems solely from the application of the ***felony-murder*** doctrine, and D did not directly precipitate the killing, attempt to kill or desire to kill, D can't be subjected to the death penalty. *Enmund, supra.*

b. **No non-murder crimes against individuals:** Where the crime is against an ***individual*** and did not lead to ***death,*** capital punishment violates the Eighth Amendment. So ***rape,*** even of a ***child,*** may not be punished by death. *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (discussed further *supra*, p. 8).

i. **Crimes against state:** On the other hand, there is so far no Eighth Amendment problem with imposing death for serious crimes against the ***state,*** such as ***treason,*** espionage and terrorism, even if no death resulted. *Id.*

c. **Execution of the mentally retarded:** The execution of the ***mentally retarded violates*** the Eighth Amendment. See *Atkins v. Virginia* (discussed further *supra*, p. 8).

d. **Juveniles:** The execution of persons who were ***juveniles*** (under 18) at the time the crime was committed violates the Eighth Amendment. See *Roper v. Simmons* (discussed further *supra*, p. 9).

V. DEGREES OF MURDER

A. **Degrees of murder:** In many states, murder is divided into ***two or more degrees.*** Since the authorized punishment typically varies substantially from degree to degree in a particular state, the classification is of great practical importance. In many (perhaps most) murder cases, there is little or no doubt that the defendant committed a killing, and the only issue is the degree of murder (or manslaughter).

B. **First-degree murder:** A distinct class of murder, generally called ***first-degree murder,*** exists in most states. (This class sometimes includes murders for which death may be imposed, but such murders are often treated as a separate "capital murder" class.) The most common statutory requirement for first-degree murder is that the killing have been ***"premeditated and deliberate."***

1. **Circumstantial evidence:** Like other mental states, premeditation

and deliberation are frequently proved by ***circumstantial*** evidence (e.g., that D lay in wait for V, or told someone that he would kill V soon).

2. **Time required for premeditation:** Courts are not in agreement on how long the defendant must have thought about the killing before executing it, for it to have been "premeditated."

   a. **Traditional view:** The traditional view is that no substantial amount of time need elapse between formation of the intent to kill and execution of the killing.

   b. **Modern view:** But the traditional position has frequently been criticized, on the grounds that it emasculates the distinction between first- and second-degree murder, since any time there is an intent to kill (usually necessary for second-degree murder) the requisite premeditation is automatically found to exist. Most modern courts, therefore, require a ***reasonable period of time*** during which deliberation exists.

Example: D has had a history of psychiatric problems, including chronic depression, an obsession with his nose (which he thinks is too big), and frequent panic attacks. D and V work together as dishwashers in a restaurant, and have always gotten along well. One evening, V sees that D is in a bad mood, tells D to "lighten up," and playfully snaps him with a dish towel several times. (V apparently has no idea he is greatly upsetting D.) The dish towel flips D on the nose, and he becomes enraged. He quickly pulls out a knife from his pocket, and fatally stabs V in the neck. D is tried for first-degree murder, which in the jurisdiction requires that the murder be "willful, deliberate and premeditated." The trial judge instructs the jury that "In order to constitute a 'premeditated' murder an intent to kill need exist only for an instant." D is convicted, and argues on appeal that this instruction incorrectly obliterate the significance of premeditation.

Held, for D. For premeditation (and thus for first-degree murder in this state), "[T]here must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by ***prior calculation and design.*** ... This means there must be an opportunity for some ***reflection*** on the intention to kill after it is formed. The accused must kill purposely after ***contemplating the intent to kill."*** D is therefore entitled to a new trial. *State v. Guthrie,* 461 S.E.2d 163 (W. Va. 1995).

3. **Elements which must be shown:** One well-known case has listed three elements which, if they exist, tend to show the requisite premeditation: (1) ***"planning"*** activity, occurring prior to the killing; (2) evidence of ***"motive";*** and (3) a ***manner*** of killing "so particular and exacting that the defendant must have intentionally killed

according to a 'preconceived design.'" *People v. Anderson,* 447 P.2d 942 (Cal. 1968).

4. **Intoxication as negating deliberation:** The defendant's ability to deliberate may be found to have been negated by ***intoxication.***

5. **Criticism of distinction:** Beyond the difficulty of distinguishing situations of "deliberation" from those in which there is merely a well-formed intent to kill without deliberation, the theory of the distinction has frequently been criticized. Many impulsive murders are characterized by greater depravity than some murders that are carefully thought out.

   a. **Model Penal Code view:** As the draftsmen of the Model Penal Code point out, "The very fact of long internal struggle may be evidence that the actor's homicidal impulse was deeply aberrational, far more the product of extraordinary circumstances than a true reflection of the actor's normal character, as, for example, in the case of mercy killings, suicide pacts, many infanticides and cases where a provocation gains in its explosive power as the actor broods about his injury.... We think it no less clear that some purely impulsive murders may present no extenuating circumstance." Comment 4(b) to M.P.C. § 210.6. Accordingly, the Code does not divide murder into first- and second-degree. (It does provide for a separate class of murders as to which the death-penalty may be imposed, but even this does not depend upon whether the crime was premeditated.)

6. **Lying in wait, torture and poison:** Apart from murders committed with premeditation and deliberation, many statutes make it first-degree murder to kill by ***"lying in wait," "torture," poisoning,*** or other special means. At least as to "lying in wait" and "poison," the rationale behind making these automatically first-degree murders is that such methods furnish evidence of premeditation.

7. **Felony-murder:** Although most first-degree murders are of the intent-to-kill variety, statutes in some states also make some or all ***felony-murders*** (typically, those involving rape, robbery, arson and burglary) first-degree. See the general discussion of felony-murder *supra*, p. 256.

C. Second-degree murder: Murders that are not first-degree are second-degree. These will typically include the following classes:

1. No premeditation: Cases in which there is ***no premeditation.***

2. Intent to seriously injure: Cases in which there may have been premeditation, but the defendant's intent was not to kill, but to do ***serious bodily injury*** (a *mens rea* sufficient for murder, as discussed *supra*, p. 251).

3. Indifference to human life: Cases in which the defendant does not intend to kill, but is ***recklessly indifferent to the value of human life*** (discussed *supra*, p. 252).

4. Felony-murders: Killings committed during the course of felonies other than those specified in the first-degree murder statute (i.e., typically felonies other than rape, robbery, arson and burglary).

VI. MANSLAUGHTER — VOLUNTARY

A. Manslaughter generally: The term "manslaughter" covers a number of distinct kinds of homicide, whose common feature is that they are deemed not sufficiently heinous to be treated as murder, but still too blameworthy to go completely unpunished. Manslaughters fall into two principal categories:

[1] ***voluntary manslaughter,*** in which there is generally an intent to kill, but some sort of extenuating circumstance; and

[2] ***involuntary manslaughter,*** in which the death is accidental.

This present section (VI) covers voluntary manslaughter; our coverage of involuntary manslaughter is done in section VII, which begins on p. 276 *infra.*

1. Two kinds of voluntary manslaughter: There are also two distinct categories of ***voluntary manslaughter:***

[1] D kills in the ***"heat of passion,"*** i.e., under a provocation that would cause a reasonable person to lose some degree of control; and

[2] D kills under an ***unreasonable mistake*** about the need for ***self-defense ("imperfect self-defense").***We consider "heat of passion" first, then "imperfect self-defense" *(infra*, p. 275).

B. Voluntary manslaughter based on "heat of passion": The most

common kind of voluntary manslaughter is that in which the defendant kills while in a ***"heat of passion,"*** i.e., an extremely angry or disturbed state.

1. **Intent:** Normally, one who commits voluntary manslaughter intends to bring about the death of the other person. But, theoretically at least, a voluntary manslaughter conviction could be based upon an intent to do ***serious bodily harm,*** or a reckless indifference to the value of human life, assuming that such a state of mind was accompanied by the requisite "heat of passion." See L, pp. 703-04.

C. Requirements for heat-of-passion voluntary manslaughter: Assuming that the facts establish what would otherwise be murder, the defendant will be entitled to a conviction on the lesser charge of voluntary manslaughter only if he meets all four of the following requirements:

[1] he acts in ***response to a provocation*** that would be sufficient to ***cause a reasonable person to lose his self-control;***

[2] he ***in fact acts*** in a "heat of passion";

[3] the ***lapse of time*** between the provocation and the killing is **not** great enough that a ***reasonable person would have "cooled off"*** (i.e., regained his self-control); and

[4] he had ***not in fact "cooled off"*** by the time he kills.

1. **Consequences of not meeting one hurdle:** If the defendant fails to clear hurdles [1] or [3] above (i.e., he is actually provoked, and has not cooled off, but a reasonable person would have either not lost his self-control or would have cooled off), he will normally be liable only for ***second-degree*** murder, since he will probably be found to have lacked the necessary premeditation. If, on the other hand, the defendant trips up on hurdles [2] or [4] (i.e., he is not in fact driven into a heat of passion, or has already cooled off), he is likely to be convicted of ***first-degree*** murder, since his act of killing is in "cold blood." See L, pp. 715-16.

D. Reasonable provocation: The defendant's act must be in response to a ***provocation*** sufficiently strong that a "reasonable person" would have been ***caused to lose her self-control.*** The rule is sometimes stated that the provocation must be such that it would cause a reasonable person to

kill, but this is clearly not required; there are presumably very few circumstances under which a truly "reasonable person" will be driven to kill, and it is clear that courts will accept all kinds of provocation as adequate for voluntary manslaughter that would not drive a reasonable person to kill. All the defendant has to establish is that a provocation would have been enough to make a reasonable person ***lose her temper.***

1. **Characteristics of the reasonable person:** There has been much dispute about exactly what characteristics peculiar to the defendant should be imputed to the "reasonable person" in determining how the latter would react to the provocation in question.

   a. **Emotional characteristics:** Courts are almost always ***unwilling*** to recognize the peculiar ***emotional*** characteristics of the defendant in determining how a reasonable person would act. Thus it is universally agreed that the fact that the defendant is ***unusually pugnacious or bad-tempered*** is not to be taken into account. If it were otherwise, the "reasonable person" test would be virtually eviscerated, since the test is of importance only to weed out those cases where the defendant is enraged by something that would not enrage an ordinary person.

   b. **Model Penal Code allows some subjectivity:** The Model Penal Code establishes a test that is somewhat ***more subjective*** than that applied by most courts. Under M.P.C. § 210.3(1)(b), the crime is manslaughter if it is "committed under the influence of ***extreme mental or emotional disturbance*** for which there is ***reasonable explanation or excuse.*** The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believed them to be."

      i. **Some subjectivity allowed:** The Code commentary indicates that the term "situation" may be interpreted to include at least some mental or emotional characteristics. "[i]f the actor had just suffered a traumatic injury...or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of

these matters."

c. **Intoxication:** If the defendant is particularly excitable because he is ***voluntarily intoxicated,*** his intoxication will never be imputed to the reasonable person. That is, he will be judged by the standard of a reasonable sober person; only if the latter would have been provoked may the defendant receive a manslaughter verdict.

2. **Particular categories:** In addition to limiting the special characteristics that may be imputed to the reasonable man, courts have also limited the use of voluntary manslaughter by allowing only ***certain categories*** of provocation to suffice, and excluding others as a matter of law.

a. **Battery:** For historical reasons, a more-than-trivial ***battery*** committed on the defendant is almost always considered to be sufficient provocation. L, p. 706. However, if the defendant brought on the battery by his own initial aggressive conduct, he will not be entitled to a manslaughter verdict.

i. **Assault:** If the other party ***attempts*** to commit a battery on the defendant, but fails (thereby committing a ***criminal assault),*** some but not all courts recognize it as sufficient provocation, at least if the threatened battery was a serious one (e.g., use of a firearm). See L, pp. 706-07.

b. **Mutual combat:** If the defendant and his victim get into a ***mutual combat,*** in which neither one can be said to be the aggressor, most courts will reduce the defendant's liability to manslaughter. L, p. 706.

c. **Adultery:** Perhaps the classic voluntary manslaughter situation is that in which the husband surprises his wife in the act of ***adultery*** with her paramour, and kills either the wife or the lover. This will virtually always be sufficient provocation.

i. **Non-married couple:** But most courts have limited this rule to ***married couples.***The discovery of one's fiancee, not to mention one's steady girlfriend, in the act of infidelity, is generally not sufficient. L, p. 708.

ii. **Second-hand discovery:** Where the defendant discovers the

adultery ***secondhand*** (e.g., by being told about it rather than seeing it), the modern tendency is to find the provocation reasonable, despite the lack of "ocular" evidence. See the discussion of the "words alone" rule, *infra.*

iii. **Reasonable mistake:** Also, if the defendant's second-hand evidence would lead a reasonable person to believe that there has been adultery, but the evidence is in fact ***misleading,*** most present-day courts would probably nonetheless allow a manslaughter finding. See, e.g., *People v. Maher* , 10 Mich. 212 (1862).

d. Words alone: The traditional rule has been that ***words alone*** can never constitute the requisite provocation. Where the words are simply ***abusive, insulting or harassing,*** this rule essentially remains ***in force*** in most states.

Example: D and V, drinking in a bar, get into an argument about the upcoming Presidential election. V calls D a moron, and then insults D's mother's chastity. D becomes enraged, pulls out a knife, and without deliberation stabs V in the stomach, intending to kill him. V dies.

D has committed murder, not voluntary manslaughter. No words of insult, standing alone, will be deemed sufficiently provocative as to cause the target's homicidal rage to be "reasonable."

i. **Words carrying information:** But if the words ***convey information*** (i.e., "I am having an affair" or "I want a divorce"), courts generally hold that the information ***may,*** if it is sufficiently inflammatory, constitute reasonable provocation. Also, words that both convey distressing information and are taunting or insulting may be sufficient, even where the information by itself would not be sufficient.

Example: D, a 46-year-old cook, marries V, a 20-year-old Israeli woman. V returns from a trip to Israel and announces that she has fallen in love with another man, Yako, has had sex with him, and plans to divorce D and return to Yako. She alternately demands and refuses sex with D and intermittently screams at him. Then she leaves. D waits for 20 hours for her to come home; when she does, she starts screaming at him. D then strangles her with a telephone cord.

Held, V's conduct was sufficient to constitute the necessary provocation for manslaughter. Verbal provocation may be sufficient. Here, V's conduct "could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition so as to cause him to act rashly from this passion." (Nor does D lose his

right to manslaughter by virtue of the 20-hour "cooling off" period prior to the killing, since D's rage was rekindled when V began screaming at him right before the killing.) *People v. Berry,* 556 P.2d 777 (Cal. 1976).

(1) Different view: However, at least in the case of women victims who taunt or insult their mates, a finding of reasonable provocation is probably ***less likely*** today than it was when *People v. Berry* was decided in 1976. For instance, it's hard to see how the case in the following Example is different from *Berry*, except for the fact that society's tolerance for abuse by men against their women partners diminished sharply from 1976 to 1991.

Example: D and V meet and marry after knowing each other only three months. Two months into the marriage, in the midst of an argument, V follows D into the bedroom, climbs on his back and pulls his hair, and taunts him verbally. She calls him names, tells him she never wanted to marry him, tells him she wants a divorce, etc. She asks him several times, "What are you going to do?" D gets up and goes to the kitchen. He grabs a large kitchen knife, hides it behind a pillow and returns to the bedroom. V continues her verbal assault and asks again, "What are you going to do?" D then lunges at V and stabs her to death. At trial, D seeks to have his murder conviction mitigated to manslaughter, arguing that his actions were provoked by V.

Held, D was not entitled to a manslaughter conviction. "Words can constitute adequate provocation [only] if they are accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm." Since the victim here was 5'1" and weighed 115 pounds, and the defendant was 6'2" and weighed over 200 pounds, D could not reasonably have feared for his bodily safety. *Girouard v. State,* 583 A.2d 718 (Md. 1991).

3. Effect of mistake: If the defendant reasonably but ***mistakenly*** reaches a conclusion which, if accurate, would constitute sufficient provocation, courts will generally allow manslaughter. For instance, if the defendant reasonably but erroneously believes that his wife has committed adultery, his killing of her will probably be reduced to manslaughter (at least in a jurisdiction where indirect knowledge of adultery would suffice).

E. Actual provocation: The provocation must not only be sufficient to cause a reasonable man to lose his self-control, but also sufficient to have ***in fact*** enraged the defendant. Thus if the defendant is an unusually cool-headed person, who is not enraged by a particular provocation, he will not be able to claim manslaughter even though a reasonable man

might have lost his self-control in the circumstances.

F. **Reasonable "cooling off period":** The lapse of time between the provocation and the killing must not be so long that a reasonable man would have ***"cooled off"*** (i.e., recovered his selfcontrol).

1. **Minority view:** A few jurisdictions, however, do not impose this requirement, and require only that the defendant ***in fact*** not have cooled off prior to the killing. (Actual non-cooling-off is a separate requirement in all jurisdictions, as discussed *infra).*

2. **Rekindling:** Even if there is a substantial cooling-off period between the initial provocation and the killing, if a ***new provocation*** occurs which would rekindle the passion of a reasonable man, the cooling-off rule is not violated. This is true even if the new provocation would not by itself be sufficient to inflame a reasonable man. Thus in *People v. Berry, supra,* D waited for V's return (possibly with an intent to kill her) for twenty hours. This would normally have been a period within which a reasonable man would have cooled off. But the California Supreme Court held that V's screaming rekindled D's rage (and implied that the screaming would have been sufficient to re-inflame a reasonable man); therefore, D was entitled to a manslaughter verdict.

G. **Actual cooling off:** The defendant must not have ***in fact*** "cooled off," or regained his composure, at the time he commits the killing. Thus if he is less passionate than the ordinary man, and after he calms down, deliberately kills, he will not be entitled to manslaughter even though an ordinary man might still have been without self-control at the time of the killing.

H. **Killing of one other than provoker:** It may happen that the requisite provocation exists, but that the defendant kills ***someone other than the provoker.*** Depending on the reasons for the error, the defendant may or may not be entitled to a manslaughter verdict.

1. **Bad aim:** If D is trying to hit X (the actual provoker), and through ***faulty aim*** hits V, a bystander, D will probably be entitled to manslaughter. This will certainly be true if D is no more than negligent in hitting V rather than X. If D is reckless as to the risk of injuring innocent parties, most courts would still probably allow a

manslaughter verdict. See L, pp. 716.

2. **Mistake as to who provoked:** If D ***erroneously believes*** that V, rather than X, is his provoker, and kills V, D will also probably be entitled to manslaughter. This will certainly be the case if his mistake is no worse than merely negligent; where the mistake is reckless, the courts would probably split.

3. **Victim known not to be provoker:** If D is aware that X, not V, is the actual provoker, but he is so enraged that he strikes out and kills V anyway, most courts will not allow manslaughter. For instance, if V is a bystander and friend of the provokers, D will probably not be entitled to manslaughter if he knowingly kills V while provoked.

4. **Model Penal Code:** The Model Penal Code does not place an explicit limitation on the identity of the person killed. Thus even in the *Tilson* situation just discussed, the defendant might obtain a manslaughter verdict if he could persuade the court or jury that his disturbance was so extreme that even killing the wrong person should not be treated as murder. See M.P.C. § 210.3(1)(b).

I. **"Imperfect self defense":** Apart from heat-of-passion, there is a second type of voluntary manslaughter, which occurs where D acts with what might be described as ***"imperfect selfdefense."***

1. **Where applicable:** That is, most states entitle D to have a murder charge lowered to voluntary manslaughter if D ***killed to defend himself*** but is not entitled to an acquittal because:

   [1] he was unreasonably mistaken about the ***existence of danger;*** or

   [2] he was unreasonably mistaken (perhaps because of ***intoxication)*** about the ***need for deadly force,*** or the proper level of non-defense required; or [3] he was the ***aggressor.***

2. **"Imperfect" defense of others:** If the defendant uses deadly force in ***defense of another,*** and does not meet all the requirements for exculpation (*supra,* pp. 129-131), some courts will similarly allow him the lesser charge of manslaughter. For instance, in a jurisdiction where one's right to defend another is no greater than that person's right to defend himself (the *"alter ego"* rule), the defendant might be entitled to a manslaughter verdict if he used deadly force in defense of

a person who turned out to have been the aggressor.

3. **"Imperfect" crime-prevention:** Similarly, a defendant might be convicted of manslaughter where he uses deadly force to ***prevent a felony,*** where the felony is not a dangerous one and the jurisdiction does not allow deadly force to be used to prevent it (e.g., D shoots an unarmed burglar). See L, p. 719.

4. **"Imperfect" coercion or necessity:** Suppose the defendant is subjected to ***coercion*** or ***necessity,*** but these defenses are not fully merited. There, too, manslaughter might be the outcome. For instance, in a jurisdiction refusing to allow the defense of duress to an intentional killing *(supra,* p. 106), a reduction to manslaughter might be allowed.

J. Other killings: There are a couple of other situations where manslaughter may be found.

1. **Mercy killings:** A defendant who commits a ***mercy killing*** (i.e., a killing to terminate the life of one suffering from a painful and incurable disease) might be convicted of manslaughter. L, pp. 720-21.

2. **Intoxication:** A few courts have even held that the defendant's ***voluntary intoxication*** was sufficient to negate "malice aforethought," and thus reduce murder to manslaughter.

   a. **Intoxication not normally enough:** But most states ***never*** permit intoxication to reduce murder to manslaughter. (However, intoxication may be enough to negate premeditation and deliberation, thereby reducing first-degree murder to second-degree; see *supra,* p. 269).

VII. MANSLAUGHTER — INVOLUNTARY

A. Involuntary manslaughter based on criminal negligence: One whose behavior is grossly negligent may be liable for ***involuntary manslaughter*** if his conduct results in the accidental death of another person. When manslaughter liability for negligence is at issue, two principal questions are raised; (1) how far from the standard of reasonable care must the defendant deviate?; and (2) must the defendant actually be ***aware*** of the risk of death or harm?

1. **Criminal negligence required:** The vast majority of jurisdictions hold that ***something more than ordinary tort negligence*** must be shown before the defendant can be liable for involuntary manslaughter. Usually "gross" negligence is required, although it is not clear what this means. It is probably necessary to show that there was a very substantial danger not just of bodily harm, but of ***serious*** bodily harm or death.

   a. **Model Penal Code formulation:** The Model Penal Code requires that the defendant act ***"recklessly."*** M.P.C. § 210.3(1)(b). The Code defines "recklessly" so as to require a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." M.P.C. § 2.02(2)(c). (The Code also requires that the defendant be aware of the risk; see *infra,* p. 277).

2. **All circumstances considered:** The existence of the requisite negligence is to be determined in light of ***all the "circumstances,"*** at least those external to the defendant. The ***social utility*** of any objective the defendant is trying to fulfill is weighed.

   Example: Suppose that D kills V, a pedestrian, by driving at 50 miles per hour in a 30-mile-per-hour residential zone. D's conduct may be held to be criminally negligent if D was simply out for a pleasure spin, whereas it might not be criminally negligent if D was rushing his critically ill wife to the hospital.

3. **Defendant's awareness of risk:** The courts are in sharp disagreement as to whether the defendant may be liable for manslaughter if he was ***unaware*** of the risk posed by his conduct.

   a. **Awareness not required:** The court's determination is likely to turn in part on the precise wording of the statute. Thus, where one of the few statutes requiring only ordinary negligence was involved, it was held that a defendant could be liable for manslaughter even though he was unaware of the danger to life. *State v. Williams,* 484 P.2d 1167 (Wash. App. 1971).

   b. **Awareness required:** Where "gross negligence" or "recklessness" is required, it seems probable that most courts would require an actual awareness of danger on the defendant's part.

   c. **Model Penal Code agrees:** The Model Penal Code, which bases manslaughter only upon a finding of "recklessness," similarly

requires actual awareness. This is because, under M.P.C. § 2.02(2)(c), a person acts recklessly only when he "consciously disregards" a substantial and unjustifiable risk.

4. **Proximate cause:** There must, of course, be a ***causal link*** between the defendant's act of negligence and the ensuing death. The defendant's conduct must not only be the "cause in fact" of the death but also a "proximate" cause, i.e., one whose relationship to the death is not ***bizarre or extraordinary.*** (More complete discussions of proximate cause in negligence crimes occur on p. 60, p. 64 and p. 70 *supra.)*

   a. **Member of endangered class:** The victim must be a ***member of the class*** that was endangered by the defendant's conduct. Thus if D drives at a grossly excessive speed through local streets, and bangs into a car which (unsuspected by anyone) contains explosives, D will not be liable for the death of V, killed when the blast sends broken glass into V's fourth-story office. In this situation, D's conduct posed a foreseeable danger only to persons on or near the street, and V was not a member of this class.

   b. **Manner of harm:** Similarly, the defendant will be liable only if the death occurs in a somewhat foreseeable, or at least not "abnormal," fashion. For instance if, on the facts of the above example, X, a nurse standing on the sidewalk, fatally dropped Y, an infant, when she heard the blast, D would almost certainly escape manslaughter liability on the grounds that the overall manner in which Y met his death was bizarre and unforeseeable.

5. **Vehicular homicide:** The majority of involuntary manslaughter cases involve death by ***automobile.*** Because it is often hard to get a manslaughter conviction in such cases (particularly where the statute requires a showing of "recklessness") and because it is often thought to be unfair to convict a motorist of the heinous felony of manslaughter, a number of states have defined the lesser crime of ***vehicular homicide.***

   a. **Intoxication statutes:** Conversely, some states have special statutes which make it a crime to cause death by ***driving while intoxicated.*** These statutes frequently impose a greater punishment

than for involuntary manslaughter.

b. M.P.C. and "criminally negligent homicide": The Model Penal Code contains no such special auto statute. However, in a belief that negligence leading to death should be punished even where "recklessness" (required for manslaughter under the Code) does not exist, the Code defines the crime of ***"negligent homicide"*** One acts "negligently," under the Code, when he "should be aware of a substantial and unjustifiable risk," and his failure to perceive that risk, under all the circumstances, involves a "gross deviation from the standard of care that a reasonable person would observe...." M.P.C. § 2.02(2)(d). Thus actual awareness of the risk is not required for negligent homicide.

c. D's mistake of fact: Apart from the standard scenario of a traffic accident caused by D's lack of coordination while drunk, D's intoxication can also cause the accident by ***impairing D's judgment.***

Example: D gets drunk at a bar, then drives home. A police car sees him drive erratically and starts to follow him. D, because his judgment has been impaired by the alcohol, thinks that the car following him contains criminals who will hijack his car. (A reasonable sober driver would have recognized the car as a police car.) Therefore, D speeds away, and kills V, a pedestrian.

D has committed involuntary manslaughter — his drunk driving constituted recklessness (the most culpable mental state ever required for involuntary manslaughter), and the intoxication proximately caused the crime by leading to his mistake of believing he was being chased by criminals.

6. Contributory negligence of victim: The fact that the victim may have been ***contributorily negligent*** is not a defense to involuntary manslaughter (or to most other crimes; see *supra*, p. 139).

Example: D gets drunk, and drives home. While en route, he has a collision with a car driven by V, who dies in the accident. If D's intoxication was a cause in fact and proximate cause of the accident, the fact that V may have driven negligently won't negate D's liability for involuntary manslaughter.

7. Causal link required: The gross negligence must be ***causally related*** to the death. So, for instance, if the death would have occurred ***even if D had not been grossly negligent,*** he won't be guilty of involuntary manslaughter.

Example: Same basic facts as in the above example, in which D gets drunk, drives

home, and has a fatal collision with a car driven by V. But now suppose that D drove at a correct speed, obeyed all other traffic regulations, and hit V when V went through a red light. If the accident would have happened the same way had D not been drunk (which seems likely), then D won't be guilty of involuntary manslaughter — in that event, his drunken driving, though grossly negligent, wouldn't be the cause in fact or the proximate cause of V's death.

B. Unlawful-act manslaughter ("misdemeanor-manslaughter"): Just as the felony-murder rule permits a murder conviction when a death occurs during the course of certain felonies, so the so-called ***"misdemeanor-manslaughter"*** rule permits a conviction for involuntary manslaughter when a death occurs accidentally during the commission of a misdemeanor or other ***unlawful act.*** The unlawful act is treated as a substitute for criminal negligence. While a few states have abolished the full concept of misdemeanor-manslaughter, the substantial majority retain it, although many place significant limitations on its use.

1. What constitutes "unlawful act": Any misdemeanor may serve as the basis for application of the misdemeanor-manslaughter doctrine (provided that the requisite causal relation, discussed *infra,* is shown). Additionally, some jurisdictions permit a showing that the defendant violated a ***local ordinance*** or ***administrative regulation.*** See L, p. 728. Also, if a particular felony does not suffice for the felony-murder rule (e.g., because it is not "inherently dangerous to life," such as grand larceny), it may be used.

a. Battery: One unlawful act that frequently serves as the basis for misdemeanor-man-slaughter liability is ***battery.***

Example: D gets into an argument with V, and gives him a light tap on the chin with his fist. Unbeknownst to D, V is a hemophiliac and bleeds to death. Since D has committed the misdemeanor of simple battery, and a death has resulted, he will be liable for manslaughter.

b. Assault: Similarly, if D commits a ***criminal assault*** on V, and V dies accidentally, the misdemeanor-manslaughter rule will apply. Thus suppose that D takes a swing at V, and misses (thus committing the attempted-battery variety of assault; see *infra,* p. 286). V, in escaping from the blow, falls down, hits his head on the curb, and dies. D is liable for manslaughter.

c. Traffic violations: Another frequent source of misdemeanor-manslaughter liability is the violation of ***traffic laws.*** For instance,

if a motorist is exceeding the speed limit (a misdemeanor) at the time he kills a pedestrian, he may be liable for manslaughter even without proof that he was criminally negligent, as long as the speeding was a “but for” cause of the death.

2. **Proximate cause:** There must be a ***causal relation*** between the violation and the death.

   a. **“*Malum in* se”:** In the case of a violation that is ***“malum in se”*** (inherently dangerous or immoral) the requisite causal relationship is often found so long as the conduct is the “cause in fact” of the death, even though it was not “natural and probable” or even “foreseeable” that the death would occur. That is, the usual requirement that the violation be a ***“proximate cause”*** of the death is frequently ***suspended.***

   b. ***“Malum prohibitum”:*** If, however, the defendant’s offense is ***“malum prohibitum”***(i.e., not dangerous in itself, but simply in violation of a public-welfare regulation), most jurisdictions ***impose*** the requirement that the violation be the ***proximate cause*** of the violation.

      i. **Licensing requirements:** The requirement of a close causal relationship often arises with respect to ***licensing*** requirements: If the jurisdiction requires a license to pursue some activity, but D would be entitled to the license as a matter of right, his conducting of the activity without a license, coupled with a harm (a death) stemming from the activity, normally ***won’t trigger*** the misdemeanor-manslaughter rule, because the failure to get a license is not deemed to be the proximate cause of the harm.

      Example: After D’s driver’s license expires, D fails to renew it, and continues driving. Driving without a currently-valid license is a misdemeanor in the jurisdiction. While D is driving non-negligently, D’s car collides with V, a pedestrian, when V darts out from between two parked cars. V dies. D is not guilty of misdemeanor-manslaughter because his misdemeanor of driving without a currently-valid license was not the proximate cause of the accident.

3. **Criticism of doctrine:** The misdemeanor-manslaughter rule has been subject to great criticism in recent years, on the grounds that it imposes the extreme sanction of manslaughter on conduct which

frequently does not even constitute ordinary, let alone criminal, negligence. Furthermore, there is little reason to believe that death is more likely to result from many unlawful acts than from other, lawful, conduct. For instance, it seems neither fair nor very effective to attempt to deter street fights by punishing with a manslaughter conviction the one defendant in every, say, 10,000 who is unlucky enough to have an opponent with a thin skull or blood disease.

a. Model Penal Code abolishes: Accordingly, the Model Penal Code ***rejects*** the misdemeanor-manslaughter rule in its entirety. See Comments 3 and 8 to M.P.C. § 210.3. However, even under the Code the fact that an act is unlawful may have an evidentiary bearing on whether it is reckless (the Code *mens rea* for manslaughter).

Quiz Yourself on
HOMICIDE *(ALL FORMS)*

63. Kingsman, holding a lead pipe, walks up to Humpty Dumpty, who is sitting on top of a wall.

(A) Assume for this part only the following additional facts: Kingsman swings his pipe with relatively little force against the side of Humpty's head. His intent is to frighten Humpty into paying his back taxes to the King; Kingsman believes (reasonably) that the pipe will cause only a slight bruise and a little pain, but that it will signify that Kingsman is prepared to get as rough as he has to on later occasions to get Humpty to pay. What Kingsman doesn't realize is that Humpty has an eggshell skull. The tap fractures Humpty's skull, and Humpty dies as a result. Is Kingsman guilty of murdering Humpty?

(B) Assume for this part only that the event happens as described in part (A) with the following differences: Kingsman intends to hit Humpty hard enough that Humpty's skull will be fractured, and he'll be in the hospital for at least a week. He does not intend to kill Humpty, because that would defeat the whole purpose (getting the taxes paid back). Kingsman in fact swings with a force, and in a

location, that in most instances would indeed have fractured a person's (or egg's) skull without killing him. In this case, tragically, Humpty's eggshell skull causes the fracture to be so bad that Humpty dies of brain edema. Is Kingsman guilty of murdering Humpty?

64. Brutus stabs Julius Caesar, with intent to kill him, on March 15, 44 B.C. Caesar lingers until April 1, 43 B.C., when he dies as a result of Brutus' attack. Under the common law, is Brutus guilty of murder?

65. Two thrillseekers, Macbeth and Banquo, set out separately one evening to have a rowdy good time. Macbeth heads off for the countryside. He takes out his gun as he drives along, and fires it into an old abandoned hunting cabin for target practice. Unbeknownst to him, a tramp, Polonius, is sleeping inside; Macbeth's shot kills him. At the same time, Banquo drives through Dunsinane, a heavily-populated residential suburb. He fires his gun into the open window of a dark apartment. His shot kills a person sleeping inside the apartment. Neither Macbeth nor Banquo intended to kill anyone. Macbeth believed the cabin was unoccupied. Banquo believed that the room into which he fired was unoccupied, but believed that there were probably people present elsewhere in the building. Is either of them guilty of murder, and if so, on what theory?

66. Señor Delgato agrees to help Speedy Gonzales rob the Limburger Cheese Factory one night. Delgato lends Speedy his gun, although he doesn't believe Speedy will have to use it; he doesn't want anyone killed just for a stinking piece of cheese. Delgato stands as lookout while Speedy breaks into the factory. Speedy is unexpectedly accosted by the night watchman, who tries to tackle him. To avoid capture, Speedy shoots at the watchman, intending to hit him in the leg to disable (but not kill or seriously wound) him. Unfortunately, Speedy's shot is slightly off, and the watchman bleeds to death from his wound. Is *Delgato* guilty of murder, and if so, on what theory?

67. Nero sets a fire to Sabina's house one night, believing (reasonably, based on the facts known to him) that Sabina and her family are away on vacation. In fact, Sabina and her family have returned a day early from vacation, and are asleep inside. The house is soon engulfed in flames. Firemen rush to the scene. One of them, Claudius, is killed

while trying unsuccessfully to save Sabina. Another fireman, Maecenas, survives the fire, but is killed when a low-lying tree branch knocks him off the fire truck on the way back to the station. For whose death(s) will Nero be liable under the felony-murder rule: Sabina's, Claudius', and/or Maecenas'?

68. Water-Pistol Kelly is robbing the Smalltown Bank. While he is holding the bank manager at gunpoint in the vault, a customer, Kitty Litter, suffers a heart attack and dies in the lobby.

(A) For this part only, assume that at the time Kitty had her heart attack, no one in the lobby, including Kitty, knew that a robbery was underway. Is Kelly guilty of murdering Kitty?

(B) For this part only, assume that just before Kitty had her heart attack, she heard from a teller that someone was holding the bank manager at gunpoint in the vault. Kitty had a nervous disposition, and was frightened (even though others in the lobby were not) that the stickup artist or his confederates might soon threaten her. Her heart attack was brought on by these fears. Is Kelly guilty of murdering Kitty?

69. Derevenko slashes Czarevich Alexis in the arm with a dagger, intending only to cut him. In fact, Alexis is a hemophiliac and, as a result of the cut, Alexis bleeds to death. In the jurisdiction, Derevenko's attack with a dagger would constitute aggravated battery, a felony. Is Derevenko guilty of felony-murder?

70. Aunt Pittypat runs up to Rhett Butler and tells him, "Your wife Scarlett is having an affair with Ashley!" (Assume that a reasonable person in Brett's position would believe, as Rhett does, that Aunt Pittypat is referring to Ashley Wilkes.) In a blind rage, Rhett runs the few blocks over to Ashley Wilkes' house, where he finds Scarlett and Ashley sitting in the living room, sipping tea. Rhett shoots and kills Ashley. In fact, Scarlett has been having an affair with a different Ashley — Ashley Farkus, who lives on the other side of town. What is the most serious crime for which Rhett can be convicted?

71. James Bond's wife, Tracy, is gunned down by Fast Eddie Triggerhand as she sits in the front seat of her car next to James.

James is heartbroken, but coolly takes her to the morgue. He spends the next few hours looking calmly for clues as to Triggerhand's whereabouts, tracking him down, and finally killing him with his trusty Walther PPK. What is the most serious crime for which James can be convicted?

72. Deerslay is an avid, and properly-licensed, deer hunter. During deer season one day, he decides to hunt in a region called Acadia, which was once completely uninhabited, but which (as Deerslay knows) is now immediately adjacent to a sizable development of homes. Deerslay is standing at a point he knows to be about 300 yards away from the closest houses, when he sees a moving flash of brown and white in the direction where the houses lie. He thinks this is a deer. He immediately points his rifle and shoots. Unbeknownst to Deerslay, the flash of brown is in fact Dierdre standing in her back yard at the edge of the woods, wearing a brown fox-fur coat trimmed in white mink. The shot strikes Dierdre in the chest, and she dies immediately.

(A) For this part, assume that Deerslay's actions (hunting so close to the houses, shooting in the direction of the houses, and not verifying that what he saw was a deer) constitute gross negligence, but that his actions do not manifest a depraved indifference to the value of human life. What is the most serious crime of which Deerslay is guilty?

(B) Same basic fact pattern as part (A). Now, however, assume that Deerslay is new to the region, and does not know that there are housing developments nearby, in the direction at which he is pointing his gun. Assume further, however, that an ordinarily careful person would have asked questions of hunters who lived in the area, and would probably have discovered that houses were nearby. May Deerslay on these facts be convicted of the same crime which you listed as your answer to the prior question?

73. Jerry insults Tom's mother. To retaliate, Tom punches Jerry in the nose. Tom intends only to injure Jerry slightly — the most he hopes or intends will happen is that Jerry's nose will get bloody. Unbeknownst to Tom, Jerry is a hemophiliac. Consequently, Jerry bleeds to death. What is the most serious crime of which Tom can be convicted, and on what theory, in a jurisdiction following the most

common approach to relevant matters?

74. Lady Godiva's horse is being re-shoed, so she is forced to drive into town in her car. She let her driver's license lapse several years ago. It is a misdemeanor in the jurisdiction to drive with a lapsed license. On the way into town, she hits a child who runs out into the street, chasing a ball. The child is killed, although Lady Godiva could not have been any more careful a driver. The jurisdiction follows the most common approach to issues of manslaughter. Can Lady Godiva properly be convicted of manslaughter?

Answers

63. **(A) No.** Murder in most jurisdictions requires one of the four following mental states: (1) intent to kill; (2) intent to commit grievous bodily injury; (3) reckless or wanton indifference to the value of human life; or (4) intent to commit any of certain dangerous non-homicide felonies (i.e., felony-murder). Here, none of these mental states is present. In particular, (2) is not satisfied, because although Kingsman used a weapon that could be a deadly weapon, he did not use it with intent to commit grievous (i.e., serious) bodily injury — a small bruise, a little pain, and fear, do not add up to serious bodily injury, and that's all that Kingsman intended. So the fact that much worse resulted is irrelevant as far as murder goes — there's no general "you take your victim as you find him" rule in murder, as there is in tort law. (This is, instead, a classic case of manslaughter, perhaps misdemeanor-manslaughter.)

(B) Yes. On these facts, Kingsman has clearly intended to inflict grievous bodily injury. Even if the strictest definition of grievous bodily injury is used (intent to inflict life-threatening injuries), the injuries intended here qualify, since fractured skulls are often fatal. Therefore, Kingsman can be convicted of murder despite the absence of an intent to kill. Alternatively, the brutality and dangerousness of the attack probably qualify for reckless-indifference-to-value-of-life murder.

64. **No.** Under the common-law "year and a day" rule (still in force in

many states), a death that occurs more than a year and a day following the defendant's act won't be murder, because the time delay creates a doubt about whether the defendant's act was the proximate cause of the death.

65. **Banquo is guilty of "reckless indifference" murder, but Macbeth is not guilty of any sort of murder.**One of the mental states that will suffice for murder is a ***"reckless indifference to the value of human life,"*** sometimes called a "depraved heart." Banquo's act of firing into a building that he knew was usually occupied would almost certainly qualify as reckless indifference to the value of human life, even though he thought the particular room was empty — because bullets go through walls, the conduct manifests indifference to the very high risk of death or serious injury. On the other hand, Macbeth had no reason to think his conduct was particularly likely to kill or badly injure someone, so his mental state doesn't meet the "reckless indifference" (or any other) mental state that suffices for murder.

66. **Yes, probably, on a theory of felony-murder coupled with accomplice liability.** First, *Speedy* is guilty of felony-murder, because the killing took place during the course of a dangerous felony (robbery). Then, under the rules of accomplice liability Delgato is also guilty of robbery, because by serving as lookout and furnishing a weapon, he encouraged or assisted Speedy's commission of the robbery. The interesting question, of course, is whether Delgato is also guilty of the killing of the watchman. The killing of the watchman was an additional crime beyond the target crime (robbery) that Delgato intended to assist. The rule is that the accomplice will be guilty of additional crimes by the principal if and only if the additional crimes were a "natural and probable result" of the target felony, and were committed in furtherance of that target felony. A court would probably conclude that where an accomplice facilitates what he knows is an armed robbery by the principal, the principal's use of the gun to escape apprehension during the robbery is a natural and probable result of (and is committed in furtherance of) the robbery. In that event, Delgato would be guilty of murder.

67. **Sabina's and Claudius', but not Maecenas'.** When a person commits any of a group of particular dangerous felonies, he will be

guilty under the felony-murder rule for any deaths, even accidental ones, that are the natural and probable consequences of the defendant's actions. Arson is universally considered part of this group of dangerous felonies. Therefore, Nero's guilty of any deaths that are the natural and probable consequences of his act of arson. Sabina's death clearly falls in this category: when one sets fire to a dwelling, the risk that the dwelling is unexpectedly occupied is great enough that this occupancy will not be deemed to be a superseding event. Claudius' death also falls into this category: when one commits arson, it is quite predictable that firefighters will respond, and relatively "natural and probable" that a firefighter may die fighting the blaze. On the other hand, death of a firefighter by getting hit by a branch while returning from the fire fight is not very natural and probable: this is not one of the kinds of events that makes fighting fires especially hazardous. So Maecenas' death probably won't be deemed to be a natural-and-probable consequence of the arson, and Nero won't be guilty of his murder.

68. (A) No, because the requisite causal link is missing. Even in a felony-murder case, the prosecution must show that the commission of the underlying dangerous felony in some sense was the proximate cause of the death — it's not enough for the death to occur at the same time and place as the dangerous felony is occurring. Here, Kitty's death had nothing to do with the felony

(B) Yes. Since the heart attack was caused by fear over the felony (the robbery), it's highly likely that a court would say that the felony "caused" the death. That is, although the heart attack was due in some measure to Kitty's unusual fearfulness, the chain of events was not so bizarre or unforeseeable that Kitty's nervous disposition will be viewed as a superseding cause. This case falls within the general rule in felony-murder cases that crime victims' reactions to the crime, unless they are truly bizarre, will be non-superseding.

69. No, because aggravated battery is not sufficiently "independent" from homicide to be covered by the felony-murder rule. If crimes consisting solely of intent-to-physically-injure could be the predicate to felony-murder, any battery or assault that unexpectedly ended in death would be "bootstrapped" to murder. For this reason, courts

universally say that battery and assault cannot be predicate crimes for felony-murder (at least if the battery and/or assault is directed solely at the person who in fact dies.) So here, Derevenko has committed only battery (he didn't intend to kill or even seriously injure Alexis), and this crime can't be the predicate crime for felony-murder.

70. **Voluntary manslaughter.** What would otherwise be murder will be reduced to voluntary manslaughter if: (1) the defendant acts in response to a provocation that would be sufficient to cause a reasonable person to lose self-control; and (2) the defendant in fact acts with such a loss of control ("heat of passion"). Here, these requirements are satisfied. The fact that Rhett made a mistake of identity will not strip him of the defense, as long as his mistake was in some sense reasonable (and perhaps even if the mistake was careless but genuine, as long as it was not reckless). Some older cases say that "words alone" cannot constitute sufficient provocation, but modern courts recognize that words may be enough if they carry factual information (rather than, say, insults); so Aunt Pittypat's words would probably be held to be enough to cause the kind of lost self-control that voluntary manslaughter is designed to deal with.

71. **He'll be liable for murder, not voluntary manslaughter.** That's because one of the requirements for voluntary manslaughter is that the defendant must have in fact been still under the heat of passion at the time of killing. If it's the case either that a reasonable person would have "cooled off" by the time of the killing, or that the defendant himself had actually cooled off (even if a reasonable person wouldn't have), then the defendant can't qualify for v.m. Here, since the facts indicate that James behaved in a quite rational, cool-headed manner, he can't be said to have acted in the heat of passion.

72. **(A) Involuntary manslaughter.** One form of manslaughter is "involuntary manslaughter," which is defined in most states as being the ***reckless or the grossly negligent causing of another's death.*** It is not necessary for involuntary manslaughter that the defendant have desired to kill, or even that he desired to injure, the victim. It is enough that he behaved in a way that recklessly or grossly negligently disregarded the risk of serious bodily injury or death. Since Deerslay knew that there were houses nearby, in the direction at which he was

aiming, it would be quite plausible for a jury to find him guilty of involuntary manslaughter.

(B) No, probably. If the jurisdiction requires "gross negligence" or "recklessness" for involuntary manslaughter, as most jurisdictions do, Deerslay's conduct here probably did not rise to that level. Most courts hold that gross negligence or recklessness is only established where the defendant was ***actually aware*** of the danger, regardless of whether he *should* have been aware of it. Similarly, the Model Penal Code would acquit Deerslay of manslaughter here. The M.P.C. requires "recklessness" for manslaughter, and under §2.02(2)(c), a person acts recklessly only when he "consciously disregards" a substantial and unjustifiable risk.

73. Involuntary manslaughter, under the misdemeanor-manslaughter rule. That rule permits a conviction for involuntary manslaughter when a death occurs accidentally during (and is proximately caused by) the commission of a misdemeanor or other unlawful act. The rule is not in force in all jurisdictions (and isn't recognized by the M.P.C.), but it's part of the law of most states. For Tom to punch Jerry was a battery, which is a misdemeanor. (Jerry's insult does not furnish Tom with a defense — words of insult are never sufficient provocation to entitle the listener to commit a harmful or offensive touching.) Once that happened, any death that was proximately caused by that battery falls within the misdemeanor-manslaughter rule. The fact that Jerry was a hemophiliac won't furnish Tom with a defense — this event (like *any* unusual frailty of the victim) won't be considered so extraordinary that it should be viewed as superseding.

74. No. The only way L.G. could possibly be convicted of manslaughter is if the doctrine of misdemeanor manslaughter applied. We will assume that it does. However, for the doctrine to apply, the commission of the misdemeanor must be the proximate cause of the death. This means at the very least that the death must be attributable to the type of risk that caused the state to make the offense an offense in the first place. It is very unlikely that a court would hold that the state has made driving with an expired (as opposed to, say, a suspended) license a misdemeanor because such driving is especially risky — license renewals are generally required for fiscal and general

recordkeeping purposes, not accident-prevention ones. Therefore, the lack of a license wouldn't be considered the proximate cause of the accident.

VIII. ASSAULT, BATTERY AND MAYHEM

A. Battery: The crime of ***battery*** exists, in brief, when the defendant causes either: (1) ***bodily injury;*** or (2) ***offensive touching.*** Generally the crime is committed intentionally, but in most states it may also be committed recklessly or with criminal negligence.

1. Injury or offensive touching: Any kind of physical injury, even a bruise from a blow, will meet the physical harm requirement. Additionally, in most states an ***offensive touching*** will suffice. An unconsented-to kiss or fondling, for example, may constitute a battery. See L, pp. 737-38.

2. Mental state: The *mens rea* for battery will usually be ***intent*** to do the injury or offensive touching. However, in most states an injury or offensive touching committed ***recklessly,*** or with criminal negligence, will also suffice. (As is the case with manslaughter, more than "simple" negligence is required; see *supra,* p. 276).

3. Unlawful act: Occasionally, the *mens rea* for battery will be found where the injury or touching resulted from an ***unlawful act*** by the defendant. For instance, if the defendant possessed an unregistered firearm, and it went off and injured another person, the defendant might be liable for battery even without a showing that he was negligent.

4. Degrees of battery: Simple battery is generally a misdemeanor. However, most states have one or more additional, aggravated, forms of battery. These are usually felonies.

a. Serious injury: Some statutes refer to the seriousness of the harm caused. Thus under Model Penal Code § 211.1(2)(a), it is an "aggravated assault" (the term "assault" being used loosely) purposely to cause "serious bodily injury" to another.

b. Use of weapon: Similarly, battery may reach an aggravated degree if a ***deadly weapon*** is used, even if serious bodily harm does not result. Thus Model Penal Code § 211.1(2)(b) makes it a felony to

cause "bodily injury to another with a deadly weapon." For instance, if D shoots at V with a pistol, he will be liable for some kind of aggravated battery even if V has only a superficial skin wound.

c. **Intent to kill:** Similarly, a battery committed "with intent to kill," "with intent to rape," or other felonious intent will often be aggravated battery. See L, pp. 741-42.

5. **Defenses:** Most of the general defenses discussed previously may be used in battery cases. For instance, it may sometimes be a defense that the victim ***consented,*** as where two men engage in a friendly scuffle.

B. Assault: The crime of ***assault*** exists where either: (1) one ***attempts to commit a battery,*** and fails; or (2) one places another in ***fear of imminent injury.***

1. **Attempted battery assault:** One who ***unsuccessfully attempts*** to commit a battery is guilty of assault.

a. **Must be intentional:** Since the offense is attempt-like, it must be committed ***intentionally.*** One who recklessly or negligently nearly causes bodily damage to another (e.g., a drunken motorist who narrowly misses a pedestrian) has not committed assault. L, p. 745.

b. **Present ability:** Some states impose the additional requirement that the defendant have the ***present ability*** to cause injury. In such a state, if D pointed his gun at V and pulled the trigger, but the gun turned out to be unloaded, D would not be guilty of assault (at least of the attempted-battery type). L, p. 745.

c. **Would-be victim need not be aware:** For assault of the attempted-battery type, it is not necessary that the potential victim be ***aware*** of the danger before it occurs. See, e.g., *U.S. v. Bell*, 505 F.2d 539 (7th Cir. 1974), upholding the conviction for assault with intent to rape of D, where D attempted to rape a female geriatric patient who because of a mental disease could not comprehend what was occurring.

2. **Intentional-frightening assault:** Some states have recognized an additional form of assault, that in which the defendant intentionally ***frightens his victim*** into fearing ***immediate bodily harm.***

a. **Intent:** This form of assault similarly can only be committed ***intentionally.*** That is, the defendant must intend to cause fear of injury.

b. **Conduct:** ***Words alone*** will almost never suffice for this kind of assault. Thus even if D states to V "I'm going to blow your head off," it will not be an assault unless the words are accompanied by some overt gesture (e.g., the pointing of a gun).

3. **Conditional assault:** Either attempted-battery assault or intent-to-frighten assault may be committed where the danger or threat is ***conditional*** upon meeting the assailant's demands. For instance, if D tells V, a bystander at a bank robbery, "One false step and I'll fill you full of lead," this is both attempted-battery assault and intent-to-frighten assault, even though V can avoid all danger by failing to exercise his lawful right to move.

4. **Aggravated assault:** Simple assault, like simple battery is a misdemeanor. However, most states have recognized various kinds of felonious ***aggravated assault.*** The most common form relates to the additional felonious intent of the assailant. Thus it is frequently a felony to commit an assault "with intent to kill" or "with intent to rape." Similarly, one who frightens another by use of a deadly weapon is probably liable for "assault with a deadly weapon."

C. **Mayhem:** The common law did not recognize aggravated forms of assault and battery. In order to punish as a felony violent attacks that did not culminate in death, the crime of ***mayhem*** evolved. The crime is committed whenever the defendant intentionally ***maims*** or permanently ***disables*** his victim. That is, mayhem is a battery causing ***great bodily harm.***

1. **Injury must be permanent:** The injury must not only be serious, but ***permanent.*** For this reason, it is usually not mayhem to break the victim's jaw, or even cut his throat with a knife (providing that no serious permanent damage is done). L, p. 750.

2. **Nature of intent:** In most states, mayhem is a crime requiring intent; thus one who negligently or recklessly endangers another, with resulting serious injury, is not guilty of the crime. However, it is not

clear precisely what intent is required. Certainly an intent to cause a serious and permanent injury (whether or not that precise injury occurs) will suffice.

a. **Intent to harm but not seriously:** Some but not all statutes would permit a mayhem conviction where the defendant intends to harm the victim, but does not intend that the injury be ***serious.*** Thus if D intends merely to strike a few blows to V's face, but because D is wearing a ring V's eye is taken out, D will in some jurisdictions be liable for mayhem.

3. **Model Penal Code abolishes category:** The Model Penal Code, unlike virtually all states, does not recognize a separate crime of mayhem. Such conduct is handled as aggravated assault, under M.P.C. § 211.1(2)(a).

IX. RAPE

A. **Definition of rape:** Rape is generally defined as ***unlawful sexual intercourse with a female without her consent.***

1. **Intercourse:** It is not necessary that the defendant achieve an emission. All that is required is that there be a sexual ***penetration,*** however slight. However, it is usually required that the penetration be of the vagina rather than the anus (although in the latter case the offense of "deviate sexual intercourse" may exist; see *infra,* p. 291).

a. **Model Penal Code recognizes anal penetration:** But the Model Penal Code recognizes anal penetration as sufficing for rape. See M.P.C. § 213.1(1) (last paragraph).

2. **The spousal exemption:** Common-law rape requires that the victim be one ***other than the defendant's wife.*** The common-law's complete spousal exemption has, however, been weakened by statutory reform.

a. **Forcible rape even while living together:** A substantial minority of states (about 17) now permit prosecution for ***forcible rape*** even if husband and wife are living together. In other words, in these states, the spousal exemption is virtually eliminated. K&S, p. 398.

b. **Separated or living apart:** An additional substantial minority (about 22 states) eliminate the spousal exemption based on the

parties' current living arrangements or marital status. Some of these eliminate the exemption where the parties are ***not living together.*** Others eliminate it only if the parties are separated by court order or one has filed for divorce or separation. See generally 99 Harv. L. Rev. 1255, 1258-60.

3. **Without consent:** The intercourse must occur without the woman's ***consent.*** The precise meaning of this requirement varies from state to state. Except in a few special circumstances discussed below (e.g., unconsciousness or under-age), the requisite lack of consent will be found only if the woman used words or acts that would make it clear to a reasonable person in the man's position that the woman was not consenting. In other words, a woman who remains silent but subjectively fails to consent will normally not be found to have met the "lack of consent" requirement.

   a. **Victim drunk or drugged:** Some courts find the requisite lack of consent where the victim is ***drunk, drugged*** or ***unconscious,*** regardless of whether this state was induced by the defendant. Other jurisdictions, however, find liability only where the defendant caused the insensibility; see, e.g., M.P.C. § 213.1(1)(b).

   b. **Fraud:** If consent is obtained by ***fraud,*** it will usually nonetheless be regarded as valid for rape purposes. For instance, if D is a doctor who induces V to have intercourse with him by telling her that sex forms part of a treatment, he is not guilty of rape in most jurisdictions. The fraud is said to be merely "in the inducement." P&B, p. 215. Similarly, if D takes V through a sham marriage ceremony, so that she thinks that they are man and wife, this will usually not be held to be rape. B&P, p. 724-37.

      i. **Fraud in the essence:** But if the fraud is such that the victim does not even realize that she is having intercourse at all, this is "fraud in the essence," and may suffice for rape. For instance, if D is a doctor who has sex with V (a not-very-intelligent woman) by telling her that he is treating her with a surgical instrument, D is guilty of rape. B&P, p. 724-37.

   c. **Mistake as to consent:** A key question is whether the defendant's ***mistake*** about ***whether the victim has consented*** should prevent D

from having the *mens rea* for rape. Courts have taken a variety of positions on this issue.[1]

i. **Mistake no defense:** Most courts ***do not recognize*** the defense of mistake as to consent. This stems from the fact that most courts view rape as a crime of ***general intent.*** In other words, most courts require the prosecution to prove only that the defendant voluntarily committed an act of sexual intercourse — consequently, whether the defendant mistakenly thought the woman consented is irrelevant. L, § 7.18(e), pp. 758-59.

ii. **Negligence standard:** A small minority of courts ***allows*** a mistake about whether the victim has consented to negative the crime, but only if the mistake is a ***"reasonable"*** — i.e., ***non-negligent*** — one. For example, California adheres to this view: "If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to ... engage in sexual intercourse, it is apparent [that] he does not possess the wrongful intent that is a prerequisite ... to a conviction of ... rape by means of force or threat." *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).

iii. **Problems posed by "date rape" and by changes in the requirement of force:** The importance of a "mistaken belief as to consent" has increased in recent years because of two developments in the law.
First, courts are somewhat ***less likely*** today to hold that the use of ***threats or force*** is an ***element*** of the offense (see *infra,* p. 291), so situations in which the woman subjectively doesn't want sex, but the man is honestly mistaken about what she wants, are more likely to lead to rape prosecutions than where force or threats are elements of the crime. Second, prosecutions for ***"date rape"*** — as distinguished from "stranger rape" — are more common than they used to be. Therefore, the number of situations in which (i) the man genuinely and reasonably believes that the woman has consented even though she started by saying "no," while (ii) the woman has in fact not consented, and meant it when she said "no," is probably much greater today. The case recounted

in the following example — at least if D's rendition of the encounter is believed — illustrates the type of situation in which some courts and commentators believe that a reasonable mistake as to consent might plausibly occur and, if it occurs, ought to prevent guilt.

Example: D and V are both 18-year-old college freshmen. Prior to the occasion in question, D and V have engaged in some sort of intimate contact in D's dormitory room (with V later claiming that the contact was just kissing and fondling, but D claiming that it included V's performing fellatio on him.) Then, two hours later, both parties are again together in D's dorm room. According to V, D forces his penis into V's mouth. According to D, (i) V tells D that their second sexual encounter will have to be "a quick one," (ii) D holds V's arms above her head and places his penis near her mouth, (iii) V says "no," (iv) D answers "No means yes," (v) V persuades D that she really does mean no, (vi) D then stops trying to have oral sex with V, but they continue to kiss and fondle one another. (It's undisputed that V then gets medical treatment, and appears shaken and upset.) After D is convicted of sexual assault and sodomy, he raises an "ineffective assistance of counsel" argument on appeal, contending that his trial lawyer's failure to request a jury instruction on reasonable mistake was a serious error.

Held (by an intermediate-level appeals court), for the prosecution. Courts in other jurisdictions have held that jury instructions allowing the defense of reasonable mistake as to consent are proper. The present court believes that "the logic of these other cases is persuasive," especially since the defense of mistake of fact has "long been a fixture in the criminal law." However, the court is bound by a prior Pennsylvania Supreme Court decision (in a stranger-rape case) holding that only the legislature can grant a defense based on a defendant's mistaken belief as to the victim's state of mind.

In any event, granting a defense for mistaken belief about consent would be a change of Pennsylvania law. Therefore, it cannot constitute ineffective assistance of counsel for D's lawyer to have failed to ask for an instruction that was not justified under then-current law. Consequently, D would lose on his ineffective-assistance claim even if the court *did* have the power to change the law on its own, which it doesn't. *Commonwealth v. Fischer,* 721 A.2d 1111 (Pa. Super. Ct. 1998).

4. **Force:** The vast majority of rape statutes apply only where the intercourse is committed by ***"force"*** or "forcible compulsion." K&S, p. 381. In other words, it is not enough that the woman fails to consent; she must also be "forced" to have the intercourse. (Where the intercourse is with a minor, or while the woman is mentally incompetent or unconscious, force is not an element of the crime; but for garden-variety rape, force is required.)

   a. **Definition of force:** Nevertheless, at least one court has found that the statutory requirement of physical force can be satisfied by the

act of penetration itself, provided the court finds that the penetration was involuntary or unwanted. In *New Jersey in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992), the court held that in cases of "acquaintance rape" where there is no evidence of force beyond the penetration itself, the "role of the factfinder is to decide ... whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable."

b. Threat of force: The defendant's ***threat*** to commit ***imminent serious bodily harm*** on the woman will be a substitute for the use of actual physical force, in virtually all states. Some states also recognize a threat to do other kinds of acts not involving serious bodily harm; for instance, Model Penal Code § 213.1(a) provides that a threat of "extreme pain or kidnapping" may suffice, and that the threatened harm need not be directed to the victim.

i. **Implied threats or threats of non-imminent harm:** On the other hand, ***implied threats,*** or threats to commit harm on some ***future occasion,*** or ***duress*** stemming from the victim's circumstances — none of these will typically suffice, because they are not threats to use force on the particular occasion.

Example: D has beaten V throughout their six-month relationship. While D and V are taking a walk, V tries to break the relationship off. D tells V he is going to "fix" her face to show her he is "not playing," and then says that at least he has the "right" to have intercourse with V one last time. V goes inside with D to a motel room, and V submits to sex. *Held,* even though V didn't truly consent, there was no rape because there was no force — D's threats to V, even though shortly before the act, were "unrelated to the act of sexual intercourse" and thus didn't count. *State v. Alston*, 312 S.E.2d 470 (N.C. 1984).

c. Resistance: Traditionally, rape did not exist unless the woman ***physically resisted,*** and in some states she was required to resist "to the utmost." In some states, resistance was specifically required by the statute; in others (probably a majority) resistance was required by the courts as a means of ensuring that force really was used. In any event, the requirement of resistance is gradually being weakened.

i. **Reasonable resistance:** No state requires resistance "to the utmost" anymore. Typically, the woman must now make merely ***"reasonable"*** resistance, as measured by the

circumstances. For instance, in the face of a gun or knife wielded by a stranger, it will presumably be "reasonable" not to resist at all.

ii. **Requirement eliminated from statute:** In fact, at least 30 states no longer list resistance as part of the statutory definition of the crime of rape, and another six expressly provide that physical resistance is not an element of the crime. L § 7.20, p. 773. However, in practice, even in these states, many courts continue to hold that the required force and non-consent are not present unless the woman actually resists. *Id.*

iii. **"Unreasonable" failure to resist:** Most states continue to insist that the woman's fear and her consequent failure to physically resist have been "reasonable" under the circumstances — if the woman becomes ***"unreasonably" scared,*** and submits without resistance, this is not rape in most states, ***even if the defendant knew of and capitalized on the fear.***

d. Requirement of force eliminated: A few states have ***eliminated*** the requirement of force entirely, and make non-consensual intercourse some sort of crime (though typically not the highest degree of rape) even in the absence of force or threat. See, e.g., Wisconsin Criminal Code § 940.225(3), making it the least-serious form of sexual assault to have "sexual intercourse with a person without the consent of that person" (with "consent" defined to refer to "words or actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse...."). Delaware and Washington have similar statutes. See K&S, pp. 390-91.

5. Corroboration: Some (but not most) states refuse to allow a rape conviction on the ***uncorroborated testimony*** of the victim. Of those states imposing some sort of corroboration requirement, some require only corroboration of any part of the victim's testimony, while others require corroboration of such aspects as force, penetration and identity. See, e.g., *U.S. v. Wiley,* 492 F.2d 547 (D.C. Cir. 1974), a case involving a 12-year-old victim, holding that there must be

corroboration of the fact of intercourse, not merely of the perpetrator's identity and his association with the victim. Often, medical evidence (i.e., an examination of the woman) is the only way of corroborating the fact of intercourse.

6. **Homosexual rape:** Because common-law rape is defined so as to require both penetration and a female victim, it was generally held that there could be no ***homosexual rape*** at common law. However, a substantial majority of states have now amended their rape statutes to be ***gender-neutral.*** In these states, one man's forcible intercourse with another is rape.

   a. **Gender-neutral by judicial decree:** At least one state has received a gender-neutral definition of rape by ***case law*** rather than legislation. See *People v. Liberta,* 474 N.E.2d 567 (N.Y. 1984), holding that it is a violation of equal protection for the state's rape statute to allow only males to be convicted of forcible rape, and therefore removing from the statute the exemption for female defendants.

B. **Statutory rape:** All jurisdictions establish an ***age of consent,*** below which the law regards a female's consent as impossible. One who has intercourse with a female below this age is punished for what is usually called ***"statutory rape."***

1. **Reasonable mistake usually not a defense:** Most jurisdictions hold that even a ***reasonable belief*** by the defendant that the girl was over the age of consent is ***not a defense,*** making this in essence a strict liability crime. This can sometimes lead to harsh results, as exemplified by the example that follows.

Example: D is a 20 year-old retarded man. His I.Q. is only 52, and he has the social skills of an 11 or 12 year-old. He is introduced to Erica, a 13 year-old girl, by a friend. One night D goes to Erica's house with the intention of using the phone. She summons him into her bedroom. They talk and then have sex. Erica becomes pregnant and has D's child. D is tried for statutory rape. Under Maryland's statute, the crime consists of having vaginal intercourse with someone who is under 14 years of age if the person performing the act is at least four years older than the victim. At trial, D proffers evidence to show that Erica and her friends had previously told Raymond she was 16 years old, and that he had acted with that belief.

Held, under Maryland's statute, the crime of statutory rape is a strict liability offense. The state need not prove any *mens rea,* and the defense cannot offer evidence regarding a

mistake of age. *Garnett v. State*, 632 A.2d 797 (Md. 1993).

a. **Model Penal Code allows reasonable mistake defense:** But the Model Penal Code ***allows*** the "reasonable mistake as to age" defense, though only for the less-serious forms of statutory rape. M.P.C. § 213.6(1) provides that a reasonable mistake as to a child's age is a defense if the criminality depends on the child's being below a critical age other than ten, but is not a defense if the crime is based upon the child's being below the age of ten. This rule is explained as follows: if the victim is in fact under ten, "no credible error of perception would be sufficient to recharacterize a child of such tender years as an appropriate subject of sexual gratification." On the other hand, where the girl is over ten, but under sixteen (making the man potentially liable for corruption of a minor but not rape), the man "evidences no abnormality.... At most, he has disregarded religious precept or social convention." M.P.C., Comment 2 to §213.6.

b. **Attempt liability is blocked:** Even in a state that doesn't allow the reasonable-mistake defense for the completed crime of statutory rape, D cannot be convicted of ***attempt*** to violate the statutory-rape statute, if no intercourse takes place and D does not realize that the girl is underage. That is, just as attempt liability in general requires intent to do an act that if completed would constitute the crime in question (see *supra*, p. 155), and just as a mistake about consent negates "assault with intent to commit [ordinary] rape," so such a mistake about age negates both attempted statutory rape and assault with intent to commit statutory rape.

Example: The jurisdiction makes it statutory rape to have sex with a minor under 16. D and V go on a date, and then back to D's apartment. V is 15, but looks 19 (and D believes that she is 19). D asks V to have sex. She says yes. He undresses her, and is about to have sex, when she says that she has changed her mind, dresses, and leaves.

D cannot be convicted of attempted statutory rape. That's so because attempting crime X requires an intent to do an act that if completed would constitute crime X. D's belief that V was over 16 prevents him from having the required intent to do an act (having sex with a minor) that if completed would constitute statutory rape. Therefore, even though D would have been (in most states) guilty of completed statutory rape if he had had sex with V, he's not guilty of attempted statutory rape here. He's also not guilty of "assault with intent to commit statutory rape," for the same reason.

X. KIDNAPPING

A. Definition of kidnapping: ***Kidnapping*** is generally defined as the unlawful ***confinement*** of another, accompanied by either a ***moving*** of the victim ("asportation") or a ***secreting*** of him.

1. Model Penal Code: The ***Model Penal Code*** has a somewhat elaborate definition of kidnapping. Under M.P.C. § 212.1, a person is guilty of kidnapping "if he unlawfully ***removes*** another ***from his residence or business,*** or ***a substantial distance from the vicinity where he is found,*** or if he unlawfully ***confines another for a substantial period in a place of isolation,*** with any of the following ***purposes:***

> "(a) to hold for ***ransom or reward,*** or as a ***shield or hostage;*** or
>
> "(b) to facilitate ***commission of any felony*** or ***flight*** thereafter; or
>
> "(c) to inflict ***bodily injury*** on or to ***terrorize*** the victim or ***another;*** or
>
> "(d) to interfere with the performance of any ***governmental or political function."***

(We'll look in more detail below at how the M.P.C. provision on moving a person works.)

2. Asportation: Assuming that the crime does not involve secret imprisonment, the prosecution must show that the victim was ***moved*** (the ***"asportation"*** requirement).

a. Large distance not required: In many states, the asportation need not be over a substantial distance.

Example: D accosts V on the street, and makes her walk 20 feet to his car, where he detains her. In many (but by no means all) states, the requisite asportation will be found despite the short distance.

b. Must not be incidental to some other offense: However, even in states that don't require the asportation to be over a substantial distance, the asportation must not be merely ***incidental to some other offense.***

Example: D, in order to rob V, forces him to stand up and put his hands against the wall, while D empties V's pockets. There is probably no asportation since there was no independent purpose to the confinement and movement; therefore, there is probably no kidnapping. But if V had been taken 20 feet away from the robbery site, bound and gagged and left in a secluded and dark place to allow D time to escape, this probably *would* be kidnapping, since the movement of V would not be "incidental" to the robbery.

c. **M.P.C. "substantial distance" rule:** Under the Model Penal Code, the asportation requirement is met only if the defendant either (1) "removes" the victim from his "place of residence or business" or (2) moves the victim "a ***substantial distance*** from the vicinity where he is found." M.P.C. § 212.1.

i. **Eliminate "trivial change of location" cases:** The M.P.C. Commentary says that the "substantial distance" requirement is designed to "preclude kidnapping convictions based on ***trivial changes of location*** having no bearing on the evil at hand. Thus, for example, the rapist who forces his victim into a parked car or dark alley may be punished quite severely for the crime of rape, but he does not thereby also become liable for kidnapping." Id. at Comm. 2.

Example: While V is stopped at a red light late at night, D opens V's car door, gets into the car, points a gun at V's head, and says, "Take me to whatever bank A.T.M. you use." V drives several blocks to a nearby bank and parks. D escorts V at gunpoint up to the A.T.M., demands that D withdraw $100, and runs away with the money. In a jurisdiction that has adopted the Model Penal Code definition of kidnapping, has D kidnapped V?

Yes. Here, D has caused V to move a "substantial distance," not merely compelled V to make a "trivial change of location having no bearing on the evil at hand." That is, forcing V to go to some specific other place, in order that the particular method of robbery could take place, was an integral part of the scheme, not an incidental by-product of the scheme. And since the asportation was done in order to "facilitate commission of any felony" (robbery), it satisfies the full M.P.C. definition of kidnapping.

Quiz Yourself on
NON-HOMICIDE CRIMES AGAINST THE PERSON

75. Mother Goose sends one of her children to Br'er Rabbit with a gift of a bottle marked "medicine." Rabbit drinks the contents, and becomes violently ill. The bottle actually contains a mild poison deliberately

mis-labeled by Mother. (Mother wanted to make Rabbit slightly sick.) What is the most serious crime that Mother is guilty of?

76. Stolitz Naya is driving a streetcar. He is travelling far faster than his bosses have instructed him to travel, and is under the influence of narcotics. Also, he's not watching whether anyone's on the tracks. Anna Karenina, a pedestrian, is reading a magazine as she crosses the street at a crosswalk. Anna doesn't see the streetcar coming, and it hits her, seriously injuring her.

(A) Has Stolitz committed a criminal assault?

(B) Has Stolitz committed a criminal battery?

77. Ferdinand, who is very angry at his wife Isabella for funding an extravagant voyage by Columbus, threatens her by pointing a rifle at her and threatening to "blow her in half." Isabella believes that Ferdinand will probably, but not certainly, pull the trigger. Isabella does not know it but the rifle is not loaded. Ferdinand does nothing further. What is the most serious crime of which Ferdinand is guilty?

78. Don Juan wants to have sex with Camille. Camille refuses because they are not married.

(A) For this part only, assume that Don Juan gets a friend of his to pose as a minister and fake a wedding ceremony. Thinking she's now an "honest woman," Camille consents to sex with Don Juan. Is Don Juan guilty of rape?

(B) For this party only, assume instead that Camille refuses to have sex unless she is at least engaged. Don Juan promises to marry Camille next year, and she consents to have sex with him. In fact, he has no intention of marrying her – next year or ever. Is Don Juan guilty of rape under these facts?

79. Clark Kent meets Lois Lane at a singles bar. By the time they meet, it is obvious to Clark that Lois has had quite a few drinks and is seriously drunk. Clark does not buy Lois any additional drinks. Instead, he asks her if she wants to come to his apartment, and she nods, somewhat dreamily. When they get to his apartment, Clark undresses her and begins to make love to her. Lois giggles and makes slurred remarks, which Clark reasonably believes indicate that she is

conscious and that she is not objecting. The next day, Lois, now sober, relives the whole episode, and makes a complaint to the prosecutor that she has been raped. Assume that Lois demonstrates to the satisfaction of the court that she would not have consented to sex had she not been drunk, and that Clark knew or should have known that the appearance of consent was due to Lois' drunkenness. May Clark properly be convicted of rape, in a jurisdiction following the Model Penal Code approach?

Answers

75. Criminal battery. The crime of battery exists when the defendant causes a harmful or offensive touching of another. The defendant's mental state may be intentional (intent to make the contact), reckless, or criminally negligent. The touching may be direct or, as here, indirect (contact between the harmful "medicine" and Rabbit's body). Thus the fact that Mother did not touch Br'er with her own body is irrelevant. And since Mother intended to bring about the harmful contact, she meets the mental-state requirement.

76. (A) No. An assault occurs only when the defendant either: (1) intends to bring about a harmful or offensive contact with another, and fails; or (2) intends to create in another a fear of an imminent harmful or offensive contact. Here, (1) is not satisfied because it's clear that Stolitz didn't intend to bring about a contact with Anna (he was just reckless in not noticing the risk). And (2) is not satisfied because Stolitz didn't intend to frighten Anna.

(B) Yes. Where a person brings about a harmful or offensive contact with another, he'll be guilty of battery if he acted intentionally or, in almost every state, recklessly. Stolitz' actions — the speeding combined with inattention and driving under the influence — certainly amount to recklessness. Therefore, he meets the mental state for battery. The fact that the contact was in a sense indirect (i.e., the fact that it was the streetcar, rather Stolitz' own body, that made harmful contact with Anna's body) is irrelevant.

77. Assault. One of the ways in which a person can commit the crime of

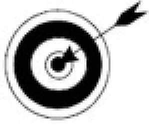
assault is by intentionally putting another in fear of an imminent harmful or offensive contact. That's what happened here: the trier of fact could infer that Ferdinand desired to put Isabella in fear that he would soon pull the trigger and shoot her. The fact that the rifle was unloaded is irrelevant to the sufficiency of Ferdinand's mental state: as long as Isabella didn't *know* that it was unloaded (and as long as Ferdinand was relying on this lack of knowledge), Ferdinand had the requisite mental state, an intent to cause fear of contact. Also, the defendant's present *ability* to actually cause the threatened contact is not one of the elements of assault, so here too the lack of a bullet irrelevant.

78. (A) No. Rape is generally defined as unlawful intercourse with one other than one's wife, without consent. Intercourse based on a man's fraudulently persuading his victim that they are married is generally not deemed to be without consent. Fraud can only negate consent in a rape situation if the fraud prevents the victim from knowing the true nature of the act involved ("fraud in the essence") — the existence of a marriage is viewed as instead involving merely "fraud in the inducement."

(B) No. Fraud in falsely promising to marry someone in the future will not negate consent. As with Part A above, fraud can only negate consent in a rape situation if the fraud prevents the victim from knowing the true nature of the act involved.

79. No. The question here, of course, is whether there was consent. Clark clearly has not used force or threats. Under the Model Penal Code, Clark would be liable for rape if he had surreptitiously drugged Lois or administered liquor to her without her knowledge. Similarly, if Lois had been completely unconscious, Clark would be liable for rape, since M.P.C. §213.1(1)(c) makes it rape to have sexual intercourse where the female is "unconscious." But nothing in the Model Penal Code makes it rape to have sex with a woman who has become drunk on her own volition, but who remains conscious — the fact that the woman's drunkenness induces her to behave in a way that she might not if she were sober is treated by the M.P.C. as irrelevant. (But some courts would convict Clark here, on the theory that there can be no valid consent where the woman is drunk, even

where this state was not induced by the defendant.)



Exam Tips on
HOMICIDE & OTHER CRIMES AGAINST PERSON

Homicides Generally

Homicides occur regularly on exams. So it's well worth your time mastering the details covered in this chapter.

Intent in Homicide Cases.

☛ **Intent, generally:** The issue of whether the defendant had the ***requisite intent*** for a particular form of homicide is commonly tested. Look for a defendant who is ***unconscious*** or ***intoxicated.***

- ☞ **Intoxication:** In intoxication scenarios, analyze the situation carefully to determine whether D was sufficiently drunk to ***prevent him from forming the requisite intent.***For instance, in a murder case drunkenness might have prevented D from forming an intent to kill or an intent to seriously injure (the two most common mental states for murder).

- ☞ **Motive vs. intent:** Also, don't confuse ***motive*** with intent. A defendant needs some sort of qualifying intent, but need not be shown to have any "motive," i.e., any "reason" to kill. So for instance D need not show ill will towards a victim.

☛ **Intent in murder cases:** Remember that there are several different mental states that can suffice for murder. Here's an overview:

- ☞ **Intent-to-kill murder:** First, of course, there's intent-to-kill murder. Here are some of the twists on this version:

  - ☞ **Acting with the desire to kill:** If D ***desires*** to kill, that's enough, even though it was ***very improbable*** that D's conduct actually would result in the death.

Example: D knows that his neighbor, N, has a weak heart and has suffered several heart attacks. D is angry at N and wants to kills him. He decides to scare him into having another heart attack. When N leaves his house, D runs to him shouting, "Look out! Look out! The sky is falling." Although D thinks this probably will not kill N, he hopes it will. When N sees D running towards him shouting he gets frightened and dies of a heart attack. D has an appropriate mental state for murder (desire to kill), and he's in fact guilty of murder, notwithstanding the unlikelihood of his plan's working.

- ☞ **Substantial certainty of death:** Where D knows that death is ***substantially certain*** to occur, then the requisite intent will be found, even if D ***does not actively desire*** the death.

Example: D puts a bomb in a plane owned by X Airlines. He desires that the bomb go off, but only so the plane will explode in the air and hurt X's reputation. However, D knows that people will almost certainly be on board, and will be killed. If the plane explodes in the sky and the passengers die, D will have the mental state required for intent-to-kill murder, because he knew the deaths were substantially certain to occur if his plan succeeded, and the fact that D didn't actively desire the deaths is irrelevant.

☞ **Intent-to-cause-serious-bodily-harm murder:** Next, remember that an intent to ***cause serious bodily harm*** will suffice, even if D does *not* desire to kill.

- ☞ **Serious injury highly likely:** In fact, if D knows that serious bodily injury is substantially certain to occur from his act, then this is tantamount to an intent to cause serious harm, and will suffice.

Example: D wants to get revenge on her coworker, V, by exposing her to a poisonous pesticide gas D uses for her work. D does not desire to kill V, but does desire to make her sick enough that she'll have temporary blindness, and have to be hospitalized for several days. (D sees from the manual for the poison gas that such results are common if humans ingest very much of the gas.) D releases the poison in V's car. V unexpectedly dies of the exposure to the poison. Because D desired to cause what a court would consider to be serious bodily harm, D can be prosecuted for murder.

- ☞ **Inference of intent:** Furthermore, a jury can infer a desire to cause serious bodily harm from the fact that D uses a weapon in a way that will generally inflict such harm.

Example: D is a good marksman. D shoots a rifle at V's legs, in an attempt to coerce V into paying a debt. Unexpectedly, V dies of shock. Since firing a rifle at someone's legs will often cause serious bodily injury, a jury can infer that D desired to cause serious (not just minor) injury. Therefore, D has the intent required for intent-to-inflict-serious-injury murder.

☞ **Reckless-indifference-to-the-value-of-human-life murder:** Profs. love to test this one, because it makes for nice fact patterns. This form exists where D disregards a ***high risk*** that his act will cause death (or serious bodily harm) to others. The classic illustration is firing a rifle into a building known to be occupied.

- ☞ **Illustrations:** Generally, you should discuss reckless-indifference in these kinds of situations:
  - □ D ***drives a car at extremely high speeds;***
  - □ D ***fires a shot in a public place*** with lots of people around;
  - □ D ***gets drunk*** while knowing that he often behaves very violently if drunk;
  - □ D induces V to play ***Russian roulette,*** and V is killed by the bullet (whether fired by D or by V);
  - □ D ***wants to scare*** (but not kill or injure) someone badly, and uses what he knows is a very dangerous method to do so, which then goes awry. *(Example:* D tries to fire a gun near V's head to scare him, but miscalculates and hits V.)
- ☞ **Consciousness of risk:** Remember that courts ***disagree*** about whether reckless-indifference murder can exist if D is reckless, but is ***unaware*** that the risk of death or serious injury is very high. So if the facts indicate that D has behaved in a very reckless and dangerous way without being aware of the danger, discuss whether the lack of unaware of the danger would prevent reckless-disregard from existing. *(Example:* D gets so drunk that he doesn't realize that what he's about to do is extremely dangerous — most courts would probably find reckless-disregard here.)
- ☞ **Distinguish from negligence:** Remember that the unthinking creation of an "unreasonable" (but not extremely high) risk is merely negligent behavior, and does not rise to the level of reckless indifference. Reckless-indifference requires a disregard of a ***very high*** probability of ***death or serious harm.***

Felony-murder

Profs love to test felony-murder, because it can involve so many sub-issues. So any time anyone is committing a felony during the course of which someone dies, you've got to think felony-murder (we'll call it f.m. here).

☛ **Definition:** Look for a fact pattern where ***during or as a consequence*** of D's perpetration of an ***inherently-dangerous felony*** (other than the homicide itself), D ***causes a death,*** even accidentally.

☛ **Situations:** Here are the most common felonies that can give rise to f.m.:

- □ ***Robbery*** (most common of all). *(Example:* D robs V's store while pointing a gun at V. V has a fatal heart attack, or D's gun goes off by accident and kills V. In both scenarios, D has committed f.m.)
- □ ***Burglary.*** *(Example:* D is breaking into V's house, thinking it's empty. V surprises D, they struggle, V falls and hits her head, then dies from the wound. Even if D wasn't trying to injure V, just escape, D is guilty of f.m.)
- □ ***Arson.*** *(Example:* D sets fire to X's house. V, a firefighter, dies fighting the blaze. D is guilty of f.m. in V's death.)

☛ **D's guilt of underlying crime:** Make sure that D would probably be found guilty of the underlying felony — if not, the death can't be f.m.

☛ **Death of co-felon:** Often the death will be that of a ***co-felon*** (either killed by a victim or by a police officer, or killed by himself in an accident). Here, note that most courts do ***not*** apply f.m. where one of the participants in the felony is killed.

☛ **Causal relationship, and intervening acts:** ***Causation*** is the most testable issue in this area. If the death is brought about by an ***intervening act*** (and is not the direct consequence of D's own act), D will be guilty only if his participation in the felony was the ***"proximate cause"*** of the death. Generally, this means that you must find that the death was the ***"natural and probable consequence"*** of the felony — if the intervening act was too abnormal or bizarre, D

will get off the hook.

☞ *Examples of foreseeable consequences & thus causal connection:*

- □ The normal reactions of ***victims, bystanders, and police*** make violence a foreseeable result of any ***robbery.*** Therefore, if a death results from these reactions, it's at least arguable that the death was a natural and probable consequence of the robbery. *(Example:* D robs S's store at gun point. If S tries to stop the robbery by shooting at D, and hits-and-kills a bystander V accidentally, that's probably f.m. Ditto if a police officer responding to S's call for help accidentally hits V or S. Not so clear if D's accomplice is accidentally killed — some states say the killing of a co-felon during the felony can't be f.m.)
- □ It is reasonably foreseeable that the occupants of a ***burglarized*** dwelling might return before an intruder has left and confront the burglar. Therefore, a killing that flows naturally from such a confrontation is probably a natural-and-probable result of the burglary, triggering f.m. *(Example:* While D is burglarizing O's house, O pulls a gun and, while trying to stop D, accidentally shoots O's wife V. D's arguably guilty of f.m. for V's death.)

Example of no causal connection: X, Y and Z commit a robbery in a casino. As they are leaving, on the steps of a gambling casino, D approaches them, believing them to be the operators of the casino. D shouts, "Death to gamblers," shoots at them, and kills Y. D was unaware of the robbery. His motive for shooting was to close down the casino because he had lost all his savings there and his life had been ruined. There is no causal relationship between perpetration of the felony and Y's death — the death resulted from a truly independent, intervening event. Therefore, even in a state allowing one felon to be guilty of f.m. for the death of a co-felon, X and Z won't be guilty of f.m.

☛ **"During commission of" the felony:** Make sure the death occurs ***during the perpetration of the felony.***

Example: V, a store owner, returns from vacation to find out that her store was held up the previous day. V becomes so upset that she suffers a cerebral hemorrhage and dies. f.m. doesn't apply to her death, because the death wasn't "during the perpetration" of the felony.

- ☞ **Immediate flight:** But the "during the perpetration" element is ***satisfied*** if the death occurs while the defendant is ***attempting to escape,*** as long as the attempt occurs reasonably close, in time and place, to the felony.

  Example: D accidentally runs over V while driving the getaway car from the scene of a bank robbery.

- ☞ **V's attempt to get free of confinement:** Similarly, if V dies while trying to ***free herself of confinement*** imposed by D, the death will be deemed to have occurred "during the perpetration of" the felony, even if D has already made his escape at the time of the death.

  Example: D, while robbing V's house, ties V to a chair. After D leaves with the loot (and in fact while D is rested comfortably at home), V has a heart attack while trying to free herself of her bonds. This will be felony-murder, since it will be deemed to have occurred "during" the perpetration of the robbery.

- ☞ **Felony never completed:** Remember that the felony need not ever be ***completed*** — as long as the death occurs during ***preparation*** for or during some part of the felony, that's enough.

  Example: D enters a 7/11, points a gun at the cashier, and demands money. The cashier dies of a sudden heart attack from fright. D flees without taking any money. Even though the underlying felony robbery was never completed (there was no taking of property), D is guilty of f.m.

☛ **Lack of desire to hurt is no defense:** Beware a common trap: the fact pattern indicates that D did not want to harm (or at least physically injure) anyone. This doesn't matter — it's still f.m. if the death proximately results from the felony.

Example: D holds up V's store with a toy pistol. V has a heart attack and dies. The fact that D never intended to cause physical injury or any harm other than economic is irrelevant — it's still f.m.

☛ **Accomplice liability:** Be on the lookout for ***accomplice liability*** in f.m. scenarios. If D2 is guilty of f.m., and D1 is D2's accomplice in the underlying felony, then D1 is guilty of f.m. as well, as long as the killing was the ***"natural and probable result"*** of the felony.

Example: R tells D that he wants to rob a candy store, and asks D if D wants to join in. D says no, but agrees that he will drive R to the store, and drive the getaway car thereafter. (D does not expect any violence to occur.) D's gun goes off during the

robbery, killing V. R is clearly an accomplice to the bank robbery, so he's guilty of the substantive crime of robbery. Then, D (not just R) is guilty of f.m. as well, because he's committed a dangerous felony (robbery, under accomplice rules) which has "caused" a death during its perpetration. The fact that it wasn't D's gun that went off is irrelevant, because a mistaken or accidental shooting is certainly a "natural" result of an armed robbery.

☞ **Express prior agreement violated:** Even if the principal and the accomplice ***agree on some ground-rules*** about how the underlying felony is to happen, and the death comes about because the principal ***violates*** those rules, that won't get the accomplice off the hook for f.m. so long as the killing was a "natural and probable result" of the felony.

Example: On the facts of the above robbery example, suppose that R expressly agrees before the robbery that he will not draw his gun during the crime except in self-defense. R draws his gun anyway, and that's when it accidentally discharges. Since D knew that R would be armed, a court would probably hold that the accidental firing was a natural and probable result of the underlying robbery. In that case, D will still be guilty of f.m.: D is an accomplice to robbery, and the death is a natural and probable result of the felony, even though it came about in part due to R's violation of his express agreement with D.

☛ **"Independent" felony:** Remember that the felony must be ***"independent"*** of the killing.

Example: D assaults V, without intending serious bodily injury. V falls, hits his head, and dies. This isn't f.m., because (even in a state that doesn't restrict f.m. to certain dangerous felonies), the underlying felony of assault isn't "independent" of the death.

Voluntary manslaughter ("v.m.")

☛ **Provocation:** The most frequently tested issue in this area is whether there was ***reasonable provocation*** for D's actions. Remember that this is an ***objective*** test, measured by the characteristics of a person of ordinary temperament.

Examples that are probably reasonable provocation (in all cases, V is the dead victim):

- □ V physically attacks, rapes, or murders D's friend or relative.
- □ V is D's wife or girlfriend, and has consensual sex with X, which D has just learned of.
- □ X is D's wife or girlfriend, and X has consensual sex with

V, which D has just learned of.

Examples that are probably not reasonable provocation:

- □ V verbally insults D.
- □ V steals some relatively inexpensive items from D.

☞ **Cooling off period:** Also, look for a lapse of time within which a reasonable person would have ***cooled off.*** If there was such a lapse, then D can't use v.m.

☞ **Time frame in fact pattern:** Often the fact pattern will give you a time frame, and help you answer the question, Was there adequate time to cool off?

Example 1: Where the facts says that D avenged his wife's rape "the morning after learning about it," there is a question whether enough time went by that a reasonable person would have cooled off.

Example 2: Where the facts say that D is too stunned to act "for a moment," the momentary pause would certainly not be sufficient to constitute a cooling-off period, if D had suffered a severe shock.

☞ **Retrieval of weapon:** Also, look for a situation where D ***goes elsewhere to retrieve a weapon,*** then kills the provoker. This is probably your prof's signal that she wants you to at least consider the issue of whether D had time to cool off.

☛ **Imperfect self-defense:** Remember that in some states, liability may be reduced from murder to manslaughter, if the defendant was ***unreasonably mistaken*** in believing that his actions were justified by the need for, say, self-defense. This is the "imperfect self-defense" form of v.m. *(Example:* D unreasonably, but genuinely, believes that V is about to attack him, so he shoots V first.)

Involuntary manslaughter ("i.m.")

☛ **Definition in fact pattern:** If the fact pattern tells you the jurisdiction's definition of i.m., read it carefully to see just how extreme D's negligence must be to trigger i.m.

☞ **Gross negligence (or "recklessness") usually required:** If the fact pattern does not contain a statute, remember that typically, D must behave with "gross negligence" or "recklessness."

Typically, this means that D must disregard a substantial danger of serious bodily harm or death — garden-variety negligence is not enough.

Example: D, the operator of an automobile service station, advises a customer, V, that removing an air pollution device (a state law requires that all cars be equipped with such a device) would increase her car's fuel efficiency. At V's direction, D works carefully to remove the device, but accidentally loosens a connection in the exhaust system. This causes exhaust gases to leak into the car, poisoning and killing V. Probably D would not be convicted of i.m., because there's no indication that he knew (or should have known) that there was a substantial risk of death or serious injury from what he was doing.

☛ **Alternative to reckless-indifference murder:** Generally, if you argue in your answer that the defendant could be prosecuted for reckless-indifference murder, you should argue in the alternative (in case D's behavior does not rise to that level) that his reckless behavior would make him guilty of i.m.

Example: V contacts D, his landlord, for the sixth time in two days to report that the heating system in his apartment building is malfunctioning. D does nothing. The furnace explodes and causes a fire, and V is killed while trying to rescue his baby. You should first discuss the possibility that L is guilty of reckless-indifference murder, on the theory that he disregarded a very high risk that the malfunction might cause a fire or explosion. But then, you should say that at the least, D is probably guilty of i.m., since his disregard of the risk was reckless.

Reckless drivers: Drivers who ***exceed the speed limit*** by a lot, or otherwise drive recklessly (e.g., wrong-way down a 1-way street), should always suggest i.m. to you if a death results. Ditto for people who drive while intoxicated.

☛ **Attempted i.m. not possible:** When D is reckless but V doesn't die, don't be tempted to charge D with *attempted* i.m. Attempt crimes require an intent to bring about a result — i.m., since it's based on recklessness rather than intent, can't be "attempted."

☛ **Misdemeanor-manslaughter rule:** If the defendant is guilty of a ***misdemeanor*** the commission of which is causally linked to a death, consider the ***"misdemeanor-manslaughter" rule:*** this rule permits a conviction for i.m. if a death occurs accidentally during the commission of a misdemeanor or other unlawful act. (Remember that not all states recognize it; and the M.P.C. doesn't).

☞ **Assault or battery as misdemeanor:** The classic fact patterns for misdemeanor-man-slaughter are assaults and batteries.

Example 1 (assault): D tries to frighten V by pointing a gun at him and pretending to fire. D is just playing a joke, but V has a fatal heart attack. Since this was assault, the misdemeanor-manslaughter rule will be triggered if the jurisdiction recognizes it.

Example 2 (battery): V insults D. D hits V with his fist, just intending to injure him slightly (not enough to constitute even "serious bodily harm.") V falls, hits his head on the edge of the sidewalk, and dies of brain trauma from the fall. Since D committed battery, this qualifies for misdemeanor-manslaughter.

☞ **Malum prohibitum:** If the offense is ***"malum prohibitum"*** — i.e., not dangerous in itself, but just a violation of a regulatory-type rule — in most states this ***can't*** be used for misdemeanor-manslaughter unless there is a close relationship between the violation and the death (which there usually won't be).

Example: D's license is suspended for non-payment (not for prior accidents). While driving without a license, but otherwise driving properly, he accidentally hits and kills V. This won't be misdemeanor-manslaughter, because there was no close causal relationship between D's failure to pay a license fee and his causing V's death.

Battery.

☛ **Definition:** Remember that a battery is an intentional, reckless, or criminally negligent application of force that results in either ***bodily injury*** or an ***offensive touching.***

Examples:

[1] D strikes V with a heavy ashtray;

[2] D pushes V

[3] D sticks a pipe against V's back so it feels like a gun.

☞ Remember that there must be a physical contact between D (or some instrumental that he controls) and V's body. Some physical effect that V suffers in response to events — but that occurs without any physical contact between D and V — won't suffice.

Example: D shoots X, V's wife, in front of V. V has a stroke when he sees this. D has not committed battery on V, because there was no physical contact between D (or an instrumentality controlled or launched by D) and V's body.

Assault.

☛ There are two situations in which you should discuss assault:

☞ **Attempted battery:** Assault can occur where D is unsuccessful in his ***attempt to commit a battery.*** Remember that: (1) the act must be done with ***intent*** to commit a harmful or offensive touching (recklessness or negligence aren't enough); and (2) the would-be-victim ***need not be aware*** of the danger.

Example: The President of the United States is driving in a car with bullet-proof glass. Intending to shoot the President, D shoots three times at the car with a rifle, striking the glass, but not penetrating it. Because of the noise of the crowd, the President is unaware of the shots. A police officer who witnesses the shots being fired arrests D. Because D perpetrated an attempted battery, he is guilty of assault.

☞ **Intentional frightening:** Alternatively, assault occurs if D intentionally ***frightens the victim*** into fearing immediate bodily harm.

Examples:

□ Chasing and shooting at somebody with a hunting rifle;

□ Sticking a pipe against somebody's back and saying, "Don't move or I'll shoot."

☞ **Doesn't see attacker:** Analyze the situation carefully where the victim ***does not see his attacker*** — it's not "intentional-frightening" assault unless there's a moment where V fears an imminent harmful or offensive contact.

Example: D shoots at V, attempting to frighten him. Because of crowd noise, V doesn't learn of the attempt until several seconds later, by which time police have already tackled D. This isn't intentional-frightening assault, because there was no moment when V actually feared an imminent contact.

Rape / Sexual Assault

☛ Rape is not tested too often. When it is, two issues are most likely:

☞ **Statutory rape:** This is a strict liability crime, The defendant needs just to have the intent to have intercourse. *Important:* D's knowledge of V's age is not an element of the crime, so he's guilty even if he (reasonably) thinks V is an adult.

Example: D, who is 22, has sex with V, a 15-year-old prostitute, who tells D she is 18. (V in fact looks 18 to reasonable observers.) D is guilty of statutory rape notwithstanding his reasonable mistake as to V's age, because under the majority approach a reasonable mistake as to age is not a defense to statutory rape.

☞ **Intoxication of defendant:** Because rape / sexual assault is a so-called “general intent” crime, D’s ***voluntary intoxication*** is ***not*** a defense as long as D ***intended to have intercourse.*** So, for instance, if D’s drunkenness prevented him from realizing that V wasn’t consenting, D’s out of luck. However, if D is so intoxicated that he does not even know that he is engaging in intercourse, then he cannot be guilty of rape (even statutory rape).

Kidnapping.

☛ This crime is not heavily tested. Basically look for:

☞ **Intent to confine:** D must intend to confine another.

Example: D steals a car and is unaware that a sleeping child is in the back seat. D does not possess the intent to commit kidnapping, since he has not intended to confine or transport anyone.

☞ **Asportation:** V must either be hidden or moved ***(“asportation”).*** Many jurisdictions hold that there is no asportation if the movement of the victim was incidental to and a necessary part of the commission of some other substantive crime.

☞ *Example:* During the course of a bank robbery, R points a gun at and orders the bank tellers and manager to go from the bank lobby to the back room while R’s partner attempts to open the safe. There has probably been no asportation, in which case there has been no kidnapping.

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1. Our discussion here assumes that the victim has the ***legal capacity*** to consent. In cases of “statutory rape” (intercourse with a person under the age of consent), and in cases where the victim cannot consent due to mental disability, intoxication, etc., the defendant’s mistake about whether the woman can consent (e.g., D’s mistaken belief that V was over the age of 16) may also be a defense. Mistake in cases of statutory rape is discussed *infra*, p. 292. Here, we are speaking about garden-variety rape, in which the woman’s legal capacity to consent is not in issue.

CHAPTER 10
THEFT CRIMES AND OTHER CRIMES AGAINST PROPERTY

Introductory note: The principal focus of this chapter is on the three basic theft crimes: (1) ***larceny*** (including "larceny by trick"); (2) ***embezzlement;*** and (3) obtaining property by ***false pretenses.*** Other property crimes briefly discussed are: (4) receiving stolen property; (5) burglary; (6) robbery; (7) arson; and (8) extortion (blackmail).

I. HISTORICAL OVERVIEW

A. Larceny was judge-made crime: Much of this chapter is devoted to the distinctions between the three major theft crimes, larceny, embezzlement and false pretenses. There could easily have developed one consolidated crime of "theft," but historically things did not work out that way. First, the crime of "larceny" was developed by English judges (rather than Parliament). This crime punished the unconsented-to taking of another's property ***from his possession.***

1. Need to expand "possession": The requirement that for a taking to be larcenous, the property must be taken without consent from the owner's possession, was a severe limitation. To expand the crime to meet the requirements of trade, judges made several farfetched manipulations of "possession."

a. Employees: For instance, suppose an employer voluntarily gave his employee or servant goods or money to use on the former's behalf. Under the original, common-sense idea of possession, the employee could not be guilty of larceny if he subsequently appropriated the property for his own purposes — his original possession was consented-to. Therefore, the judges decided that, at least where the employee was a minor one (e.g. a clerk), the employer never voluntarily gave him possession, but merely "custody"; possession remained in the owner until the wrongful appropriation (which was thus larceny).

b. Breaking bulk: Similarly, if a carrier was given bales or other wrapped goods, and he appropriated them to his own use, this would normally not be larceny, since he obtained possession lawfully. But if he ***"broke bulk"*** by breaking open the bales and taking the contents, the judges instituted the fiction that at the

moment of breaking open the bales and taking the contents, the possession flew back to the owner; the taking of the contents thus constituted an unlawful re-taking of possession by the carrier, and it was therefore larceny.

2. **Statutes on embezzlement and false pretenses:** Other stretching of the concept of possession occurred through the years, as will be discussed below. Finally, however, Parliament created an ***embezzlement*** statute (1799), to deal with employees who received property not directly from the employer, but from a third person for the employer. Similarly, the statutory crime of false pretenses was created (1757) to deal with one who acquires not only possession, but title, without the owner's consent.

   a. **No overlap with larceny:** Since these statutes were attempts to "plug the holes" in the definition of larceny, they were construed so as to have ***no overlap*** with larceny. That is, if the defendant's acts fit within the definition of larceny, they could not constitute embezzlement or false pretenses, and vice versa.

   b. **Same problem exists today:** American jurisdictions adopted the same tripartite scheme, with distinct statutory definitions of larceny, embezzlement and false pretenses. Such a scheme offers the defendant great opportunity to escape conviction on a "technicality."

      i. **How to escape conviction:** The reason for this is that, even though in some jurisdictions the prosecutor may charge, say, both embezzlement and larceny on the same facts (if he is not sure which category the facts fall into), the ***jury may only convict on one.*** Suppose that the jury convicts on larceny rather than embezzlement. Then, on appeal, the defendant may argue that the facts presented at the trial constitute embezzlement, rather than larceny; if the appellate court agrees, the conviction is reversed. In some cases the double jeopardy rule may be construed to prevent retrial on embezzlement charges. In any event, the defendant has at least obtained a new trial. See L, p. 849, fn. 2 and 3.

3. **Need for understanding distinctions:** Some American states have

now consolidated the three main theft crimes into one basic crime, "theft." See *infra*, p. 329. However, most states have retained the distinction, and some of the states which have consolidated still require the prosecutor to fit the defendant's conduct into one of the three pigeon-holes. Therefore, the student's principal job in this area is to master: (1) the dividing line between larceny and embezzlement (i.e., was possession originally obtained unlawfully [larceny] or lawfully [embezzlement]?); and (2) the line between larceny and false pretenses (what was obtained unlawfully, mere possession [larceny] or title [false pretenses]?)

II. LARCENY

A. Definition: Common-law larceny is defined so as to include the following six elements:

1.The ***trespassory***

2.*taking* and

3.*carrying away* of

4.*personal property*

5.of ***another***

6.with ***intent to steal.***
See L, p. 795.

B. Trespassory taking: As noted, larceny is a crime against possession. It requires the wrongful taking of property from another's possession, so that if the defendant is ***already in rightful possession*** of the property at the time he appropriates it to his own use, he cannot be guilty of larceny.

Example 1: The Ds contract to sell their farm to X. According to X, the deal covers certain items of personal property (e.g. some unattached bathroom accessories) as well as the real estate. X moves in after the closing and discovers that the personal property is missing. The Ds are charged with larceny of these items.

Held, the Ds cannot be convicted of larceny, because at the time of the alleged misappropriation, the Ds were in lawful possession of the items. The terms of the sale were that the Ds could maintain possession until X moved in; since the alleged taking and carrying away occurred before this, there can be no larceny liability. (The Ds might be guilty of fraudulent conversion, or "larceny by bailee," but they were not charged with either of these crimes.) *Commonwealth v. Tluchak,* 70 A.2d 657 (Pa. 1950).

Example 2: D rents a horse from a stable, saying he plans to take a trip and return that same evening. Instead, he sells the horse that same day and cannot be located because he has given a false address to the stable-keeper.

Held, whether D has committed larceny depends on his intent at the time he made the rental arrangements. If at the time of those arrangements he intended to sell the horse, his initial possession was wrongful, and he has committed larceny. But if at the time he made the rental arrangement he really planned to take the trip, and changed his mind later, he has not committed larceny, because he was in rightful possession up until the sale. Here, the issue of what D's intent was at the time he made the arrangements was properly left to the jury, which found that he had a fraudulent intent at that time; therefore, D is guilty of larceny. *King v. Pear,* 168 Eng. Rep. 208 (1779).

1. **Trapped by owner:** One situation in which the requisite trespass may be found lacking is that in which the ***owner learns in advance*** that a thief is planning to take his property, and therefore lies in wait for the theft, perhaps even facilitating it (e.g., by leaving the door unlocked). It is often held that there is ***no trespass*** when the thief takes the goods away, although the rationale for such decisions is not uniform.

Example: D arranges with Dolan, an employee at the Plankinton Packing Co., for Dolan to put three barrels of the company's meat on the loading platform. The plan is for D to load the barrels on his wagon and drive away like any customer. D informs his boss of the plan, and is instructed to feign cooperation. The barrels are put out on the platform, D drives away with them, and is arrested. He is charged with larceny.

Held, D's conviction reversed. There can be no larceny without a trespass. Here, the owner of the barrels in effect consented to their being taken. Furthermore, there was a "delivery" of the barrels to D for practical purposes. Therefore, even though D may be as morally culpable as one who took the barrels from the same platform without the owner's knowledge or consent, an essential element of larceny is missing and there can be no conviction. *Topolewski v. State,* 109 N.W. 1037 (Wisc. 1906).

a. **Criticism:** It is hard to see why the owner's "consent" should bar liability in *Topolewski*. There is no consent, in the sense of a shared objective, as there would be if a woman consented to sexual intercourse (thereby negating the existence of rape). Nor is this a case of entrapment (see *supra,* p. 140), since (1) the police were not involved; and (2) D was clearly the initiator of the plan. Fletcher (pp. 86-88) suggests that the decision's rationale stems from the historical notion that larceny is a "forcible or stealthful act of thieving," and that takings that have the external appearance of routine commercial transactions are not included. (However, as Fletcher notes at p. 88, this would not explain why a clever thief, such as a burglar who dresses up as a moving-man and steals in

broad daylight, can be convicted of larceny).

2. **Taking by employee:** A ***minor employee*** is generally held to have only ***custody,*** so that the employer retains possession. Thus if the employee (e.g. a bank clerk) appropriates the property, he has committed the necessary trespass, and is guilty of larceny at common law.

   a. **High employee:** If the employee is one who has a ***high position*** and is given broad authority, he will be deemed to have possession, not just custody, of property that he holds for the employer's benefit. Therefore, if he subsequently appropriates the property for his own purposes, he is not guilty of larceny, since he has not committed a wrongful taking from the owner's possession. He thus falls under the typical embezzlement statute (which applies only where the defendant's original possession is lawful; see *infra,* p. 321).

   b. **Property received from third person:** The rule that a minor employee has custody only does not apply where the property is received by the employee for the employer's benefit from a ***third person.*** In this situation, even the minor employee has possession, not custody, and if he later appropriates it, he is not guilty of larceny.

      i. **Possession transferred to owner:** But there is an exception to this exception: If the employee receives the property, and transfers it to the employer's possession, he is guilty of larceny if he re-takes it subsequently. Thus in *Nolan v. State,* 131 A.2d 851 (Md. 1957), D worked for a finance company. He collected cash receipts throughout the day, and put them in the office's cash drawer. At the close of business, he would appropriate some of the cash from the drawer. The court held that this was larceny, not embezzlement, since the money went into the cash drawer (thus entering the finance company's possession) and was re-taken later. (A concurrence criticized the formalistic reasoning of the majority, pointing out that the cash drawer was under the defendant's control.)

3. **Transaction in owner's presence:** If the owner of property delivers

it to the defendant as part of a transaction which the owner ***intends to be completed in his presence,*** the defendant receives only custody, and the owner retains ***"constructivepossession."*** Therefore, if the defendant appropriates the money, the requisite trespass exists, and the crime is larceny.

Example: D drives into X's gas station. He asks for his tank to be filled up, and drives off without paying.

Held, D is guilty of larceny, not embezzlement or false pretenses. X, when he put the gas in the tank, did not intend to part with title (ownership) of the gas unless he was paid for it. Although he did intend to part with possession, this intent was vitiated by D's fraud, and X retained "constructive possession." Therefore, when D drove off he was taking the property without consent from X's possession. *Hufstetler v. State,* 63 So.2d 730 (Ala. Ct. App. 1953).

Note: The larceny in *Hufstetler* is frequently called ***"larceny by trick,"*** since actual possession was obtained by deceit. "Larceny by trick," which is discussed further, *infra,* p. 312, is not a distinct crime, but is simply one means by which larceny can be committed (just as it can be committed by a forcible taking not accompanied by deceit).

4. **Bailee who breaks bulk:** As we saw *(supra,* p. 307), a carrier or other ***bailee*** who ***breaks bulk*** is guilty of larceny. This rule derives from ***Carrier's case,*** Y.B. 13 Edw. IV, f. 9, pl.5 (Eng. 1473), in which a carrier broke open bales consigned to him, and sold the contents. Although the carrier may have had rightful possession of the packaged goods to start with, "constructive possession" returned to the owner when the bales were broken into, and the misappropriation constituted a larcenous taking of possession.

   a. **Extension of doctrine:** The "breaking bulk" doctrine has been extended to cover the situation where the carrier or other bailee (e.g., a warehouseman) is given a quantity of un-packaged goods, and appropriates some (but not all) of them. See L, p. 799. Some American states continue to apply the "breaking bulk" doctrine, so that there is larceny if bulk is broken, and embezzlement if it is not. In other states, a separate offense called "larceny by bailee" exists, covering all taking by bailees regardless of whether bulk is broken; e.g., *Burns v. State, infra,* p. 321, construing such a statute.

5. **Finders of lost or mislaid property:** One who finds ***lost or mislaid property*** commits the requisite trespass if he ***intends to keep it*** at the time he finds it. If he lacks such an intent at the time of finding (e.g.,

he intends to try to return it to the owner), his possession is rightful and there is no trespass. Then, if he later changes his mind and does keep it, he is ***not guilty of larceny,*** since he is already in lawful possession. (This result may also be viewed as an application of the rule that there must be concurrence of intent to steal with taking of possession; see *infra,* p. 317.) Such a finder may, however, be guilty of embezzlement in some states; see *infra,* p. 321.

a. **Means of returning to owner necessary:** Furthermore, even one who does not intend to return the property at the time he finds it will not be guilty of larceny unless either: (1) he knows who the owner is (e.g., a wallet with the owner's name and address in it) or (2) he has reason to believe that he ***may be able to find out*** who and where the owner is (e.g., a pet wearing a partially identifying tag or collar). See L, p. 800. Under the common-law view, if such knowledge or reasonable belief is lacking at the time of finding, the finder will not become guilty of larceny even if, subsequently, he discovers the owner's identity.

b. **Property delivered by mistake:** The same rules apply where the owner of property ***delivers it by mistake*** to the defendant. That is, the defendant is not guilty of larceny unless, ***at the time he receives the property,*** he: (1) realizes the mistake; and (2) intends to keep the property.

c. **Model Penal Code changes rule:** The Model Penal Code substantially changes the trespass rules in cases of lost, mislaid, or misdelivered property. Under M.P.C. § 223.5, the recipient's intent at the time he obtains the property is ***irrelevant.*** Instead, he becomes liable for theft "if, with purpose to deprive the owner thereof, he fails to take ***reasonable measures to restore the property*** to a person entitled to have it." Thus D's conviction in *Rogers* would have been affirmed under the Code, since D, whatever his intent at the time he received the property, failed to return it to the bank. **[Note to SLE 6-5-12:** *Rogers* apparently removed before this.]

6. **Larceny by trick:** For a taking of property to be larcenous, the original possession by the defendant must be wrongful. As we saw in

Hufstetler, supra, p. 310, possession will be wrongful if it is obtained by ***fraud or deceit.*** The larceny in this situation is said to be ***"by trick";*** larceny by trick is simply one way in which larceny may be committed, not a separate crime.

a. **Distinguished from false pretenses:** One who obtains ***title,*** as opposed to mere possession, from another is not guilty of common-law larceny. Where possession is obtained by fraud or deceit, it will often be hard to tell whether title has passed as well. If it has, the crime is that of false pretenses, discussed *infra,* p. 322. The means of distinguishing between larceny by trick and false pretenses are treated in the discussion of the latter.

b. **Need for conversion:** Where the larceny is by trick, one additional requirement exists that is not necessary for other forms of larceny: The property must be ***converted*** by the defendant (i.e. destroyed, sold, or otherwise deprived of much of its utility to its owner). Contrast the following two situations:

   i. **Burglar:** First, consider a burglar who is caught right outside the scene of the crime carrying away a stereo. He is guilty of larceny (as well as burglary) because he has taken the property and "carried it away" (see *infra,* 312), even though he has not yet had a chance to "convert" it (i.e., deprive its owner of a substantial part of its value).

   ii. **Larceny by trick:** Now consider a person who obtains possession of the same stereo by falsely telling its owner that he will return it tomorrow, when he intends not to return it at all. The possession here is trespassory (since it is obtained "by trick"), but if the recipient is caught the next day, with the stereo unharmed, he will not be guilty of larceny by trick, since there has been no conversion. This is true even though there may have been an ***intent*** to convert (e.g., an intent to resell the unit). If, on the other hand, six months were to pass, without a return of the unit, then the taker would be guilty of larceny by trick, since a substantial portion of the stereo's value to the owner would have been lost. See L, pp. 799-800.

C. Carrying away ("asportation"): The defendant, to commit larceny,

must not only commit a trespassory taking (discussed *supra)*, but must also ***carry the property away.*** The technical term for this requirement is ***"asportation."***

1. **Slight distance sufficient:** However, as long as every portion of the property is moved, even a ***slight distance*** will suffice. And, in fact, if the defendant merely brings the property under his "dominion and control" without physical movement, in many courts today that's enough.

Example: D enters V's car, turns on the lights and starts the engine. At that point he is arrested. At common law, this would probably not be enough movement to satisfy the asportation requirement. But many courts today would hold that since D brought the car under his dominion and control, he did enough to satisfy the requirement. If D drove the car a few feet, *all* courts would agree that this was enough to meet the asportation requirement.

2. **Innocent purchaser transports property:** Suppose the defendant falsely pretends to own certain property, and sells it to X, who carries it off. Is this carrying off by an ***innocent third person*** sufficient to meet the asportation requirement? Most courts follow the reasonable view that the innocent purchaser is the defendant's ***agent*** for purposes of the trespassory taking and asportation requirements, and that the defendant is therefore guilty of larceny. See L, p. 804.

D. Personal property of another: Common-law larceny exists only where the property that is taken is ***tangible personal property.***

1. **Tangible personal property:** Thus one could not commit common-law larceny of ***real estate.*** Nor could one steal ***intangible*** personal property, such as stocks, bonds, checks or promissory notes. See L, pp. 805-06.

2. **Modern expansion:** All states have expanded larceny to cover more than just tangible personal property. ***Intangible items,*** such as stocks and bonds, are always covered. Some items that would formerly have been considered real property (e.g. minerals in the ground), are also usually covered. ***Gas and electricity*** are brought within some statutes, as are ***services.*** Thus one who makes a telephone call or stays in a hotel room without making payment may be guilty of larceny.

   a. **Trade secrets:** Some courts have held that the taking of ***trade***

secrets can constitute larceny.

b. Model Penal Code "theft of services": The Model Penal Code contains a separate provision, § 223.7, establishing the crime of ***"theft of services."*** The statute explicitly refers to professional services, hotel accommodations, restaurant meals, and admission to exhibitions. A refusal to pay after the rendering of the service (such as in a hotel or restaurant) gives rise to a "presumption that the service was obtained by deception as to intention to pay."

c. Theft of the right to "honest government": Even in jurisdictions recognizing intangible items, including services, as being the kind of property that can be stolen, the services in question may be found by the court to be ***too intangible*** to be covered by the theft statute. For instance, in *McNally v. U.S.*, 107 S.Ct. 2875 (1987), the two Ds (one of whom was a public official at the time in question) were charged with violating the federal ***mail fraud*** statute by entering into a self-dealing patronage scheme under which the citizens of Kentucky were defrauded of the "intangible right" to have the state's affairs conducted honestly. (The government charged that D1 sent the state's insurance business to D2's insurance agency, in return for a kickback of some of the commissions.)

i. Result: The Supreme Court held that Congress, when it passed the federal mail fraud statute, intended only to protect "property rights," and that the right asserted here — the intangible right of the citizenry to good government — was not a "property" right, so that the Ds could not be prosecuted. (But Congress responded to *McNally* by amending the statute to cover a scheme "to deprive another of the intangible right of honest services." See 18 U.S.C. § 1346.)

E. Property of another: The property taken must, to constitute larceny, be property ***belonging to another.*** Where the defendant and another person are ***co-owners,*** the common-law view is that there can be no larceny. Thus a partner who steals property of the partnership would not be guilty of larceny. However, a few states have changed this rule by statute. See L, p. 809.

1. **Embezzlement or false pretenses:** Some states which do not allow a co-owner to be guilty of larceny may nonetheless allow a conviction of embezzlement or false pretenses if the other aspects of these crimes are met. See *infra,* p. 320 and p. 326.

2. **Recapture of chattel:** If the defendant is attempting to ***retake*** a ***specific chattel*** that belongs to him, the defendant will not be guilty of larceny, because he is not taking property "of another". In most states, this is also true if the defendant is genuinely ***mistaken*** (even if unreasonably) in thinking that the thing he is taking belongs to himself rather than the other person. But this rule does not apply where the defendant is taking ***cash*** or other property in satisfaction of a ***debt*** — in this situation, the "claim of right" defense may be available (see *infra,* p. 316) but that is conceptually different.

Example: D's bicycle is stolen. Two days later, he sees, chained to a lamp post, what appears to be the same bike. D genuinely believes that this is his own, stolen, bike. He cuts the chain and removes the bike. If the bike was in fact his own, clearly D is not guilty of larceny, because he has not taken property "of another." If D genuinely believes that the bike was his — even if this belief is unreasonable — most courts will similarly hold that he has not committed larceny. (Of course, the fact that the bike was not in fact the one previously stolen from D may make it hard, as an evidentiary matter, for D to convince the court that he genuinely held the belief that the bike was his own.)

But now, suppose that D is owed $100 by V, and that D sees V's bicycle parked on the street. If D takes the bike in payment, he probably cannot defend on the grounds that the bike is not "property of another." On the other hand, most states would allow him to raise the "claim of right" defense, discussed *infra*, p. 316. (If D took the bike forcibly from V's person, in an attempt to get satisfaction of the debt, even the "claim of right" defense probably won't work, since that defense usually does not apply in cases of violent crime such as robbery. See *infra*, p. 317.)

F. **Intent to steal:** Larceny is a crime that can only be committed ***intentionally,*** not negligently or recklessly. The Latin phrase often used to describe the intent is ***"animus furandi"*** (literally "intent to steal").

1. **Intent to permanently deprive owner:** As a general rule, the defendant must be shown to have an intent to ***permanently deprive*** the owner of his property. An intent to take property temporarily is not sufficient.

Example: D, a 17-year-old boy, enters the house of X (another boy), and takes his bicycle. He testifies that he took it to get even with X for something X had done, and that he intended to bring it back, but got caught before he could do so.

Held, D's conviction of burglary (based on intent to commit larceny) reversed. One must have an intent to deprive the owner of his property permanently, not temporarily. *People v. Brown,* 38 p. 518 (Cal. 1894).

a. **Must have actual ability to return:** However, an intent to return the property will not negate liability if one's intent is to use it in a way that makes it likely that the owner will not get it back. For instance, if one intends to take a car, drive it hundreds of miles, and ***abandon it,*** the requisite intent to steal will be found, even though there is no intent to keep it permanently; the reason is that the intended use makes it likely that the owner will not recover the car. See L, p. 813.

b. **Substantial deprivation:** Similarly, if one intends to use the property for such a long time, or in such a way, that the owner is deprived of a ***significant portion of its economic value,*** the requisite intent to steal exists. Thus a Comment 6 to Model Penal Code § 223.2 poses the case of a D who takes a lawnmower belonging to V, with an intent to keep it all summer and fall. According to the Code, this constitutes larceny, because D is intending to deprive his neighbor of a "substantial part of the useful life of the mower."

c. **Issue is intent, not result:** But the issue, both as to abandonment and as to use for a substantial period, is the defendant's ***intent,*** not what actually happens. For instance, if D intends to borrow V's car for a brief round-trip and return it, D does not meet the intent-to-steal requirement even if he gets into an accident after one block that destroys the car.

2. **The sell-back-to-owner, reward and refund exceptions:** If the "intent to permanently deprive" requirement were construed too literally, creative thieves, especially shoplifters, would be able to make money under a variety of techniques while defending on the grounds that they did not intend to keep the property permanently. Therefore, courts have relaxed the intent-to-permanently-deprive requirement in several fact patterns commonly resorted to by thieves. Thus the requisite intent to steal will be ***found*** in the following scenarios, even though arguably the thief was not intending to permanently deprive the owner of the property:

□ The thief intends to ***"sell"*** the property ***back to the owner;***

□ The thief takes the property for the purpose of claiming a ***reward*** for "finding" it;

□ The thief takes an item on display in a store and brings it to the cashier, falsely claiming that he bought and paid for it on a previous occasion, and asking now for a ***refund.*** (This is what happened in the California Supreme Court case in the following example.)

Example: D enters a Mervyn's department store carrying a Mervyn's shopping bag. He goes to the men's department, takes a shirt that is on display, removes it from its hangar, goes to the women's department, and tells the cashier there that he previously bought the shirt for his father but now wants to return it for a refund. (He is filmed while doing all of this.) The cashier issues him a voucher that can be used to purchase other items at the store, and he walks away with the voucher. He is arrested for petty theft, and defends on the grounds that (a) he did not take possession of the shirt by "trespass" (see *supra,* p. 308), since by putting the shirt on display the store consented to his carrying it up to the counter; and (b) he did not have any intent to steal the shirt, since he did not intend to deprive the store of it permanently and, indeed, did not so deprive them of it.

Held, for the prosecution — neither defense is valid. As to (a), the store may have consented to D's picking up the shirt, but not to his picking it up with an intent to steal it, so if he had such an intent the requirement of trespass is satisfied. As to that issue of intent-to-steal (i.e., defense (b)), the weight of authority is that in the taking-with-intent-to-exchange-for-a-refund scenario, as in the intent-to-sell-back-to-the-owner and intent-to-get-a-reward scenarios, the requisite intent to steal is *present* even though the taker did not intend to permanently deprive the owner of possession of the underlying item. This result makes sense, because D is in fact ***asserting the right of ownership*** over the item: "a claim of the right to 'return' an item taken from a store display is no less an assertion of a right of ownership than the claim of a right to 'sell' stolen property back to its owner." Also, schemes like D's create "a substantial risk of permanent loss" to the store, because "if the defendant's attempt to obtain a refund for the item fails for any reason, he has a powerful incentive to keep the item in order to avoid drawing attention to the theft." *People v. Davis,* 965 P.2d 1165 (Cal. 1998).

3. Intent to return equivalent property: As noted, an intent to return the very property taken negates an intent-to-steal. But where the defendant intends to return ***equivalent*** property, not the very property taken, it is not clear whether intent-to-steal is present.

a. Offered for sale: If the property is being ***offered for sale,*** and the defendant intends to pay for it shortly thereafter, he is almost certainly not guilty of larceny. Thus if a newspaper stand is momentarily untended, and D takes a newspaper without paying for

it (because of a lack of change), and intends to pay for it the following day, he will not be a thief. See M.P.C., § 223.1(3)(c), explicitly granting a defense where one takes property "exposed for sale," intending to pay and "reasonably believ[ing] that the owner, if present, would have consented."

b. Property not for sale: Where the property is not being offered for sale, the defendant might be found to have the requisite intent-to-steal despite his intent to pay or return equivalent property. This is particularly likely to be the case if the property is unique, something for which there is no exact monetary value (e.g., an original painting). See L, p. 814.

c. Embezzlement: The requisite intent for larceny should be distinguished from that for embezzlement; intent to return the equivalent property is virtually never a defense to an embezzlement charge. See *infra,* p. 322.

4. Claim of right: If the defendant takes another's property with intent to ***collect a debt*** which the other owes him, or to ***satisfy a claim*** against the other, this will generally negate intent-to-steal.

a. Money taken against liquidated claim: The taking in such circumstances is quite likely to be non-criminal if the defendant takes ***money*** in satisfaction of a liquidated debt or claim (i.e., one with a fixed monetary value). This will generally be true even if the defendant is ***mistaken*** (even unreasonably mistaken) about whether the debt is owed or the claim valid, so long as his belief is an honest one.

Example: D works for V. V fires D, and refuses to pay him for three weeks of vacation pay, which D genuinely believes is owed to him. Assume that under applicable legal principles, and as any reasonably knowledgeable employee would understand, D was not entitled to any vacation pay, because D had taken all the vacation to which he was entitled up to the moment he was fired. D nonetheless reaches into V's cash register and removes three weeks' pay. D is not guilty of larceny, because he took pursuant to an honest, though unreasonable and mistaken, belief that he had a legally-enforceable claim against V for the money.

b. Unliquidated claim or property taken: If, on the other hand, either the defendant's claim is unliquidated (e.g., a claim for damages from a car accident), or he takes the victim's property

rather than money, it is less clear that his claim of right will negate intent-to-steal. But if what he takes is clearly less than what he is owed (or honestly believes is owed him), the defense of claim of right will nonetheless probably be recognized. See L, p. 815.

c. **Usually not a defense to robbery:** Most states hold that the "claim of right" defense is ***not available*** where D is charged with a crime of ***violence,*** including ***robbery.***

Example: D is charged with robbery, for having taken $25 by force from V. At trial, D testifies that V had previously owed him $25 and agreed to pay him back $15 of this. D, by his account, saw that V had enough money to pay back the whole $25, but that V refused to pay back more than $15. D then forcibly took the entire $25 owed to him from V's stack of cash. D asserts the defense of claim of right, in that he merely took back what was owed to him.

Held, for the prosecution. The New York legislature did not intend the "claim of right" defense to be available in crimes involving force, including robbery. This is "consistent with what appears to be the emerging trend of decisions from other jurisdictions." *People v. Reid,* 508 N.E.2d 661 (N.Y. 1987).

Note: The court in *Reid* suggested that the result might be different if D had been trying to take back a ***specific chattel*** which he owned, and which V had taken from him. In that event, D would not be guilty of robbery, because he was not taking property "from an owner thereof." But here, D was merely taking ***fungible cash*** to satisfy a claimed debt, so the cash was clearly "property of another." That being the case, the only issue was whether the legislature had intended to authorize the "claim of right" defense, and, as noted, the court found that the legislature had not so intended.

5. **Concurrence of taking and intent; mistake:** As with any other crime, larceny requires a ***concurrence*** between the *actus reus* (the taking) and the *mens rea* (the intent-to-steal). Thus if the defendant commits the taking under innocent circumstances, he does not commit larceny even if he subsequently decides to keep the property. This is true, for instance, if D ***mistakenly believes that the property is his own*** (and, indeed, it's true even if the mistake is an ***unreasonable*** one).

Example: D, an absent-minded professor, picks up his colleague's black umbrella thinking that it is his own. Subsequently he realizes the error, but decides to keep the umbrella anyway. D is not guilty of larceny, because at the time of taking he did not have an intent to steal, and at the time he had the intent to steal, he no longer met the *actus reus* requirement for larceny.

a. **Model Penal Code:** But, as noted, Model Penal Code § 223.5

imposes a different rule, making a person guilty of theft if he "fails to take reasonable measures to restore the property to a person entitled to have it," regardless of whether there was an intent to steal at the time he came into possession of lost, mislaid or misdelivered property.

i. **Container rule:** Suppose the lost or misdelivered property is in an envelope or ***container*** (e.g., money inside an envelope). A few states hold that the defendant does not take possession of the enclosed property until he discovers it, and can thus be guilty of larceny if at the time of discovery he decides to keep it. Thus if D in *Rogers, supra,* had received the overpayment in an envelope, and realized the mistake only when he arrived home and looked at the contents, he would be guilty of larceny in these minority states if he at that time decided not to return the money. See L, pp. 817. **[Note to SLE 6-5-12: *Rogers* apparently removed before this.]**

b. Continuing trespass: Some states apply the doctrine of ***"continuing trespass,"*** in order to make the defendant's trespassory taking coincide with his guilty intent. The doctrine applies where the defendant's original taking, while not done with intent to steal, is nonetheless ***somewhat culpable;*** his trespass is said to continue up until the time he decides to keep the property. For instance, if D decides to borrow V's car for a short time and return it (a culpable taking even though one not made with intent to steal), he will be liable for larceny under the "continuing trespass" doctrine if he subsequently decides not to return the car. (But if he took the car honestly, believing that it was his own, his original taking would not be trespassory, and the doctrine would not apply at all. Thus he would not be guilty of larceny even if he subsequently decided to keep the car). See L, pp. 817-18.

G. Degrees of larceny: Almost all states divide larceny into at least two degrees, ***petit*** and ***grand.*** Grand larceny usually consists of cases where the property stolen has a market value of more than a certain amount (e.g., $500). Theft of an automobile and theft from the ***person*** of another (e.g., pickpocketing) are often treated as grand larceny regardless of amount.

1. **Aggregation:** Where the defendant has stolen several items, which together meet the amount for grand larceny, but no item meets it separately, the status of the offense depends on the circumstances. If the items were stolen ***at one time*** from one victim, the aggregate value will usually be considered. Also, property taken at the same time from several people will usually be aggregated, on the grounds that all the takings are part of a single scheme. See L, p. 808.

III. EMBEZZLEMENT

A. Definition: Embezzlement varies somewhat from state to state, but in general it is composed of the following elements:

1. A ***fraudulent***
2. ***conversion*** of
3. the ***property***
4. of ***another***
5. by one who is ***already in lawful possession*** of it.
   See L, p. 818.

B. Need for embezzlement crime: As we saw, larceny occurs only where the defendant wrongfully obtains possession. If he obtains possession lawfully (e.g., with the owner's consent), and later misappropriates it, he has not committed larceny. To deal with this situation, the crime of embezzlement exists.

1. **No overlap:** Embezzlement statutes are generally construed so as ***not to overlap*** with larceny. That is, a given fact pattern must be either larceny or embezzlement, and cannot be both. L, pp. 818-19.

C. Conversion: For most larceny, it is only necessary that the defendant take and carry away the property. But for embezzlement, he must ***convert it*** (i.e., deprive the owner of a significant part of its usefulness). Thus if he merely uses it for a short time, or moves it slightly, he is not guilty of embezzlement (regardless of whether he intended to convert it).

Example: D's boss lends him the company car to do a company errand, and D decides to abscond with it or sell it. If he is stopped before he has traveled very far, he will not technically be guilty of embezzlement, since he has not yet converted the car.

D. Property of another: To be the subject of embezzlement, property must fall within certain classes, and must also belong to someone other than the embezzler.

1. **Kind of property which may be embezzled:** Larceny statutes often provide that any property which may be the ***subject of larceny*** may also be embezzled. Thus tangible personal property (covered by common-law larceny), plus any other classes of property (e.g., stocks and bonds) covered by the larceny statute will be covered by the embezzlement statute as well.

   a. **Extension beyond larceny:** Furthermore, some embezzlement statutes are even ***broader*** with respect to property covered than the corresponding larceny statute. For instance, although one generally cannot commit larceny of real estate (for one thing, it cannot be "carried away"), one can easily embezzle it (e.g., by using a power of attorney received from the owner to deed the property to oneself or to mortgage it for one's own purposes). L, p. 820.

2. **Property "of another":** One can only embezzle property belonging to ***another,*** rather than to oneself.

   a. **Owner to pay from own funds:** Thus if defendant has an obligation to ***make payment from his own funds,*** he ***cannot embezzle*** even if he fraudulently fails to make the payment. Two famous cases involving this principle are set forth in the following examples.

Example 1: D, a coal mine operator, has his employees sign orders directing him to deduct from their wages the amount that each owes to a grocery store. D deducts the amount, but then fails to pay the store owner.

Held, D is not guilty of "fraudulent conversion" (a kind of embezzlement). D did not misappropriate his employee's money, but rather, failed to make payment from his own funds. It is true that he owed money to the employees as unpaid wages, but this gives rise only to civil liability, not criminal. *Commonwealth v. Mitchneck*, 198 A. 463 (Pa. 1938).

Example 2: D runs both a loan company and a collection agency. His loan company receives a promissory note for $200 from X. He gives her only $7 in cash, and agrees to use the rest of the loan proceeds to pay off certain of X's creditors. D then goes to two of the creditors, to whom she owes $57, and convinces them to retain his collection agency to collect the sum (without telling them of his relationship to X). He pays them $38 and keeps the remaining $19 as his own collection fee.

Held, D's conviction of larceny reversed. D may have been a debtor of X for $193, but he was not a custodian of her money. Even had he failed to make any payments at all, he would have had only civil liability. Furthermore, X did not lose anything by D's conduct, since she would not have gotten the $19 anyway. (And while the creditors might have lost, the indictment did not charge D with stealing from them.) *State v. Polzin*, 85 P.2d 1057 (Wash. 1939).

i. **Model Penal Code critical:** The Model Penal Code draftsmen are highly critical of the logic behind *Mitchneck* and *Polzin.* As the draftsmen point out, Mitchneck could have been convicted of theft if he had paid his employees their full wages at one window and received the grocery money back again at a different window. Similarly, Polzin could have been convicted if he had handed $200 over to X, and she had immediately handed him back $197 with which to pay the creditors. As the draftsmen state, "the physical manipulation of greenbacks has no conceivable criminologic significance." (Tent. Dr. No. 1 at 114.)

ii. **Code changes rule:** Therefore, the Code establishes the new crime of "theft by failure to make required disposition of funds received." (M.P.C. § 223.8.) The provision applies wherever the person with the obligation to pay agrees to ***reserve funds*** for the obligation. Thus Mitchneck and Polzin would be liable under the provision, but one who buys goods on credit and does not pay for them would not be (since he has not agreed to reserve particular funds). See Comment 1 to § 223.8.

b. **Co-owners of property:** One who is ***co-owner*** of property together with another cannot, according to the usual rule, embezzle the joint property, because it is his "own." This is true, for instance, of ***joint tenants*** in real estate, or ***partners*** in a business. Occasionally, however, the embezzlement statute explicitly applies to co-owned property

c. **Agent for collection:** A person may undertake to ***collect money*** for another, and to remit it (usually minus a commission). When such a person collects and then fails to remit, the courts are split as to whether this is embezzlement. See, e.g., *State v. Riggins,* 132 N.E.2d 519 (Ill. 1956), in which D ran a collection agency, one of

whose clients was X. D’s arrangement with X was that he could collect from her debtors and commingle all funds received in one bank account; furthermore, he was not required to pay anything to X on a particular account until it was paid in full. He made collections over a period of time (including full collection from some accounts), and did not remit. The court held that D could be guilty of embezzlement, because he was not a co-owner of the funds, but merely an “agent.” (A dissent criticized the finding that D was an “agent,” arguing that the embezzlement statute’s use of the term “agent” was intended to be narrow, and did not apply to an independent businessman who works for hundreds of clients.)

E. By one in lawful possession: As noted, the principal distinction between larceny and embezzlement is that the latter is committed by one who is ***already in lawful possession*** of the property before he appropriates it to his own use.

1. Employees: Virtually all embezzlement statutes apply to ***employees*** who misappropriate property with which they have been entrusted. However, since common-law embezzlement exists only where the employee is originally in lawful possession (not merely custody), some misappropriation by employees will be larceny.

a. Minor employee: Thus as noted *(supra,* p. 310), a ***minor employee*** (e.g., a bank clerk) is likely to be held to have received only ***custody*** of the item, with “constructive possession” remaining in the employer. When such an employee takes it for his own purposes, he is therefore committing larceny (by unlawfully obtaining possession).

i. Possession from third person: But if the property is obtained by the employee directly from a ***third person,*** not from the employer, this will usually constitute possession rather than custody. See, e.g., *Commonwealth v. Ryan,* 30 N.E. 364 (Mass. 1892), holding a bank clerk liable for embezzlement rather than larceny where he received cash from a third person, briefly deposited it in the employer’s cash drawer, and withdrew it for his own use.

b. Broad statutes: A number of states, however, now have broad

embezzlement statutes that make it embezzlement rather than larceny for an employee to take property in his possession or "under his care." Under such a statute, even a minor employee who at common law would have had only "custody" is guilty of embezzlement when he misappropriates. See L, pp. 824-25.

2. **Finders:** One who finds ***lost or mislaid property,*** or to whom property is ***mistakenly delivered,*** cannot be guilty of larceny if he gains possession without intent to steal. *(Supra*, pp. 311-311.) However, many embezzlement statutes may not be drawn so as to make such a person an embezzler either. Thus he may go free. See L, p. 825.

   a. **Bailee statutes may cover:** However, some states have special ***"larceny by bailee"*** statutes, and others have embezzlement statutes explicitly covering finders and other bailees. In either event, the finder is likely to be liable. See, e.g., *Burns v. State*, 128 N.W. 987 (Wisc. 1911), wherein D, a constable, finds a roll of money thrown away by an insane man. D fails to return the money, and is convicted of "larceny by bailee." Conviction affirmed, on the grounds that there has been a "bailment," even though there was not a formal contractual arrangement between the insane man, as bailor, and D, as bailee.

F. **Fraudulent taking:** The embezzler must not only intend to take the property, but his taking must be ***"fraudulent."*** The principal issue with respect to the defendant's mental state is whether a ***claim of right*** or an ***intent to repay*** negates a fraudulent state of mind.

1. **Claim of right:** If the defendant honestly believes he has a ***right*** to take the property, this will often negate the existence of fraud. For instance, if he mistakenly believes that the property is ***his,*** or that he is authorized to use it in a certain way, this will be a defense (perhaps even if the mistake is unreasonable; see L, p. 826).

2. **Collection of debt:** Similarly, if the defendant takes the property in order to ***collect a debt*** owed him by the owner, there will probably be no fraud. For instance, in *Regina v. Feely*, [1973] 2 W.L.R. 201 (Eng. 1972) D was branch manager of a bookmaking firm, and "borrowed" 30 from the cash drawer. He defended on the grounds that his

employers owed him 70, and that the 30 should be treated as partial payment of this debt. *Held,* it should have been left to the jury to consider whether the taking was "dishonest" (the term used in the statute). It cannot be said as a matter of law that one who takes in this situation has the necessary fraudulent intent.

3. **Intent to repay:** It is very commonly raised as a defense to embezzlement that the defendant ***intended to return the property taken.***

   a. **Intent to return the very property:** If the defendant intends to return the ***veryproperty taken,*** and has a substantial ability to do so at the time of taking, this may be a defense. One who uses his employer's car, intending to return it, for instance, would probably escape conviction. See L, pp. 826-27.

   b. **Intent to return equivalent property:** But much more commonly, the property taken is ***money,*** and the intent is not to return the same dollars, but an ***equivalent sum.*** Perhaps because it is precisely along these lines that most embezzlements occur, it is uniformly accepted that such an intent to return the equivalent is ***no defense.***

      i. ***Ability to repay irrelevant:*** Generally, of course, the embezzler does not have a realistic possibility of paying back the money. But ***even if he does,*** this will not help him.

IV. FALSE PRETENSES

A. Definition: The crime of obtaining property by false pretenses, usually referred to as simply ***"false pretenses,"*** generally consists of the following elements:

1. A ***false representation*** of a
2. ***Material present or past fact***
3. Which ***causes*** the person to whom it is made
4. To ***pass title to***
5. His ***property*** to the misrepresenter who
6. ***Knows*** that his representation is false, and ***intends to*** defraud.

   See L, p. 828.

B. Need for crime: Larceny, as noted, exists where the defendant obtains possession unlawfully, but does not obtain title. If a person uses fraud or deceit to obtain not only possession but also ownership (title), he must be prosecuted for the crime of false pretenses, which exists in all jurisdictions.

1. No overlap: Like the crime of embezzlement, false pretenses was first enacted as a Parliamentary statute in order to supplement larceny. Therefore, the courts have always construed false pretenses statutes in such a way that there is no overlap with larceny; either one is guilty of larceny or of false pretenses, but not of both.

2. Difficulty of distinguishing from larceny to trick: Since one kind of larceny (larceny "by trick") is accomplished with the use of fraud or deceit to obtain possession, it will sometimes be difficult to tell whether an appropriation is larceny or false pretenses (i.e., whether title or merely possession has passed). This issue is discussed further *infra*, p. 325.

C. False representation of present or past fact: There must be a ***false representation*** of a ***material present or past fact.***

1. Non-disclosure and concealment: Normally the misrepresentation will be an explicit one, made by use of words. But courts have recognized other kinds of misrepresentations.

a. Reinforcing false impression: For instance, it may be a misrepresentation to ***reinforce a false impression*** held by another. Model Penal Code § 223.3(a) includes such conduct within the crime of "theft by deception." The Code Commentary gives the following example: D buys a glass ring from Woolworth's. V, who mistakenly fancies himself to be a diamond expert, sees the ring, and says to V "That is a nice diamond ring you're wearing. How much will you sell it for?" D responds saying "$500" (which he knows to be much more than the value of the ring). D would be liable for "theft by deception" under the Code, since he has reinforced what he knows to be V's false impression. (Comment 3(a) to § 223.3.)

b. Concealment: Similarly, active non-verbal conduct may suffice.

For instance, if D sold V a car with a broken engine block, and painted the engine block in such a way as to ***conceal*** the defect, he might be liable for false pretenses.

c. Fiduciary relationship: Also, if the defendant is in a ***fiduciary relationship*** with the other party (e.g., attorney and client), he may have an affirmative duty to speak the truth, and if he remains silent with knowledge that the other person is mistaken, he may be liable. See M.P.C. § 223.3(c).

d. Silence normally not enough: But there is no general duty on the part of a party to a bargaining situation to speak the truth rather than remaining silent. That is, one may generally ***remain silent*** even though one knows that the other party is under a false impression (provided that one did not cause that false impression in the first place). See L, p. 830.

2. False promises not sufficient: The representation, according to most courts, must relate to a ***past or present fact.*** The majority rule is that ***false promises,*** even when made with an intent not to keep them, are not sufficient.

a. Rationale: The rationale for this majority view is that a contrary rule might lead to ***imprisonment of debtors,*** who borrow with an honest intent to repay, but later get into financial difficulties. The theory is that it will often be nearly impossible to tell whether D borrowed with intent to repay, or with a dishonest intent not to.

b. Minority view: But there has been a tendency in some courts to allow false statements as to future facts, including false promises, to suffice.

Example: D obtains the life savings of two elderly women, by promising to give them mortgages on certain properties. The money is never repaid, and the mortgages are never tendered.

Held, D can be convicted (of the consolidated crime of "theft," one form of which is false pretenses) if it is shown that he did not intend to perform the promises at the time he made them. It is true that there is a risk of prosecuting one who is "guilty of nothing more than a failure or inability to pay his debts," but this danger can be guarded against by requiring something more than the mere non-performance to prove the fraudulent intent. *People v. Ashley,* 267 P.2d 271 (Cal. 1954).

Note: A concurrence argued that there is no effective way to guard against this

danger, since juries will often reason that the defendant "should" have known he couldn't keep the promise, and that therefore that he did in fact not intend to keep it.

c. **Distinguished from larceny by trick:** Although a false promise will not, as noted, usually suffice for false pretenses, for no logical reason such a promise ***will suffice for larceny by trick.*** For instance, if one rents a car by promising to return it in two days, and then keeps the car permanently, this will suffice for larceny by trick. See L, pp. 831-32.

D. Reliance: There must, of course, be a causal relation between the false representation and the passing of title. This requirement is usually expressed by stating that the victim must ***"rely"*** upon the representation. Thus if the victim does ***not believe*** the representation, the crime does not exist. See L, p. 833.

1. **Representation must be "material":** Also, the false representation must be a ***"material"*** one. That is, it must be one which would play an important role in a reasonable man's decision whether to enter into the transaction. The courts have not been very liberal to defendants in determining what is material.

Example: D purchases two television sets on credit from V by stating that he is the free-and-clear owner of a Packard car worth over $4,000, and giving V a chattel mortgage on the car. D fails to disclose that there is a prior mortgage on the car, for $3,000. The car is then in a collision, sustaining $1,000 worth of damage, and is repossessed by the first mortgagee. D is prosecuted for obtaining the television sets by false pretenses. He defends on the grounds that the sets were only worth a total of $272, and that even with the first mortgage he had an equity in the car of $1,000 (five times the value of the sets); therefore, he argues, the misrepresentation was not material.

Held, conviction affirmed. There was evidence that V would not have sold the sets had it known the true facts. Therefore, D's misrepresentation was material. (A dissent argued that, insofar as D gave security that was worth, by any standards, more than three times the value of the property being purchased, he should not be found to have materially defrauded V.) *Nelson v. U.S.,* 227 F.2d (D.C. Cir. 1955).

E. Passing of title: To decide whether a case involves larceny (usually by trick) or false pretenses, it is necessary to determine whether the victim has passed title (ownership) to the property, or merely possession. ***Only if the title has passed*** will the crime be false pretenses. In general, the question will be what the victim ***intends*** to do.

1. **The victim has only possession:** For the victim to pass title, he himself must of course have something more than mere possession.

One who finds lost property, for instance, or who purchases stolen goods from a fence, does not have title; if he is swindled, therefore, this is larceny rather than false pretenses. See L, pp. 835-36.

2. **Sale as opposed to loan or lease:** Where the victim parts with property (as opposed to money), there is a transfer of title if a ***sale*** occurs. If, on the other hand, the property is merely ***lent*** or ***leased,*** only possession has been transferred, so the offense is larceny by trick.

3. **Purchase of goods on conditional sale:** Suppose the defendant ***buys goods*** under a conditional sale contract, by which the seller retains a ***security interest*** in the property until it is completely paid for. In this situation the buyer probably gets a significant enough ownership interest to qualify for false pretenses, if he has lied in the negotiations (e.g., by ***misrepresenting his ability to pay).*** See L, p. 836.

4. **Handing over of money:** If the victim ***hands over money,*** it is probably the case that he does not expect to get the money back (but rather expects to get something else of value in return). If so, the crime is false pretenses. For instance, if D sells V a glass ring claiming that it is a diamond, and V pays an exorbitant price, D has obtained ownership of the money, not merely possession, and is guilty of false pretenses.

   a. **For specified purpose:** But occasionally, a person gives money to another with the understanding that the latter will apply it towards a ***particular purpose.*** In this situation, it is usually held that possession, not title, is all that passes. The crime is therefore larceny.

   Example: V, an immigrant, asks D, a lawyer, to assist him in straightening out a disorderly conduct arrest (which he fears will prevent him from getting U.S. citizenship). D tells V that it will be necessary to bribe the arresting policeman, and V gives D $2,000 for this purpose (in addition to a $200 legal fee). D never pays the money to the policeman, and is charged with larceny.

   Held, D is guilty of larceny by trick, not embezzlement. V did not intend that title to the money would pass from him until it was actually paid over to the policeman. Therefore, D obtained only possession. *Graham v. U.S.,* 187 F.2d 87 (D.C. Cir. 1950).

   b. **Loan of money:** If, on the other hand, the victim makes a ***loan*** of

money without explicit restrictions on how the recipient is to spend it, this will be false pretenses rather than larceny. Thus if D borrows money from Bank by misrepresenting his assets, he receives title to the money, not merely possession. See L, p. 838. See, e.g., *Nelson v. U.S.,* discussed *supra,* p. 324 (D borrows by lying about whether his automobile is already mortgaged; held liable for false pretenses).

F. Property of another: The defendant must have received property, and it must be property belonging to "another."

1. Property that qualifies: Originally the crime of false pretenses was limited to property that could be the subject of larceny, i.e., tangible personal property. But modern statutes have generally extended the crime to cover at least documents representing rights (e.g., stocks, bonds, insurance policies, etc.).

a. Extended to cover anything of value: In fact, some statutes are broad enough to cover anything that has value. Thus Model Penal Code § 223.0(6) defines property, for theft purposes, to include ***"anything of value."***

2. Joint ownership: Since the property received by the defendant must belong to "another," most courts still hold that property D ***co-owns*** with V does not qualify.

a. Modern view finds liability: But modern courts are increasingly likely to hold that where D takes property belonging to himself and a co-owner, at least part of what was taken *is* property of "another" (the other's co-ownership interest), and can thus give rise to false pretenses.

G. Defendant's mental state: False pretenses, like embezzlement and larceny, is essentially a crime requiring intent. However, since one of the elements of the crime is that the representation be false, too strict a construction of the intent requirement might allow scoundrels to escape. Therefore, the intent requirement is met if either (1) the defendant ***knows*** that the representation is untrue; (2) he ***believes,*** but does not know, that the representation is untrue; or (3) he ***knows that he does not know*** whether the representation is true or false. See L, pp. 839-40.

1. **Practical significance:** Thus if the prosecutor can show that the representation was false, he can gain a conviction merely by showing that the defendant had no way of knowing whether it was true or false. This will often be much easier to demonstrate than it would be to show actual knowledge by the defendant of the falsity.

2. **Reasonable belief in truth of representation:** But if the defendant believes the representation to be true, he will not be liable for false pretenses ***even if his belief was completely unreasonable.*** That is, as to the falsity of the statements, the crime is not one that can be committed by gross negligence. (Of course, the fact that such a belief would be extremely unreasonable will be evidence that the defendant did not really hold it.)

3. **Intent to defraud:** Even if the defendant knows or believes that the statement is false, he cannot be convicted if his intent was not ***"fraudulent"*** The principal significance of this additional requirement is that a ***claim of right*** (e.g., collection of a debt) may be a defense to false pretenses just as to embezzlement *(supra*, p. 322) or larceny.

   a. **Attempt to collect debt:** Suppose, for instance, that D sells V a bicycle, and V does not promptly pay the purchase price. D makes reasonable attempts to collect, but is unsuccessful. V then complains that the bike is defective, and D tells him that if he will bring it in, D will obtain a new replacement bike for him. V gives back the bike, and D refuses to give the new one. On these facts, it seems probable that D would not be guilty of false pretenses, since although he made a false promise (which in some states may suffice; see *supra*, p. 324), he had no intent to defraud — he was trying to collect a legitimate debt. See L, p. 841, fn. 84.

H. Defenses: Two defenses are particularly likely to be raised in false pretenses cases:

1. **Gullibility of victim:** The defendant may claim that the representation, although false, was not one which would have deceived an ordinarily intelligent man, and that the ***victim's gullibility*** should therefore furnish a defense. This defense is ***extremely unlikely to succeed,*** since one purpose of the criminal law is to protect those who cannot take care of themselves. See L, pp. 841-42.

2. **No pecuniary loss:** The defendant may argue that despite the representation's falsity, the victim has suffered no actual ***pecuniary loss.*** For instance, suppose D sells V what he claims to be a fabulous set of stainless-steel kitchen knives, for the unbelievably low price of $2.95. The knives are really a weak alloy which rusts easily, but they are nonetheless worth $2.95. The fact that there has been no actual pecuniary loss will probably ***not be a valid defense.*** See L, pp. 842-43.

I. Crimes related to false pretenses: A number of statutory crimes are related to false pretenses, in that they typically involve the obtaining of title to property by fraud or deceit. A full discussion of these crimes is beyond the scope of this outline; however, they may be summarized as follows:

1. **Bad checks:** If a person obtains property by writing a ***bad check*** (either one for which there are insufficient funds at the bank, or one for which there is no valid account) it may be possible to convict him of false pretenses. But this approach will not always work; for one thing, the court may hold that title to the property does not pass until the check is cashed, so that if it never clears, there can be no false pretenses. See L, p. 852.

   a. **Bad check statutes:** Therefore, many states have enacted special ***bad check statutes,*** which make it a crime to write a check with knowledge that there are insufficient funds to cover it. Most such statutes provide that if the check is returned for insufficient funds, and the issuer fails to make good on it within a short statutory period of time (usually ten days), knowledge of the insufficiency, and an intent to defraud, may be presumed. See L, pp. 852-54.

2. **Forgery:** The crime of ***forgery*** exists where a document (usually a check or other negotiable instrument) is forged. The falsification must relate to the ***genuineness*** of the instrument itself (e.g., a signature purporting to be that of someone other than the actual signer). It is not necessary that the forged document actually be used to obtain property from another; thus one who acquires stolen checks and signs the account holder's name to them will be liable even if the checks never leave the forger's possession. See L, pp. 844-45.

3. **Mail and wire fraud:** The federal ***mail-fraud*** and ***wire-fraud*** statutes make it a federal crime to use the mails or "wires" (i.e., electronic communication methods like phone or email) as part of a scheme to defraud a victim of his property. So, for instance, the mail fraud statute (18 U.S.C. § 1341) applies to anyone who has "devised or intend[s] to devise ***any scheme or artifice to defraud*** or [to obtain] money or property by means of ***false or fraudulent pretenses,*** representations, or promises," and who then, in order to carry out the scheme, ***uses the U.S. postal system.***

   a. **Success not required:** One significant aspect of the mail- and wire-fraud crimes is that ***the scheme does not have to be successful*** for liability to exist. So despite the name, federal mail fraud and wire fraud are really inchoate ***"attempt-like"*** crimes.

   Example: D decides to run a Ponzi scheme. He sends 100 letters to would-be investors, promising to invest their money in privately-held Internet startups, and to deliver the investors an annual rate of return of at least 20%. D secretly intends to deliver "profits" to early investors not by making Internet investments but by using money from later investors. Before anyone invests in the scheme, D is arrested.

   D can be convicted of federal mail fraud, because he has "devised [a] scheme or artifice to defraud," and has used the U.S. mails in support of that scheme. The fact that no victim has actually been injured in the scheme (or has even turned over money to D) doesn't matter.

   b. **Theft of honest services:** The basic wire-and mail-fraud statutes have always, since they were first enacted in the 19th century, clearly covered schemes to deprive another of ***money*** or ***tangible property.*** But until 1988 there was an ambiguity about whether these statutes also covered schemes to defraud a person of ***"intangible*** rights," like the right of an employer to have its employee ***behave without undisclosed conflicts of interest.***

   Example: Devon works as a purchasing manager for V, a business. Devon causes V to buy goods from X, a supplier, in return for a bribe that X mails to Devon. The goods are the same quality and price as the ones V would have bought in the absence of the bribe, so V hasn't suffered any loss of money or property from the scheme. Until 1988, it was unclear whether the lack of financial loss to anyone meant that the mail-fraud statute didn't apply to Devon.

      i. **Congress' answer:** Congress resolved this intangible-rights issue in 1988 by passing a new provision, 18 U.S.C. § 1346. § 1346 says that for both mail and wire fraud, the term "scheme

or artifice to defraud" ***includes*** "a scheme or artifice to deprive another of the ***intangible right of honest services."*** So in our Example about Devon the crooked purchasing agent, under § 1346 Devon is clearly guilty of mail fraud, because by taking a bribe in connection with his services he has deprived his employer V of "the intangible right of honest services."

(1) Crooked acts on behalf of employer: The deprivation-of-honest-services idea is a pretty vague and potentially far-reaching one. For instance, suppose a corporate employee, in order to boost the company's stock price, falsely tells the public that the corporation is profitable; does that sort of dishonesty — where the employee is being dishonest but not acting directly against the interests of the employer — constitute deprivation of the employer's intangible right of honest services? In a 2010 case, the Supreme Court answered ***no,*** and gave a ***restrictive reading*** of the honest-services concept: the "intangible right of honest services" provision ***applies only to bribes and kickbacks,*** and therefore does not apply to a corporate employee who with no direct conflict of interest commits fraudulent activities in order to benefit the corporation. See *Skilling v. U.S.*, 561 U.S. _ (2010).

Example: D (Jeff Skilling, the CEO of Enron) tells the public that Enron is solvent and profitable, when in fact it is neither. (He apparently does so in order to continue receiving a lucrative salary, and to protect the value of his stockholdings and stock options.) After the company collapses and shareholders lose their entire investments, Skilling is charged with a number of crimes. One of the crimes charged is wire fraud of the "deprivation of intangible right of honest services" variety, on the theory that Skilling deprived Enron of his honest services.

Held (by the Supreme Court), since Skilling did not take bribes or kickbacks, he did not deprive Enron of honest services, and is therefore not guilty of honest-services wire fraud. (This doesn't mean he didn't commit *securities* fraud, just not honest-services fraud.) *Skilling v. U.S., supra.*

V. CONSOLIDATION OF THEFT CRIMES

A. Need for consolidation: As has been noted throughout this chapter, it will often be extremely important to determine on which side of the

dividing line between larceny and embezzlement, or between larceny and false pretenses, a particular case lies. The jury must take its choice of one or the other, and if it picks the wrong one, its verdict will be overruled on appeal. Furthermore, the dividing line can be extremely blurry.

1. **Consolidation by some states:** Therefore, a number of states (still a minority) have joined larceny, embezzlement and false pretenses into ***one unified crime,*** usually called "theft." California and New York are among the states which have adopted this approach.

   a. **Advantage for prosecution:** It is still necessary that the prosecution establish facts which would fall within one of the three traditional theft classes, larceny, embezzlement or false pretenses. But the advantage for the prosecution is that the indictment need not specify which theory will be proceeded on, and the jury does not have to make an election; it simply returns a verdict of guilty of theft. Then, on appeal, so long as the facts are found to support guilt of one of the traditional offenses, the conviction will be affirmed.

2. **Model Penal Code consolidation:** The Model Penal Code goes even further in the direction of consolidation. The Code establishes a number of theft crimes which, among them, cover not only larceny, embezzlement and false pretenses, but also receiving stolen property and blackmail or extortion.

   a. **New classifications:** What were formerly larceny and embezzlement are now consolidated as "theft by unlawful taking or disposition" (§ 223.2). What were formerly false pretenses and that form of larceny called "larceny by trick" are now "theft by deception" (§ 223.3). Blackmail and extortion are now "theft by extortion" (§ 223.4). Receiving stolen property is treated by itself (§ 223.6). Finally, there are sections for "theft of property lost, mislaid, or delivered by mistake" (§ 223.5) (which previously could have been either larceny or embezzlement, depending on the facts); "theft of services" (§ 223.7); and "theft by failure to make required disposition of funds received" (§ 223.8) (which might formerly have been no crime at all, as in *Commonwealth v. Mitchneck* and

State v. Polzin, both *supra,* p. 319).

VI. RECEIVING STOLEN PROPERTY

A. Need for punishing receipt: A thief, like a wholesaler, does not find it practical to deal with ultimate consumers. He therefore uses a middleman, known as a "fence," who typically buys the goods at an extremely small fraction of their market value, and resells them to end-users who may or may not be aware that the goods are stolen property. Statutes punishing ***receipt of stolen property*** are directed primarily at such fences (though they can be used as well against end-users who purchase with knowledge that the property is stolen).

B. Elements of offense: A detailed analysis of typical receipt of stolen property statutes is beyond the scope of this outline. Briefly, such statutes are violated if it is shown that the defendant has: (1) received (2) stolen property, (3) knowing that it has been stolen, and (4) done with intent to deprive the owner. See L, p. 855.

1. **Stolen property:** Most statutes, even though they may refer to "stolen" property (which would normally imply larceny), have been construed to apply to property taken by ***embezzlement*** or ***false pretenses*** as well. L, p. 857.

2. **Trap laid by police:** Suppose the police, or the owner of property, catch a thief who has stolen it, before he has sold to his fence. They may be able to persuade the thief to cooperate (in order to reduce his punishment) in trapping the fence, by passing the property on to the latter. In this situation the fence is not guilty of receiving stolen property, since the property has lost its character as stolen. (He may be guilty of ***attempted*** receipt of stolen goods, though even here he might escape with the defense of "impossibility," as in *People v. Jaffe, supra,* p. 164.)

3. **Knowledge that it is stolen:** The principal issue in most prosecutions for receiving stolen property is whether the defendant ***knew*** that the property had been stolen. It is usually not enough that the defendant merely ***suspected*** (or still less that he should have suspected) that the property was stolen. L, pp. 858-59.

   a. **Strong belief is sufficient:** However, it is not required that the

defendant know, with 100% certainty, that the goods are stolen. It is sufficient, in virtually all jurisdictions, that he ***believes them to be stolen.***

i. **Knowledge requirement circumscribed:** Some states have weakened the requirement of knowledge even more. A few, for instance, punish one who merely has "reason to know" the stolen status of the goods. L, p. 859.

b. Model Penal Code applies presumption: Other statutes require knowledge, but establish a ***presumption*** of knowledge in certain circumstances. Model Penal Code § 223.6(2), for instance, institutes a presumption that a ***dealer*** (defined as one who is "in the business of buying or selling goods") possesses the required knowledge or belief if he: (a) is found in possession of property stolen from two or more persons on separate occasions; (b) has received stolen goods in another transaction within one year prior to the transaction charged; or (c) is a dealer in the kind of property received, and buys for a consideration which he knows is far below its reasonable value. (This presumption can, of course, be rebutted by the dealer.)

VII. BURGLARY

A. Common-law burglary: The common-law crime of burglary was defined to be the ***breaking and entering of the dwelling of another at night with intent to commit a felony.*** Nearly all states punish as burglary conduct which fails to meet one or more of these requirements; however, the requirements are sometimes maintained for higher degrees of the crime.

B. Breaking: The common law required that there be a ***"breaking."*** The principal significance of this was that an opening must be created by the burglar. If the owner simply left his door or window ***open,*** the requisite breaking did not exist. (However, no force or violence was needed; the mere opening of a closed but ***unlocked*** door sufficed.)

1. Consentual entry: Nor did breaking exist when the defendant was ***invited*** into the house (assuming that he did not stray into a portion of the house where he had not been invited).

2. **Most states abandon breaking requirement:** Most American jurisdictions no longer require breaking for burglary. Instead, there is typically a requirement that D's presence on the property be "unlawful." L, p. 885.

C. Entry: There must also be, under the common-law view, an ***entry*** following the breaking. However, it is sufficient that ***any part*** of the defendant's anatomy entered the structure, even for a moment (e.g., D reaches his hand through a window to unlock it). See L, p. 886.

1. **Requirement maintained:** Nearly all American states continue to impose the requirement of an entry.

D. Dwelling of another: The common law required that the structure entered be the ***dwelling of another.***

1. **Dwelling:** Thus the structure was normally required to be a ***house.*** A place of business did not suffice (unless the proprietor or one of his employees usually slept there). However, it was not required that the house be occupied ***at the particular moment of entry.*** L, pp. 887-88.

2. **Statutory modification:** All states now have at least one form of statutory burglary that does not require that the structure be a dwelling. However, many states require a dwelling for higher degrees of burglary; see, e.g., Model Penal Code § 221.1(2).

E. Nighttime: At common law, the breaking and entering had to occur ***at night;*** this requirement reflected the belief that the greatest danger to honest homeowners occurred after dark. If the sun had set, however, it was no defense that the dwelling was artificially illuminated. See L, p. 890.

1. **No longer a requirement:** No state now requires, for all degrees of burglary, that entry be at night. However, about half the states impose this as a requirement for higher degrees of burglary. L, p. 890.

F. Intent to commit a felony: At the time of entry, the common-law burglar must have ***intended to commit a felony*** once he got inside. Today, an intent to commit a felony is not required; however, all states require that the defendant have an intent to commit ***some crime*** within the structure. In some states, the statute provides that the intent must be to commit either a felony or a theft crime (though the latter may be a

misdemeanor, e.g., petty larceny). L, pp. 890-91.

VIII. ROBBERY

A. Definition of robbery: Robbery is generally defined as larceny committed with two additional elements: (1) the property is taken from the ***person*** or ***presence*** of the owner; and (2) the taking is accomplished by using ***force*** or putting the owner in ***fear.***

B. From the person or presence of owner: The property must be taken from the ***presence*** or ***person*** of its owner. There will normally not be much question about whether the property is taken from the victim's "person." The taking from the victim's ***"presence"*** is a bit trickier. The test for "presence" is whether the victim, if he had not been intimidated or forcibly restrained, could have prevented the taking. Thus if D enters V's house and confines him to one room, and then takes property from the opposite end of the house, this will be robbery. L, p. 869. Similarly, if D points a gun at V in V's house, forces V to disclose the combination to V's safe, and takes money from the safe, this will be robbery.

C. Use of violence or intimidation: The taking must be by use of ***violence*** or ***intimidation.***

1. Violence: Violence will exist if the thief engages in a struggle with the victim before taking the property, ties the victim up, hits him on the head, or otherwise uses substantial physical force to accomplish the taking. But ***pickpocketing*** is not robbery (assuming no struggle by the victim).

a. Purse-snatching: If the thief simply ***snatches*** property from the owner's grasp (e.g., a purse), before the owner has a chance to resist, it is almost always held that the requisite violence is ***not present.*** L, p. 870. (However, if the owner is able to put up a struggle, the requisite force will be found to exist even if the thief uses only his hands.)

2. Intimidation: Alternatively, a ***threat of harm*** may suffice in lieu of violence. For instance, if D pulls a gun on V, and says, "Your money or your life," this is robbery even though no actual force is used.

a. Apprehension, not fear: All that is required is that the victim be placed in ***apprehension*** of harm (in the sense that he expects harm

to occur); it is not required that he be ***afraid.*** Also, the requisite apprehension probably exists even though the victim believes that he could prevent the harm by using force of his own. For instance, if D says to V, "Give me your money or I'll kick you in the face," robbery exists if V complies, even though V knows that he could shoot D with a revolver secreted in his pocket and thereby prevent the attack.

b. **"Reasonable man" standard not applied:** It is irrelevant that a "reasonable man" would not have been apprehensive of bodily harm. Thus if the victim is unusually timid, robbery can exist even though most people would not have been afraid in the situation. L, p. 875.

3. **Taking must concur with violence or intimidation:** The violence or intimidation must occur either ***before*** or ***simultaneously*** with the taking. Thus if D snatches V's purse before V can resist (so that the requisite violence does not exist), the taking will not become a robbery merely because D subsequently has to use violence or threats to prevent V from recapturing the property. L, pp. 875-76.

D. **Aggravated robbery:** Most jurisdictions recognize several degrees of robbery. One aggravated form is "armed robbery," which exists where the defendant uses a deadly weapon. (Such "armed robbery" statutes are usually held to apply although the gun is unloaded; occasionally even a ***toy pistol*** has been held to suffice. This view is criticized in L, pp. 878-79.)

IX. ARSON

A. **Nature of offense:** At common law, arson is the ***malicious burning*** of the ***dwelling*** of ***another.*** P&B, p. 273.

1. **Act posing great risk of fire:** The *mens rea* requirement for arson is ***"malice,"*** not "intent." Therefore, D need ***not*** be shown to have intended to create a burning — it's enough that D intentionally took an action under circumstances posing a ***large risk*** of a burning.

Example: D, a sailor, intends to steal rum from the hold of a ship. He lights a match to see better, and the rum catches fire. Since D's act is "malicious" (i.e., wrongful), and since it posed a large risk of a burning of the dwelling of another (people live on the ship), D can be found guilty of arson, even though he did not intend the burning.

Cf. *Regina v. Faulkner*, 13 Cox C.C. 550 (1877); see also P&B, p. 276.

2. Dwelling: The property burned must be a ***dwelling.***

Example: D starts fire to an office building. Because this is not a dwelling, D cannot be guilty of common-law arson.

a. "Of another": Furthermore, the dwelling must be "of ***another,"*** i.e., must not belong to the defendant.

Example: D sets fire to his own house, in order to collect the insurance proceeds. If only D's house burns, he's not guilty of common-law arson. P&B, p. 283. That's true even if the house is co-owned by D's wife W. (But if the fire spreads to another house, D is guilty, even if he didn't expect or desire the spreading.)

X. BLACKMAIL AND EXTORTION

A. Nature of offense: The crime of robbery exists only where property is taken by use of violence or a threat of immediate harm. If the defendant obtains property by a threat of ***future harm,*** he is guilty of ***extortion*** (or, as the crime is called in some states, ***"blackmail").***

B. Nature of threat: The threat can be to cause physical harm to the property owner or, in some cases, the latter's family or relatives. A threat to cause economic injury may sometimes be sufficient, as where a corrupt union leader threatens to call a strike unless the employer pays him off. See L, p. 881.

1. Threat to accuse victim of crime: Perhaps the most common kind of threat that will suffice is a threat to ***accuse the victim of a crime.*** Also, threats to expose some non-criminal secret of the victim that would subject him to disgrace are usually covered by extortion statutes. L, pp. 881-82.

C. Attempt to recover property: The fact that the victim is guilty of the crime or disgrace in question is, of course, no defense to a charge of extortion or blackmail. However, suppose the victim has taken property ***from the defendant,*** and the defendant threatens him with exposure or prosecution merely in order to recover the property. The courts are split on whether this constitutes extortion.

1. Yes: Some courts have held that such conduct is extortion, despite the claim of right. See, e.g., *People v. Fichtner*, 118 N.Y.S.2d 392 (App. Div. 1952), in which the Ds, managers of a supermarket, threatened

X, a suspected shoplifter, with arrest and publicity unless he signed a confession that he had taken $50 worth of goods from the store over a four-month period, and repaid the $50. The Ds did not take the money for their own use, but rung it up on the store register. The court held that this was extortion, even though X may in fact have stolen the $50 worth of goods (which he denied).

a. **Rationale:** The court theorized that one of the purposes of the extortion statute was to prevent “the concealment and compounding of a felony to the injury of the State,” and that the existence of a just debt was irrelevant to this statutory purpose.

2. **No:** Other courts have held that this is ***not*** extortion, at least if the amount obtained by the defendant is no more than the amount actually taken from him by the victim.

a. **Model Penal Code:** See also M.P.C. §223.4, making it a defense to extortion, in some circumstances, that the defendant “honestly claimed [the property] as restitution or indemnification for harm done in the circumstances to which [the] accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.”

Quiz Yourself on
THEFT CRIMES & OTHER CRIMES AGAINST PROPERTY *(ENTIRE CHAPTER)*

NOTE: For all questions in this chapter, assume unless otherwise noted that the common-law definitions of all theft crimes are in effect.

80. Bunter, the manservant of Lord Peter Wimsey, is given certain grooming aids — barber’s tools and the like — belonging to Wimsey that Bunter is to use in performing the services of his job. After several years of faithful service, Bunter decides to leave Wimsey’s employ and announces that he will be leaving on July 1, following the June 30 expiration of his correct contract. On July 1, having formed an attachment to the tools of his trade, Bunter decides to take the grooming aids with him when he leaves, which he does later that day. What theft crime, if any, is Bunter guilty of?

81. Racer X covets Speed Racer's car, the Mach V, which is unattended in Speed's driveway.

(A) For this part only assume that, succumbing to impulse, Racer X hops in and rolls the car several feet out of the driveway, intending to keep the car until he can sell it. As he is about to start driving down the street, X's conscience overcomes him, and he returns the car to the driveway. Speed Racer, who witnesses the incident from his window, becomes furious, and decides to file a criminal complaint. Is Racer X guilty of common-law larceny?

(B) For this part only, assume the following: Racer X never intends to keep the car or sell it. Instead, he intends just to take it for a little spin, to see how it accelerates. He hops in, drives around the block, and returns the car exactly where he found it. Is Racer X guilty of larceny?

82. Pandora leaves her magic box in the cloakroom of a restaurant. Hope leaves her magic box next to Pandora's. After having a few too many cocktails at dinner, Hope returns first and picks up Pandora's box by mistake, even though Pandora's box is somewhat bigger than hers, and a slightly different color. (Assume that Hope's mistake was honest but that a reasonably sober person wouldn't have made the error.) Hope takes Pandora's box home and never looks at it again. Is Hope guilty of larceny?

83. Genie loses her black wine bottle at the beach. She puts up signs all over the place offering a reward for its return. Anthony Nelson subsequently finds the bottle.

(A) Assume for this part only that: Anthony, believing the bottle he's found is the one he's seen signs about, picks up the bottle, intending to return it to Genie. However, it sits in his car for a while, and he subsequently decides to keep it. Is he guilty of larceny?

(B) Assume for this part only that: Genie never put up the signs, and there are no indications of ownership on the bottle. Nelson finds the bottle and intends to keep it. A couple of days later, during a return visit to the beach, he overhears Genie telling another beachcomber about her lost bottle. He says nothing, and gets in his car and drives

home. Is Nelson guilty of larceny?

84. T. Pott, presidential advisor to President Warren Harding, has been given a government-owned shredder for his office use. He takes it home one night (to use it to shred cheese for pizza), and never brings it back. Three months later he's fired. What theft crime, if any, has Pott committed?

85. Wanda Oceanview is a real estate agent. Charles Foster Kane authorizes her to sell his home, Zanadoo, for $100,000. Wanda sells it for $102,000. She pockets the extra $2,000, honestly believing she's entitled to the extra money as a commission. In fact, however, as a matter of local law governing real estate brokers, Wanda is not entitled to any commission, because she doesn't have a written agreement providing for any commission. An ordinarily prudent real estate broker would know this. As soon as these facts of law are explained to Wanda by Kane's lawyer (two weeks after she deposits the money), Wanda reluctantly refunds the money. Is Wanda guilty of embezzlement?

86. Tokyo Rose is the manager of an army base PX during World War II. Silk stockings, which the PX sells for $5 a pair, are in short supply. Rose takes three pair of stockings from the PX, and sells them to civilians for $20 a pair. At the moment she takes the stockings, she intends to put the $5 per pair PX price back in the register as soon as she can sell the stockings and get the cash for them. The next morning, Rose does exactly that, so the PX ends up with the same $5 a pair as if they had been sold in the regular course of business. Is Rose guilty of embezzlement?

87. Guido tells Jules that he is going to dredge land from the continental shelf off Florida and build an offshore casino. He asks Jules to invest, and, with visions of golden poker ships dancing in his head, Jules does so.

(A) For this part only, assume that Guido in fact has no intention of actually building the casino — he plans to invest Jules' funds at the racetrack instead. Under the majority view, is Guido guilty of false pretenses?

(B) Same facts as part (A), except that Guido says he's already received the necessary permits to build the casino. In fact, he has not, and has no intention of building the casino. Under the majority view, is he guilty of false pretenses?

88. Old Mother Hubbard applies for welfare benefits. Her caseworker asks her if she is receiving funds from any other source. Hubbard says no. Although she receives unemployment benefits, Hubbard believes the question referred to other earnings, not benefits. (Assume that Hubbard's belief about what the caseworker means is honest but unreasonable.) Based on her response to the question, Hubbard receives the welfare benefits. Is Hubbard guilty of false pretenses?

89. Jessie James, a professional criminal, knows that J.P. Morgan, a rich banker, will be away from home for several days. Therefore, at 1:00 a.m. on a Tuesday, Jessie goes to J.P.'s house, jimmies a lock on J.P.'s rear door, and enters the house. At the time of his entry, Jessie's intent is to steal whatever cash and jewelry he can find. However, Jessie inadvertently sets off J.P.'s alarm. Jessie is arrested by police before he has a chance to place any of J.P.'s possessions into the sack that he has brought with him. What is the most serious common-law crime of which Jessie may be convicted?

90. Bonnie & Clyde, a crack theft team, decide to try to steal from the First National Bank. They break into the Bank at 10 PM one night, when they suspect no one is there. Their purpose is to steal as much gold bullion as they can from the vault (to which they have previously learned the combination by bribing a bank employee). They break in, and are in fact able to take $100,000 worth of bullion before an alarm rings and frightens them off. Have Bonnie & Clyde committed common-law burglary?

91. Prince Charming breaks into his friend Cinderella's home at midnight one evening, intending only to leave a note demonstrating to Cinderella how simple it would be to burglarize her home. While inside, he sees a valuable painting that he falls in love with and decides to make off with it. Is Prince Charming guilty of burglary?

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80. Larceny. The point of this question, of course, is for you to figure out whether this is larceny or embezzlement. Where at the time of the trespassory taking the defendant is in lawful possession (not just "custody") of the items, the taking is embezzlement; if the defendant is just in custody at that moment, the taking is larceny. Here, had Bunter absconded with the tools during his actual employment, the crime might have been embezzlement, on the theory that Wimsey had given possession (not just custody) of them to Bunter; the case could have gone either way on the issue of possession vs. custody. But by July 1, given that the employment contract had ended, Bunter could not have had more than temporary custody of the tools, not true possession, since he no longer had any job-related reason to have them. At that point, the taking was a taking from Bunter's possession, so the crime was larceny.

81. (A) Yes. Larceny is defined at common law as the trespassory taking and carrying away of the personal property of another, with intent to steal. The two interesting issues here are: (1) was there a "carrying away"?; and (2) was there an intent to steal at the appropriate time? (1) is satisfied, because even a very small movement of the goods meets the carrying-away ("asportation") requirement, so rolling the car into the street sufficed. As to (2), the intent to steal must occur at the time of the carrying-away, and need not occur at any other time. Since the facts make it clear that at the moment the car was driven into the street, X intended to keep it and permanently deprive Speed Racer of it, this requirement was satisfied, and the crime was complete. The fact that X changed his mind (and returned the goods) shortly thereafter is irrelevant.

(B) No. Larceny requires the taking and carrying away of another's personal property with the "intent to steal." An intent to steal is generally deemed present only if the defendant has an intent to ***permanently deprive*** the owner of the property. Since Racer X did not intend to deprive Speed of the use of the car permanently, he hasn't met this requirement. (That's why most jurisdictions have special "joyriding" statutes to deal with this kind of situation.)

82. No, because her mistake was honest. Larceny requires an intent to take the property of another. If a person takes property believing that it is his own, the requisite intent to take another's property is not present. That's true even if the mistake is an unreasonable one. So larceny is in effect a "specific intent" crime — the requisite intent includes a belief about title, and even voluntary intoxication can negate that intent.

83. (A) No. A finder of lost property is only liable for larceny if, at the moment he finds the property, (1) he has reason to believe he can find the owner's identity *and* (2) he intends at that moment to steal the item. Here, (2) is not satisfied, because at the time Nelson found the bottle, he intended to return it. Since his intent to steal and finding the bottle do not coincide, he is not liable for larceny. The fact that Nelson later formed an "intent to steal" is irrelevant, at least under the common law. (But Model Penal Code § 223.5 *does* make it larceny for a defendant to "fail to take reasonable measures to restore [lost or mislaid] property to a person entitled to have it," regardless of whether there was an intent to steal at the time the defendant came into possession. So Nelson *would* be guilty of larceny under the M.P.C.)

(B) No. For larceny to exist, there must be an intent, existing at the time the defendant comes into possession of the property, to deprive the rightful owner of permanent possession. Where property is lost or mislaid, and at the time it comes into the defendant's possession there's no clue to its ownership, the defendant cannot have the requisite intent to "deprive the owner" of it. Therefore, Nelson won't be guilty of common-law larceny, even though he later discovered the owner's identity. (At that later point, he has the requisite intent, but it doesn't coincide with the moment of "taking," so it doesn't count.) (Again, under M.P.C. § 223.5 the result would be different, since by not speaking up Nelson would be "fail[ing] to take reasonable measures to restore [the] property to a person entitled to have it.")

84. Embezzlement. Embezzlement is the fraudulent conversion of the property of another by one who is already in lawful possession of it. That's the case here. The main issue is whether Pott was already in lawful possession of the shredder when he converted it to his own use.

Since he was a relatively high-level official, and was given physical use of the shredder for as long as he held the government post, a court would almost certainly hold that Pott had possession, not just temporary custody, of the shredder. That makes his conversion embezzlement, rather than larceny (which could have occurred only if he had custody rather than possession at the time of the conversion.)

85. No. Embezzlement requires the "fraudulent" conversion of another's property by one in lawful possession of that property. The issue here is whether Wanda's conversion was "fraudulent." If a person honestly believes that she has a right to take the property — as where she is taking it in satisfaction of what she believes to be a valid debt — the conversion will not be deemed to be fraudulent. And that's true no matter how unreasonable the defendant's belief in her claim of right is. So the fact that Wanda "should have known better" is irrelevant. (Of course, the more unreasonable the defendant's belief, the more likely the trier of fact is to conclude that the belief was not in fact genuinely held. But if the trier *does* believe the belief was genuine, then its unreasonableness is irrelevant.)

86. Yes. When a person takes property and intends to replace equivalent property later, that's not a defense to embezzlement. Embezzlement requires only a fraudulent conversion of property by one with lawful possession of the property. Since these elements are satisfied here, Rose will be liable. (Note that this most frequently happens when an employee takes money from his employer to pay off personal debts, intending to replace it later. The "intent to replace" is no defense.)

87. (A) Amazingly enough, no. False pretenses requires a "factual" misrepresentation. Furthermore, the fact being misrepresented must be a past or present one — a promise that something will or won't happen in the future does not suffice as a factual misrepresentation, under the oft-criticized majority view. And that's so even if the promisor has absolutely no intention of keeping the promise. (But a minority of courts find liability where the speaker never intends to keep the promise.)

(B) Yes. Here, Guido has knowingly made a false representation about a present or past fact: that he has received the necessary

permits. Therefore, the transaction meets all the requirements for the crime of false pretenses: (1) a false representation of a (2) material present or past fact (3) which causes the person to whom it is made to (4) pass title to his property to the misrepresenter, who (5) knows that his representation is false, and intends to defraud.

88. No, because she had an honest belief that her statement was true. False pretenses requires a *knowing* misrepresentation intended to convince the victim to pass title to property. Here, the intent to defraud is missing. Even an unreasonable belief in the truth of one's statement will negate intent, as long as it's an honest belief.

89. Burglary. The common-law crime of burglary is defined to be the breaking and entering of the dwelling of another at night with intent to commit a felony therein. The "trick" here is that Jessie is guilty of burglary ***even though he in fact did not carry out the crime he had intended*** (larceny). That is, once Jessie broke into and entered J.P.'s premises at night with an intent to commit larceny, he had already completed the crime of burglary.

90. No. The definition of common-law burglary requires the breaking and entering of a *dwelling* of another at night. The bank is not a dwelling, it's a place of business. (But many modern statutes have expanded the definition to cover the breaking/entering of any structure, dwelling or not.)

91. No. Burglary requires breaking and entering the dwelling house of another at night with the intention to commit a felony therein. At the moment Charming broke and entered, he had no intent to commit an act that was a felony therein (since leaving a warning note, even if it's a malicious prank, is not a felony). It's true that Charming later formed an intent to commit a felony (steal the painting), but to count, the felonious intent must exist at the moment of entry. Therefore, Charming is not guilty of burglary (but will, however, be guilty of larceny for taking the painting).

***Exam Tips** on*

THEFT CRIMES

Larceny and ***burglary*** are the theft crimes most frequently tested.

Larceny

☛ If you think you have larceny in your facts, confirm that all the required elements of common-law larceny have been met: The (1) trespassory (2) taking and carrying away of (3) personal property of (4) another (5) with the intent to steal.

☛ **Trespassory taking:** Look for a defendant who is ***already in rightful possession*** of the property at the time he decides to appropriate it for his own purposes — if so, he is ***not*** guilty of larceny because the "trespassory" taking element is missing.

Example: D is walking in the street at night and finds a watch (with the owner's name engraved on it) lying on the ground near a pawnshop. He decides to take it home and to try to locate the owner. However, once he gets home, he decides to keep it. Since D was already in lawful possession of the watch at the moment he decided to keep it, he will not be guilty of common-law larceny.

☛ **Carrying away:** Determine whether the defendant assumed ***dominion and control*** over the object. Generally, but not always, this means that there must be a physical ***movement*** of the object.

☞ **Slight distance sufficient:** But if D causes even a ***slight movement*** of the object (after forming the intent to misappropriate), this will suffice for the dominion-and-control element.

Example 1: D is having dinner in a restaurant with V. V leaves the table to go to the restroom and D notices V's expensive watch on the table. She decides to steal it and puts it into her pocket. D begins to feel guilty, so when V returns to the table, D hands her the watch and says, "Here, you dropped this, and I put it into my pocket for safekeeping." Since D moved the watch from the table to her pocket with the intention of keeping it, she carried it away. She was actually guilty of larceny at that moment. (The fact that D changed her mind shortly thereafter and tried to "undo" the crime doesn't change this result.)

Example 2: While shopping, D decides to take a purse without paying for it. She puts the purse under her coat, and takes two steps towards the exit. She then realizes that the purse may have a sensor that will set off an alarm, so she puts the purse back on the display counter. D has committed larceny — she completed the crime the moment she moved the purse the couple of steps, with intent to steal it. (As in the prior example, the fact that D changed her mind shortly thereafter and

tried to undo the crime doesn't change this result.)

☛ **Intangible property:** Be on the lookout for property that is intangible. Remember that at common law, only tangible property could be the subject of larceny. But if your fact pattern has intangible property (e.g., a check, or services), say that under modern statutes, larceny has usually been expanded to cover intangibles.

Example: D, a student, breaks into the offices of X, her professor, and photographs the original text of the exam that X will be giving the next day. (D never physically moves the original.) Although the original text is intangible property in a sense, a modern larceny statute would probably still cover it, making this larceny.

☛ **Property of "another":** Be on the lookout for property that appears to be property of one other than D, but really belongs to D. When this happens, D can't be guilty of larceny for taking the property, because it's not property of ***"another."***

- ☞ ***Example:*** D pawns his watch to X, a pawnbroker. The pawn agreement says that D may reclaim the watch by paying $100 at any time during the next month. Two weeks later, D breaks in to X's store and takes the watch. D has at least a good argument that he hasn't committed common-law larceny, because he hasn't taken property of "another" (he himself still has title to the watch, subject to X's right to possess it as security for repayment).

- ☞ **Collecting a debt:** As a twist on "property of another," watch for a situation in which *V owes D money* or an item, and D takes a different item (or money) with an equal or lesser value, as a form of ***self-help.*** Here, V probably ***won't be guilty*** of larceny — his honest claim of "right" will negate the intent to take property "of another". And that's probably true even if D is ***wrong*** (though honest) in his belief that V owes him the debt.

Example: V has borrowed $50 from D, and has also borrowed D's watch (worth $50). V has repeatedly refused either to give back the watch or repay the $50 debt. While D is visiting V, he finds V's wallet on a table. D takes $100 from the wallet, intending this to constitute repayment for both the $50 and the watch. D is not guilty of c/l larceny, because he took under a claim of right. (Probably the same result would apply if D honestly but mistakenly believed that V had never repaid the $50 loan.)

☛ **Intent to permanently deprive:** This issue frequently arises on exams. The two rules to keep in mind are: (1) The only intent that matters is the intent ***at the time of the taking*** (not at some point after); and (2) There must be an intent to ***permanently*** deprive the owner of the property (or at least of a significant portion of the property's economic value).

☞ **Intent to borrow item:** Often, the defendant has a viable argument that he merely wanted to ***borrow*** the item. If so, there's no c/l larceny, because there's no intent-to-permanently-deprive.

Example: D breaks into her the office of V, her professor, to photocopy his notes. While in the office, she notices a gold-plated pen on V's desk and takes it with the intent of returning it in a week or two, hoping in the meantime that V will be so distressed about losing his pen that he will not notice that his notes have been disturbed. The next day, the pen is stolen from D's briefcase. D is not guilty of c/l larceny, because at the time she took the pen she did not intend to permanently deprive V of it (and the fact that the pen was later stolen by someone else, so as to prevent her from returning it, is irrelevant).

☞ **Actual ability to return:** But in intent-to-borrow situations, keep in mind that D will lack the requisite intent only if, viewed as of the time of D's taking, there is a substantial likelihood that D will in fact be able to return the property to V in pretty much its original form. If the facts show that the property probably won't be returned to V (or will likely be returned in damaged form), then D will be found to have the requisite intent-to-steal despite the intent to "return" it.

Example: Outside and during the night, D robs V of his billfold in order to retrieve a memorandum from it. After removing only the memorandum from the billfold, D throws V's billfold into the gutter, where he "expects" V to find it. In your answer, you should analyze the probability of the billfold being found and returned to V. If a jury finds that D should have realized that leaving the billfold there made it unlikely that D would get it back, then D probably has the requisite intent-to-steal the billfold even though D may have hoped or expected that D would get it back.

☞ **Property returned:** Conversely, don't be fooled by a fact pattern which indicates that the item was ***actually returned.*** That fact is inconsequential if D's decision to return it was formed subsequent to the taking. *(Example:* In the fact pattern above where D puts V's watch in her pocket at the

restaurant and then changes her mind and returns it, this is still larceny.)

- **Contingent borrowing:** Lastly, be on the lookout for what could be termed a "contingent intent" to return "borrowed" property. For an intent-to-return to negate intent, D's intent must clearly be to return the item and not be contingent on any circumstances.

  Example: D, V's employee, "borrows" money from V's cash register, intending to gamble with it and to return it if she wins. She does in fact win, and returns the full amount. Regardless, D had the requisite intent to steal, because her intent-to-return was subject to a contingency.

- **Larceny by trick:** It can still be c/l larceny when D obtains possession of the property by fraud or deceit, instead of by force. But in this situation, make sure V was induced only to transfer temporary possession (not ownership or title) — if title is transferred, it's false pretenses, not larceny-by-trick.

  Example: V rents a car to D, who pays with what turns out to be a worthless check. D keeps the car (as he intended all along). This is c/l larceny (of the larceny-by-trick variety), because D has fraudulently induced V to part with mere possession, not title. But if V had *sold* (transferred title) to the car to V in return for the worthless check, this would be false pretenses rather than c/l larceny, since in that situation title (rather than mere possession) would have been procured by D's deceit.

- **Where V doesn't have lawful possession:** Don't be tricked by a fact pattern which indicates that the ***victim*** of the theft ***does not have lawful possession of the property.*** As long as V's claim to the property is better than D's, that's enough for larceny. So, for instance, the fact that V himself previously stole the property, or possessed it illegally, is irrelevant. *(Example:* D may commit a larceny by stealing V's illegal-to-possess marijuana plant.)

Robbery

- **Definition:** Remember that robbery is defined as larceny with two additional elements: (1) the property is ***taken from the person or presence*** of the owner, and (2) the taking is accomplished by ***force or putting the owner in fear.*** Remember to note in your answer that the crime of larceny merges into that of robbery.

- ☛ **“From the person”:** The requirement that the taking be ***“from the person”*** of the victim is sometimes tested. The main thing to remember is that if the property is taken from V’s ***house*** while V is confined in the house, that’s deemed to be “from the person” of V, regardless of how close V is to the property when it’s taken.

  Example: D stops V outside of V’s apartment, points a gun at him, and forces V to take him inside the apartment. There, D ties V to a chair, and forces V to disclose the combination to a safe located in a different room. D then uses the combination to steal a diamond necklace from the safe. This is robbery — the necklace will be deemed to have been taken from V’s “person” even though V was in a different room at the time of the taking.

- ☛ **Intent:** Since robbery is built on larceny, D must have the specific intent to permanently deprive another of the other’s personal property. Refer to the discussion regarding larceny above. So watch for situations where D believes that the property actually belongs to him, or where his intent at the time of the taking is not to permanently deprive — there can’t be robbery in these situations, since there’s no underlying larceny.

- ☛ **Force:** This element is occasionally tested. Generally, it’s obvious when a taking is accomplished by using force or a threat of force, but there can be close questions, where your job is to notice that there’s an issue about whether force-or-threat-of-force is present.

  Example: V is shot while driving his car. The car rolls into a tree and comes to a stop. D, a bystander, opens the driver’s door with the intention of helping V. However, when he sees that V has been shot, he decides there’s nothing he can do. D notices that V is wearing an expensive watch and begins to remove it. V opens one eye and faintly motions D away. D takes the watch and says, “You won’t need this where you’re going.” V dies moments later. Given the circumstances, V’s faint protestations were adequate to demonstrate he was not relinquishing the watch freely. Therefore, D probably would be deemed to have obtained the watch by force or threat of force.

Embezzlement

- ☛ Definition: In many fact patterns, embezzlement should be argued as an alternative to larceny. Remember the definition of c/l embezzlement: A fraudulent conversion of the property of another, by one who is ***already in lawful possession*** of that property.

- ☛ **Employees:** Think of embezzlement anytime an employee

misappropriates the employer's money. Remember that c/l embezzlement exists only where the employee is originally in lawful *possession* of the employer's property (not merely *custody).* This means that if an employee has custody of the employer's property, but not true "possession," the misappropriation would be larceny, not embezzlement. Point this out whenever the employee is a minor, clerical-type person.

Example: D is a cashier at the V supermarket. D periodically pocket $5 or $10 from the cash register. D's minor-employee status indicates that she probably has only temporary custody of the cash in the drawer, and that "constructive possession" remains with V. If so, D's conduct is probably larceny, not embezzlement. (But if D was V's controller, entrusted with investing the company's cash, his misappropriation would probably be embezzlement, since his seniority indicates he was given "possession," not just temporary custody, of the funds.)

☛ **Bailees:** Also think of embezzlement where the property is in the lawful possession of a ***bailee*** (repair-person, pawnbroker, etc.), who then appropriates it.

Example: V's watch is broken, so he gives it to D, a jeweller, to be repaired. D takes it, fixes it, and then (because he's deeply in debt to bookies) puts it for sale in his store. X buys it. D has committed embezzlement, since he was in lawful possession of the watch at the time he sold it.

☛ **Possession must be lawful:** Remember that the defendant's possession must be ***lawful,*** not produced by fraud or other crime.

Example: D offers for "sale" various cars that he doesn't in fact own. He collects a $100 cash down payment from V, then vanishes without producing the car. D cannot be guilty of embezzling money because his possession of the $100 is the result of fraud and was never lawful. (In other words, his crime is larceny, not embezzlement.)

☛ **Intent to repay:** Remember that if what's embezzled is money, D's ***intent to repay*** the money is never a defense to embezzlement charges. And that's true even if the repayment actually occurs.

False pretenses

☛ The crime of obtaining property by false pretenses is not heavily tested.

☞ **Definition:** This crime is committed when, with the intent to cause V to transfer title to personal property, D makes a fraudulent misrepresentation which causes V to make the

transfer.

- ☞ **Title passes:** Distinguish false pretenses from larceny by trick. In false pretenses, title passes. In larceny by trick, only possession passes.
- ☞ **Purchase with bad check:** Think false-pretenses if D purchases V's property with what D knows is a ***bad check.***
- ☞ **Swindle:** Also, think false pretences if D ***swindles*** V, by charging V money for something that doesn't have the qualities D says it has.

Example 1: D sells V a potion that D says will cure impotence. D knows it's actually a completely inert substance. This is obtaining money by false pretenses.

Example 2: D, an antiques dealer, handwrites a letter on old parchment, making the letter seem to be by George Washington. She puts in historically plausible details, and signs Washington's name. She sells the document to V for $10,000, while saying that she can't vouch for the document's authenticity. This is obtaining money by false pretenses — D has falsely represented (in the document itself) the document's origins, in order to receive the purchase price. (The fact that D has orally disclaimed knowledge of whether the document is real doesn't protect her, since she's intentionally created a false impression of authenticity.)[1]

Burglary

- ☛ When a question requires you to analyze whether a defendant can be convicted of burglary, first attempt to ascertain the particular jurisdiction's required elements of the crime. If the fact pattern does not mention them, discuss the common-law requirements: (1) the ***breaking & entering*** of (2) the ***dwelling*** of ***another*** (3) in the ***night;*** (4) with ***intent to commit a felony*** therein. Some things to keep in mind about this definition:
  - ☞ **Breaking:** Remember that ***no force*** is required.
    - ☞ **Unlocked door:** So for instance, a defendant who ***opens a closed door or window***(even an unlocked one) has fulfilled the "breaking" requirement, if this is done without the owner's authorization.
    - ☞ **Use of key:** But if D uses a ***key*** to gain ***authorized*** entry, this is not "breaking." *(Example:* V gives D her key so she

can water her plants while V is on vacation. D then enters and steals. This is not "breaking," and therefore not burglary.)

☞ **Closed area:** Watch for a fact pattern that describes an initial entry that clearly does not involve a "breaking," but the defendant subsequently breaks into a ***large enclosed structure*** located within the larger structure. In some states, breaking and entering such a closed area within which a person is capable of standing is sufficient.

Example: X, Y, and Z enter a casino shortly before closing and hide in the bathroom until it closes. After closing, they hold the employees at gun point. A heavy safe, large enough to walk into, is blown open by X; Y and Z enter it and grab sacks of money from it. Although their initial entry into the casino did not constitute a breaking, blowing open the safe probably does, in which case X has committed burglary (and Y and Z are his accomplices to that burglary).

☞ **Entry:** Remember that an ***entry*** must follow the breaking. But it doesn't take much to satisfy this element — even putting a hand or foot into the previously-enclosed space will suffice.

Example: X kicks in the door to someone's room and fires a shot at somebody inside. The bullet certainly entered the room and X's foot probably did when he kicked in the door. So either probably qualifies as an entry, making the whole transaction a burglary.

☞ **Dwelling of another:** Although the c/l definition requires that the entry be into the "dwelling" of another, you may want to note in your answer that some jurisdictions have ***broadened*** the definition. So it may be sufficient that the structure is ***attached*** to a dwelling, such as a garage, or a pawnshop that has living quarters upstairs. Additionally, note that many jurisdictions have extended the definition to *any* structure, even one with no connection to a residence (e.g., an office; a warehouse; or a store.)

☞ **Nighttime:** Pay attention to the ***time of day.*** If there's no mention of this in the fact pattern, write that you're assuming that the burglary occurred at night or that the jurisdiction has abandoned the nighttime requirement for all degrees of burglary.

- ☞ **Intent to commit crime inside structure:** Under the common law, the defendant must have intended to commit a ***felony*** inside the structure. But where appropriate, note in your answer that in some states today, all that's required is the intent to commit some crime, whether felony or non-felony theft crime. Two key points:

  - ☞ **Not just theft:** Don't mistakenly assumes that burglary requires an intent to commit a *theft* crime within. Intent to commit *any* felony will do, even at common law.

    Example: D breaks into a house with the intent to shoot and kill V, the house's owner. At the moment D breaks and enters at night, he's committed burglary, because he had an intent to commit a felony (murder) inside.

  - ☞ **Intent at time of entering:** Make sure that D intended, at the time of the breaking and entering, to later commit a felony. Don't be tricked by a defendant's *subsequent* decision to take something or to commit some other crime within the structure.

  - ☞ **Recovering own property:** Even though D has the intent to take something at the time of entering the structure, if he ***believes (even incorrectly) that it belongs to him,*** there is ***no intent*** to commit a crime.

    Example: Although D knows that V is out of town, he goes to V's apartment to retrieve his own camera so that he can take pictures at his sister's wedding. V's apartment door is locked, but D shakes the doorknob and the door opens. D searches for the camera, but can't find it. On his way out he takes a silver candy dish from a shelf to give as a wedding present. Although V committed a breaking and entering and a larceny, the fact that he entered only with the intent to recover his own camera prevented him from having the requisite intent to be convicted of burglary. (And the later decision to take the candy dish doesn't count, because it wasn't an act that D intended at the moment of the breaking-and-entering.)

Arson

- ☛ **No intent to burn needed:** Remember that D need not have ***intended*** to start a fire or burning — it's enough that D intentionally took an act that posed a ***large risk*** of starting a burning.

  Example: D becomes enraged when V, a convenience-store owner (who lives above the store) refuses to sell him cigarettes after hours. To retaliate against V, D backs his

truck into the store's gas pumps, intentionally destroying them. A spark from D's engine makes the gas in the pumps catch fire; the ensuing blaze burns down the store and V's apartment. D is guilty of common-law arson, since he took a "malicious" act that burned the dwelling of another — the fact that D didn't desire to burn anything is irrelevant, since he intended to take an act (driving into the pumps) that posed a serious risk of causing a destructive fire.

Receiving stolen property

- Two key issues:
  - **Stolen property:** Remember that for D to be guilty of receiving stolen property, the property must ***in fact be stolen,*** under the jurisdiction's theft statute. So you'll have to carefully analyze the property in terms of larceny, embezzlement, etc.

    Example: X is walking in the street and finds a watch lying on the ground. He decides to take it home and to try to locate the owner. However, once he gets home, he decides to keep it. He then becomes nervous and gives the watch to his friend D saying, "Here, you can have this watch, but be careful, it's hot." D keeps the watch. Since X was not guilty of c/l larceny (he did not have the intent to permanently deprive the owner of possession at the time of the taking), the watch was not the subject of larceny. Therefore, D was not guilty of receiving stolen property.

    - **Decoy:** Look for a fact pattern where the police are attempting to trap a thief or receiver of stolen goods. The decoy property used in such a scheme has probably been recovered by the police and has therefore ***lost its character as stolen.*** Therefore, D can't be guilty of receiving stolen property.
  - **Knowledge that it's stolen:** Make sure D ***knew*** the property was stolen *at the moment he acquired possession* of it.

    Example: D's friend T gives him a new television as a birthday gift. The next day D asks T for the warranty document. T informs D that there isn't any because the television was stolen. D keeps the television. D is not guilty of receiving stolen property, because he did not know it was stolen when he received it.

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1. The writing does not constitute the separate crime of forgery, by the way — forgery is the fraudulent making of a false writing having apparent legal significance. P&B, p. 414. Since the document here had no "apparent legal significance" (as, say, a check would have), it's not a forgery even though it's a false writing created with intent to defraud.

EXAMPLES & EXPLANATIONS

Criminal Law

Seventh Edition

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CHAPTER 1

The Sources and Limitations of the Criminal Law

OVERVIEW

Ever since Cain slew Abel, societies have had to deal with those whose acts seem “wrong.” A conclusion that an act is wrong may be simply innate.[1] Some wrongs, however, seem worse than others. Thus, breaking a promise or tripping someone seems wrong, but homicide, rape, and maiming seem “really” wrong. If a general consensus arises that specific acts are really wrong, there will be laws against such acts. Some acts will be criminally punished, while others will be handled by civil parts of the legal system. This book focuses on how that behavior is defined and punished as “criminal.”

American criminal law has three main sources: (1) the common law, (2) statutory law, and (3) constitutional law. Of these, the most important is statutory law, since it is now accepted that it is unconstitutional to punish someone unless her conduct was previously proscribed by the legislature. Nevertheless, criminal statutes are interpreted in light of an 800-year history of common law principles and against more modern constraints imposed by constitutional doctrines. The criminal law is yet further limited: Since most of criminal law consists of statutes, courts have established maxims of statutory interpretation, some rooted in the Constitution, others not. Of these, the most important are examined on pages 9-12, including the void-for-vagueness doctrine and the rule of lenity.

Finally, this chapter explores, if only briefly, the procedural limitation that requires the prosecution to persuade a jury beyond a reasonable doubt that the defendant is guilty. Just as important as the

standard and its articulation are the reasons why the Supreme Court has held this standard to be required by the Constitution.

SOURCES OF CRIMINAL LAW

The Common Law as a Source of Criminal Law

Early English custom condemned as felonies seven offenses: mayhem, homicide, rape, larceny, burglary, arson, and robbery. All other offenses were misdemeanors, and they ranged from serious crimes (kidnapping) to less serious crimes (assault). These classifications became known as the "common law" because they were commonly shared.[2]

The term "common law" is usually employed to refer solely to judge-made law, typically in the areas of torts and contracts. However, legislatures early on became interested in defining crimes; therefore, in the context of criminal law, the term "common law" incorporates both statutes and judge-made law as well as judicial interpretations of statutes. The power of courts to "create" crimes existed until well into the nineteenth century and in some rare instances, continues even today.

Initially, English law treated all injuries, except homicide, as inflicting private harms that could be compensated. If the injured party accepted compensation, the defendant could not also be criminally sanctioned. After the Norman Conquest, however, the new kings, unhappy with leaving such decisions in private hands, sought to establish their power over crimes by punishing these actors. Although this divergence between torts (compensable acts) and crimes (punishable acts) began more than 800 years ago, and took centuries to complete, even today, many acts that constitute crimes also often constitute torts. Therefore, it is still helpful to compare the common law rules of tort, in which compensation to the plaintiff is the major concern, with the common law rules of crimes, in which punishment of the defendant is the sole concern.

Legislative Sources

The legislature increased in importance when the procedures for torts and crimes divided. The English Parliament codified the common law of crimes and — slowly at first, then rapidly — enlarged the list of felonies beyond the initial seven. In the United States, legislative dominance in defining crimes through statutes has continued on the ground that the protection of citizens was too important to leave to the gradual development by judges of the common law. In addition, courts decided that applying newly defined crimes retroactively would violate the requirement of fair notice, a basic doctrine of English-American law.

In political theory, legislatures should be at least predominantly, if not exclusively, the source of criminal law in a democracy. To the extent that criminal law reflects moral sentiments of the community, the legislature, as the most democratically elected institution, should prevail. Courts, which are often appointed, should be subordinate to the representative body; even where judges are elected, they are not as frequently reviewed by the populace.

Statutes are usually written not one provision at a time but address many issues that are considered in a relatively short time. It would be unrealistic to expect legislatures to focus on the precise questions that litigation may pinpoint. Moreover, no matter how carefully written, statutes are in English, a notoriously ambiguous and opaque language. Thus, judicial interpretation of statutes is inevitable.

The interplay between the common law (developed by courts) and statutes (developed by legislatures) is dynamic. American courts can no longer "create" crimes, as their English forebears did in earlier times (see Chapter 10 (theft) and Chapter 13 (conspiracy)). There is also agreement that there can be no crime unless there is a statute prohibiting the conduct.[3] Still, courts can construe statutes either broadly or narrowly, thus effectively broadening or narrowing the reach of the statutory criminal law.

The Model Penal Code as a Source of Criminal Law

In our federal system, each state is free within constitutional limits to develop its own common and statutory law. Consequently, state and federal legislatures have enacted differing statutes, and the courts have interpreted English common law principles differently. As a result, American criminal law, while sharing a common basis, is quite diverse. Prior to 1960, it was difficult to speak of "the criminal law of the United States."

In 1962, the American Law Institute (ALI), a private organization comprised of leading lawyers, judges, and scholars, adopted the Model Penal Code (MPC), intended as legislation for states to adopt or reject. Since its promulgation in 1962, the MPC has been adopted in whole or in part by legislatures in over 35 states. Because of that general acceptance, no survey of current criminal law could omit the MPC. This book compares the doctrines of the MPC with the previous doctrines of law. Those earlier doctrines, whether statutory or judicial, are referred to together here as the "common law." Be warned, however — our comparison is with the MPC *as adopted by the ALI*. No state has adopted the MPC precisely as proposed by the ALI, and many jurisdictions (most importantly, the federal Code and that of California) still have not adopted the MPC in any way. Thus, while it may be generally true that the MPC is "American law," any specific provision may not be "the law" in a particular jurisdiction. Still, even in jurisdictions that have not enacted the MPC, courts sometimes look to it for guidance because it is thought to embody neutral and carefully constructed approaches to criminal law doctrine.

Constitutional Sources and Limits

Many decisions you will read in your constitutional law class are criminal law cases. In this sense, many constitutional guarantees in the Bill of Rights *directly* limit legislative policy. Thus, under the First Amendment, Congress and state legislatures may not pass *any* law (including a criminal law) that restricts freedom of speech, religion, or the press. In addition to these well-recognized constitutional rights, decisions of the last 30 years have recognized a "right of privacy" that legislatures may not infringe. It was under this theory that the Supreme

Court decided the famous case of *Roe v. Wade,* 410 U.S. 113 (1973). Although procedurally that case was a civil matter, it held that states could not criminally punish persons performing or undergoing abortions. Similarly, *Bowers v. Hardwick,* 478 U.S. 186 (1986), was a civil suit to enjoin enforcement of a criminal statute. There, however, the court held that the right to privacy did not forbid states to punish criminally homosexual sodomy. (In 2003, the Court, in a case involving a *criminal* conviction, overruled *Bowers*; but the point still remains that crucial criminal matters may arise by the civil process. *Lawrence v. Texas,* 539 U.S. 558 (2003).)

The precise contours of these rights, including the right to privacy, are not clear. Nonetheless, each of these constitutional rights reminds us that the criminal law is not merely a means of punishment — the doctrines of the criminal law also protect those whose conduct does not fall directly within its clear meaning.

Beware — for those who have not yet studied constitutional and federal law (and perhaps for those who have), in this book (and in your casebooks) you are likely to find several cases decided by the United States Supreme Court. With one or two exceptions, those decisions are NOT based on the federal Constitution, but construe federal statutes. Neither the decisions, nor their rationale, "bind" state courts. The decisions may, or may not, be good policy. But the United States Supreme Court has been extremely wary of "constitutionalizing" criminal law, and thus "requires" states to follow specific rules with regard to crimes. There are exceptions to this statement, but they are unusual. Don't "overread" decisions by the United States Supreme Court.

While it is true that only legislatures can define crimes, courts give less deference to the legislative power in the criminal arena than in other areas. Whether that is due to the unique sanctions that criminal law carries (see Chapter 2 on punishment) is not clear. However, recognizing the interplay of these three sources — common law, statutes, and constitutional precepts — is essential to understanding American criminal law.

LIMITATIONS ON THE CRIMINAL LAW

Law-abiding people should not have to guess whether there is a criminal law forbidding their conduct or, if there is, what that law means. Likewise, the police, who enforce the law, should not have the power to decide what behavior the law covers. Finally, both trial and appellate courts need to know what the law is in order to apply it fairly and consistently in numerous cases.

Several doctrines, including the principle of legality, the constitutional doctrine of “void for vagueness,” and the rule of lenity, address these concerns. The principle of *legality* provides that before individuals can be convicted and punished for engaging in such conduct, it must be legislatively prohibited. The constitutional doctrine of *void for vagueness* requires the criminal law to be sufficiently clear so that individuals of ordinary ability can understand what their legal obligations are. The rule of *lenity* requires a court to construe criminal statutes strictly, resolving doubt in favor of the defendant.

The Principle of Legality

The Common Law in England

The common law method of formulating new crimes virtually stopped in the mid-nineteenth century. Nonetheless, English judges still occasionally apply common law crimes to novel situations that are not expressly covered by a criminal statute. Thus, in *Shaw v. Director of Prosecutions*,[4] the defendant published a “Ladies Directory” of prostitutes, which contained their names, pictures, addresses, and telephone numbers. Prostitution itself was not a crime, but soliciting in public was. The House of Lords upheld the defendant’s conviction for “conspiracy to corrupt public morals” even though there was no criminal statute forbidding the publication of such a directory. Viscount Simonds concluded that courts retained:

> residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State. . . . [I]t is their duty to guard against attacks which may be the more insidious because they are novel and unprepared for. . . . Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can

foresee every way in which the wickedness of man may disrupt the order of society.[5]

The Common Law in the United States

The early colonists brought with them the common law of England and its statutes, both civil and criminal.[6] Thus, most states had common law crimes. A number of states enacted comprehensive statutory criminal codes in the nineteenth century. In most states, common law crimes were displaced by specific statutory declaration; in others, the common law was preserved, but today, only legislators can create new crimes.

The Strengths and Weaknesses of Common Law Crimes

Common law crimes have some strengths. As Viscount Simonds observed, they ensure that the criminal law is always available to punish harmful conduct even if the legislature failed to anticipate its occurrence by enacting an applicable criminal statute. They also discourage the imaginative exploitation of loopholes in the criminal laws. Common law crimes provide flexibility, which permits adjustment to new and unanticipated situations. In the arena of drug crimes, for example, "designer drugs" are created so quickly that Congress (or state legislatures) cannot keep up with statutes that incorporate their names (or chemical compositions) and prohibit their manufacture. Consequently, federal statutes now allow the Attorney General, working with the Department of Health, to add a newly created drug to the list, for a limited period of time; the listing is valid only for a period sufficient to allow Congress to decide whether to amend the statutorily designated list of drugs.

Common law crimes, however, also have serious weaknesses. First, unless there is a clear precedential case available, an individual could not know beforehand if her contemplated conduct is lawful or criminal. Only when a court decides after the fact, using analogies or cases from other jurisdictions, would a defendant learn whether she had committed a crime. Even someone trying to obey the law must act at her own peril as the defendant in *Shaw* unhappily learned. Faced with such uncertainty, many individuals may play it safe and avoid engaging in conduct that would not be declared criminal.

Second, under a common law system, the limits on governmental authority are not clear. The criminal law is a restriction on individual liberty, but it is also a restriction on governmental authority. Unless the law draws a clear boundary between permissible and impermissible behavior, the government can more easily use the awesome power of the criminal law to convict and incarcerate individuals it considers its enemies for behavior that may have actually been innocent.[7]

The absence of a clear set of rules embodied in criminal statutes thus creates uncertainty in predicting the future. It also weakens the moral justifications for conviction and punishment and diminishes the restraints on government.

Principle of Legality

Today, most jurisdictions have enacted comprehensive modern criminal statutes and have abolished courts' authority to create new crimes. This clear preference for a statutory criminal law reflects a collective sense of justice that individuals are entitled to the protection afforded by clearly announced rules that both protect individual autonomy and limit governmental authority. Fair warning is an essential part of due process which is the foundation of the American criminal justice system. Relying on statutes rather than cases to create crimes also supports separation of powers: The legislature *makes* the law; courts *interpret* and *apply* the law.

The *principle of legality* is an important part of American criminal law today, a principle expressed in the often-cited Latin maxim: "*Nullum crimen, nulla poena, sine lege*" ("There is no crime without law, no punishment without law"). Today, a defendant cannot be convicted of a crime unless the legislature has enacted in advance a statutory definition of the offense.[8]

Providing prior notice of illegality by statute also supports the reasons for convicting and punishing lawbreakers. Utilitarians would concede that, before deterrence can be effective, an individual must be able to know what conduct is forbidden and the consequences of breaking the law. Most retributivists conclude that the fundamental purpose of punishment is to blame those who choose to do wrong. Unless adequate notice of criminal behavior is provided, it is difficult to

argue that the defendant has "chosen" to commit a wrongful act. Moral condemnation and punishment without such notice are indefensible.

Ex Post Facto

The Constitution expressly forbids both Congress and state legislatures from passing ex post facto criminal laws.[9] Legislatures cannot enact statutes that criminalize acts that were innocent when done or that increase the severity of the crime or the punishment after the fact. Such laws are a form of retroactive criminalization. This constitutional restraint ensures that the legislature give fair warning of criminal conduct and its consequences.[10]

The ex post facto prohibition is expressly limited to legislatures. Nonetheless, American courts today are sensitive to the basic unfairness created by *unforeseen* judicial interpretations of criminal statutes that expand their reach and, in effect, retroactively criminalize behavior or aggravate the severity of the crime or its punishment. Concern that due process prohibits such judicial construction of criminal statutes and respect for the separation of powers have influenced courts to avoid such interpretations.[11]

A good example of this cautious judicial approach is *Keeler v. Superior Court.*[12] The defendant was charged with murder (killing a "human being") under California law after he intentionally shoved his knee into the abdomen of his former wife, who was in an advanced state of pregnancy, and said: "I am going to stomp it [the unborn fetus] out of you." The fetus was delivered stillborn with a fractured head.

The majority, rejecting the prosecution's argument that the statute should be interpreted in light of changing medical technology, interpreted the phrase "human being" as used in the California murder statute as having the common law meaning of "born alive," which was the generally understood meaning of "human being" when the statute was enacted first in 1850 and reenacted in 1872. The majority decided that a court should not expand the reach of a criminal statute to include conduct beyond that intended by the legislature. In its view, to do so might violate the separation of powers by judicially rewriting a law

enacted by the legislature, thus usurping the legislature's law-making authority.

Interpreting the phrase "human being" to include a viable fetus might also violate federal and state due process, according to the majority. Providing a new judicial definition of this material element of murder was constitutionally impermissible. Under the applicable law in effect when the defendant struck his wife, he had only committed an assault on his former wife (and possibly an abortion). Deciding after the fact that his conduct actually constituted murder would be an exercise in retroactively increasing the severity of the defendant's crime and its penalty.[13]

However, the Supreme Court has since given courts greater authority to expand retroactively the scope of the criminal law. In *Rogers v. Tennessee*, 532 U.S. 451 (2001), the defendant stabbed the victim, who died more than one year and a day after the stabbing. Even though Tennessee at the time followed the common law rule that the victim must die within one year and a day of the defendant's act to establish murder, the state supreme court retroactively abolished this rule and upheld the defendant's murder conviction. Without this authority, courts could not engage in "incremental and reasoned development"[14] of precedent. So long as a court's decision is not "unexpected and indefensible,"[15] it has the power to broaden the reach of the criminal law.

The Rule of Lenity

This fear of improper judicial expansion of a statutory definition of crime is also reflected in the *rule of lenity*, also referred to as the *rule of strict construction*.[16] English courts originally developed this principle to restrict capital punishment in response to the increasing number of felonies punishable by death.[17] This rule of strict judicial construction requires courts to "construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit."[18] Simply put, ambiguity in the statutory language should be resolved in the defendant's favor. This rule works to advance the

legality principle by deeming an individual's conduct legal if a law is ambiguous and can be read as to not criminalize the individual's behavior.[19] Some courts, however, will apply the rule of lenity only if other strategies for interpreting a criminal statute fail to make its meaning clear.[20] Because this rule is not a constitutional requirement, courts do not have to follow it and legislatures may supersede it by statute.[21]

The Model Penal Code did not expressly adopt the rule of lenity. Instead, it requires that criminal statutes be "construed according to the fair import of their terms." In cases involving ambiguous language, however, it directs courts to construe statutory language to further both the general purposes of the criminal law and the specific purposes of the statute under consideration.[22] A number of jurisdictions subsequently followed suit and adopted a defense for "*de minimis* infractions."[23] This defense rests on the notion that a defendant should not be culpable for an act that can be deemed criminal under the law, but that was not an act the legislature sought to prohibit when enacting the law.[24]

Void for Vagueness

The United States Supreme Court has consistently struck down criminal laws that are so vague that ordinary people could not reasonably determine their meaning and application from the language of the statute.[25] The Court has also consistently struck down statutes which confer excessive discretion on law enforcement authorities to arrest or prosecute,[26] or on judges and juries to determine what conduct is prohibited.[27] The "void for vagueness" doctrine is based on the due process clauses of the Fifth Amendment (when a federal statute is involved) and on the Fourteenth Amendment (when a state statute is involved). It helps ensure that the American criminal law implements the principle of legality.[28] There is an important distinction in regarding a statute as vague as opposed to ambiguous. An offense is vague when an individual is unsure what the illegal conduct is. By contrast, an ambiguous law allows for multiple readings of the same law, none of

which are inherently incorrect.[29]

The doctrine ensures that criminal statutes provide fair notice of what behavior is forbidden. It requires the legislature to define the elements of the crime clearly in advance rather than require the judiciary to do so retroactively and additionally requires the legislature to provide notice of potential sanctions.[30] The vagueness doctrine also prevents police from arbitrarily choosing which persons they will arrest. Finally, it helps ensure a consistent and equal application of the criminal law. Void for vagueness does not preclude the legislature from passing a criminal law to accomplish a legitimate law enforcement goal. It simply requires the legislature to use clear and focused language. Of course, it is not always clear when a law is too indefinite so as to be unconstitutional. Courts are more likely to strike down laws as unconstitutionally vague when they are very general in scope, are overly broad or too readily reach innocent behavior (especially if the First Amendment is involved), and confer very broad discretion on police officers to arrest whom they choose (especially if racial discrimination appears to be involved).[31] Thus, in *Papachristou v. City of Jacksonville*, the Supreme Court struck down a broadly worded vagrancy ordinance because it gave the police “unfettered discretion” to decide whom to arrest. Justice Douglas noted: “The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”[32] More recently, in *City of Chicago v. Morales*,[33] the Court agreed with the Illinois state supreme court that a Chicago ordinance that prohibited criminal street gang members from “loitering” with other gang members or non-members was unconstitutionally vague because it failed to give ordinary citizens adequate notice of what conduct is criminal and conferred too much enforcement discretion on police officers.

There is an emerging issue in the void for vagueness context — an increasing number of statutes are being written to prohibit a great amount of behavior. Additionally, these statutes are broadly written which allows for the executive to find whichever undesirable behavior they choose to be criminal.[34] Most recently, in *United States v. Jonson*, the Supreme Court used the void for vagueness doctrine to hold a law defining a violent felony as a crime that “otherwise involves conduct

that presents a serious potential risk of physical injury to another" unconstitutional.[35] The Court took issue with the presence of the disparity of risk associated with the listed crimes in the statute in combination with the use of the word "otherwise" as an overly broad catch-all phrase. The combination of these factors left the public uncertain as to what could constitute a "potential risk" and therefore what was prohibited.[36]

However, courts have a pattern of upholding statutes against a vagueness challenge if the statute alerts an ordinary person that there is a reasonable risk that his conduct would violate the law. As Justice Holmes said in *Nash v. United States*, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[37] Finally, a court can construe the statute more narrowly so that, as interpreted by the court, it is not unconstitutionally vague.[38]

The Burden of Proof

A final "limit" on the criminal law's reach is the procedural protection afforded to a criminal defendant. In this book, we discuss only one[39] — the high standard of proof required in criminal cases.

In virtually all legal proceedings, the person who wishes to change the status quo must demonstrate that there is good reason for doing so. Thus, she must carry the burden of proof that some legal harm has been inflicted, and that some legal remedy should be provided. In most civil lawsuits, the standard by which this proof must be established is articulated as a "preponderance" of the evidence. In a few suits, the standard is "clear and convincing," which is assumed to be "more than" a mere preponderance. In 1972, the United States Supreme Court confirmed in *In re Winship*[40] what had been the rule in the United States for over two centuries: In a criminal case, the United States Constitution requires that the prosecution has the burden of proof, and the standard of proof is beyond a reasonable doubt (BRD). The Court gave two reasons for this requirement: (1) defendants *might* face loss of liberty if convicted; (2) defendants would *certainly* be stigmatized as having

committed immoral acts. In later cases, the Court made clear that *both* of these factors must be present to require this level of proof. In civil commitment cases, where there is a potential loss of liberty but no stigmatization as a criminal, for example, the standard is “clear and convincing,” not BRD.[41]

It is fairly easy to quantify the preponderance standard: 50.01 percent of the probabilities. And “clear and convincing” is “somewhat more” (70 percent?). But how much is “beyond a reasonable doubt”? In *United States v. Fatico,* 458 F. Supp. 388 (S.D.N.Y. 1978), a United States district court judge polled his colleagues and found that they “quantified” BRD as low as 76 percent and as high as 95 percent. As it turns out, there is no uniform national standard for beyond a reasonable doubt.

Nor can words better capture the heart of the standard. Since *Winship,* the Court has continuously questioned attempts to explicate more fully the purport of the words. In *Sandoval v. California* and *Victor v. Nebraska,* 511 U.S. 1 (1994), the Court upheld instructions that defined reasonable doubt as “not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt” or as requiring proof beyond a “moral certainty” and an “actual and substantial doubt.” The Court’s opinions, however, clearly demonstrated that the Justices were troubled by *any* attempt to define the term. Indeed, it has been suggested that trial judges should *never* try to do so.[42]

Debate has recently arisen about “what” the prosecution must prove beyond a reasonable doubt. One question involves the degree of factual particularity about which the jury must be unanimous. If the charge is carrying a concealed weapon, for example, and eight jurors find that the gun was in the defendant’s right pocket, and four believe that it was in his left pocket, this lack of unanimity does not invalidate the conviction. But if eight jurors believe that the defendant, charged with grand larceny, stole a lamp on Thursday, and four believe that he stole a car worth the same amount of money on Friday, this is a sufficient difference to preclude a conviction.

A second issue has been addressed by the Supreme Court in a series of opinions. Suppose that a statute declares that possession of cocaine is illegal but imposes different sentences depending on the amount of

cocaine involved. May a judge decide the question of *amount* (by a preponderance standard), or must this issue be left to the jury, in which case the standard of proof is beyond a reasonable doubt? In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that the Sixth Amendment required that any fact that *increased the potential maximum sentence* had to be proved to the jury BRD.[43] Thus, in this example, if the statutory maximum for 5 grams was a year, but the statutory maximum for 50 grams was 10 years, the amount must be submitted to a jury. On the other hand, suppose that one statute allows a sentence of 1 to 20 years for possession of cocaine but that sentencing guidelines establish the "usual" sentence to be 1 and 10 years, respectively, depending on the amount. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court held that even within the statutory framework, if the *sentencing guideline maximum* were to be increased, *Apprendi* required the court to submit the issue to the jury. Thus, if kidnapping carried a 10-year statutory maximum, but sentencing guidelines provided for a 2-year cap unless the kidnapping was done "for ransom" — in which case the guideline maximum was 5 years, still below the statutory maximum of 10 years — the jury would have to decide, BRD, whether ransom was involved. Six months later, the Court ruled the federal mandatory sentencing guidelines constitutionally invalid under *Apprendi-Blakely*. The Court reinterpreted the federal statutes establishing the guidelines as making them advisory, and not mandatory upon judges. If the guidelines are merely mandatory, an issue such as ransom need not be submitted to the jury, because even if the judge found ransom to be a factor, she would be under no compulsion to increase the sentence she would otherwise have imposed. *United States v. Booker*, 543 U.S. 220 (2005). *Booker*, which involved the interpretation of a federal statute, does not apply to the states; however, *Blakely* continues to require proof BRD of any fact that would increase the maximum sentence possible.

The *Apprendi-Blakely* cases' emphasis on the effect on maximum sentences is somewhat puzzling. Suppose that a statute establishes two different maximums (1 year vs. 3 years) between two different levels of larceny, depending on the value of the items stolen. Under a literal reading of *Apprendi*, the value of the goods must be submitted to the jury, although the increase in potential sentence (2 years) is only a small fraction of the increase in potential sentence under the drug guidelines.

On the other hand, if *Apprendi* reaches the drug statute, many people argue that recent salutary reforms in sentencing processes will be threatened. Some people, however, have suggested that *Apprendi* would allow the jury to find the facts that potentially affect a sentence while allowing the judge to decide the precise quantity of that effect, much as a jury's finding that the defendant assaulted the victim "with intent to kill" allows the judge to increase the sentence based upon that finding.[44]

Examples

1. Bobby was pulled over for speeding. When the officer stepped up to her window he noticed an open gas can on the floor of her car. The officer issued Bobby two tickets, one for speeding, and another for the unsafe handling of explosives. Bobby did not know that the gas can in the back of the car did not have the cap on. The relevant statute states "it is a criminal action to knowingly transport highly flammable or toxic materials in an unsafe manner." Bobby wants to rely on the lenity doctrine; as her attorney, how would you make this argument?

2. Tarrance promotes "rave" concerts in San Francisco. These concerts are one-time events featuring rock bands and are put on in secret locations on short notice. The promoters often sell drugs at these events.

   Tarrance receives anonymous calls from the producers detailing their plans to put on an all-night "Techno-Funk" rave concert and also to sell esctasy, an illegal designer drug. They tell Tarrance the date and location of the concert and hire him to print up catchy flyers advertising the event and the directions to the secret location. He is also hired to find friends who will pass out flyers to individuals who might be interested in attending the concert.

   Tarrance knows that ecstasy is often sold at rave concerts, but he has never been to a rave concert, does not sell drugs, and has never taken ectasy. He is hired only to promote the concert.

   A teenager passing out flyers is stopped and questioned by the police. She tells the police that Tarrance hired her to pass out the flyers. The police obtain a warrant and search Tarrance's home.

They find no drugs or drug paraphernalia; they find only a printer and the printed flyers.

A creative prosecutor charges Tarrance with "advertising an event at which drugs will be sold," even though there is no statute defining this offense. Can Tarrance be convicted on this charge?

3. Benton, a convicted felon, is arrested after he is caught buying a gun that has been transported across state lines. The prosecutor initially charges him with violating Title IV of the Omnibus Crime Control Act, which prohibits a convicted felon from buying a gun that has been transported in interstate commerce and provides a maximum penalty of two years in prison.

   Unfortunately for Benton, the prosecutor does some additional research and discovers that the Safe Streets Act of 1968, using the same language as Title IV, proscribes the very same conduct but provides a maximum sentence of *7* years. The prosecutor amends the charge, dropping the Title IV charge and adding the Safe Streets charge, hoping to obtain a longer prison term.

   The defense counsel moves to dismiss the prosecution, claiming the statutes are void for vagueness because the law does not clearly set forth the penalty for this offense. What result?

4. Gabriela is an attorney for Scussy Scum, who has been charged in Las Vegas with solicitation to commit murder in a high-profile case. After the grand jury indicts Scussy, Gabriela holds a press conference where she states that the police fabricated stories and tampered with evidence in this case, and that these practices have become "all too common in Nevada."

   Two weeks later Gabriela is charged with violating a criminal statute that forbids a lawyer to speak about a pending case in ways that "a reasonable lawyer should know would have a substantial likelihood of materially prejudicing an adjudicative proceeding." Section (b) of the law provides that a lawyer "may state without elaboration . . . the general nature of the . . . defense." Statements by an attorney are permitted under this section even though they may "materially prejudice" the case.

   Gabriela claims she reasonably believed she could speak generally about her client's defense because of the language in

section (b). She claims that the statute is constitutionally void for vagueness because attorneys, the group targeted by the law, must guess at its meaning.

What result?

5. Russ, a convicted sex offender, was driving to his job at 7:00 a.m. The most direct route took him past the entrance to a five-acre city park. He ran out of gas just outside the park entrance. A police officer, who stopped to assist Russ, ran a license check and found that Russ was a convicted sex offender. The officer had just passed a mother with a baby in a stroller on the other side of the park. Russ was charged and convicted for violating a city ordinance that prohibited "a convicted sex offender from being within 2,000 feet of a park, playground, school, day care center, bus stop, or pool when children are present."

Explanations

1. The government will argue that Bobby knew that the gas can was in the vehicle and was transporting it in an unsafe manner and therefore she acted criminally. To make the best argument for Bobby using the lenity doctrine, a defense attorney will argue that although Bobby knew the gas can was in the car, she did not know that the cap was off and that she was therefore transporting the gas can in an unsafe manner. The statute is not clear as to whether or not it requires knowledge of only the transportation of the highly flammable material, or the knowledge of both the transportation and the unsafe manner of said transportation. Because this statute can be read two different ways, it is ambiguous. Resolving this ambiguity in accordance with the rule of lenity, Bobby did not act criminally. If the court is persuaded by the rule of lenity, it will resolve the ambiguity in favor of Bobby (the defendant). However, the rule of lenity works more like a suggestion than an absolute rule, so courts may ignore it and rule against Bobby.

2. At one time, many American jurisdictions recognized "common law crimes," thereby allowing prosecutors to charge new crimes even though there was no statute specifically forbidding the

defendant’s conduct. If the evidence established that the defendant had injured social interests generally protected by the law, judges and juries were allowed to determine the criminality of the defendant’s behavior based on the evidence presented.

In such a common law jurisdiction, the court might well conclude that Tarrance had committed a crime because his behavior helped other individuals violate a specific statute that forbids selling drugs. This approach provides the criminal law with sufficient flexibility to meet new and unanticipated dangers. It also discourages creative criminals from taking advantage of the legislature’s failure to pass a criminal law that prohibits such harmful behavior.

Today, however, virtually every American jurisdiction has abolished common law crimes and, instead, requires the legislature to pass laws that specifically state what conduct is criminal and what punishment can be imposed. This provides individuals with adequate notice of what they can and cannot do and avoids retroactive punishment. It also ensures that prosecutors and juries are not making law, thereby preserving the important role of the legislature in our constitutional system of separated powers.

Tarrance will not be convicted of the charged offense because there is no law that criminalizes his conduct — promoting concerts. He did not attend the concert nor did he supply or sell drugs there. If the legislature wishes to prohibit the act of promoting events at which drugs will be sold, it must enact a law specifically making such conduct criminal. This principle of legality will help ensure that the legislature has thought about the problem and also will limit police and prosecutorial discretion. More importantly, it will provide sufficient guidance to individuals about what conduct can expose them to criminal responsibility.

3. The void for vagueness doctrine also applies to punishment. At first glance, Benton’s case seems to be one of unacceptable ambiguity. Two different laws provide different punishments for the very same offense. Can Benton successfully argue that these laws are void for vagueness because the statutes do not clearly set forth what penalty can be imposed for this offense?

In *United States v. Batchelder*, 442 U.S. 114 (1979), the Supreme Court held that two similar criminal statutes were *not* unconstitutionally vague. Each statute clearly set forth the conduct proscribed and the punishment authorized. The Court then concluded that two different statutes prohibiting the same conduct but providing two different penalties create no more uncertainty than does a single statute authorizing alternative penalties. These laws provide Benton with adequate notice of the range of punishment that can be imposed for his conduct and impose a reasonable limit on sentencing discretion.

4. The court might well find this statute void for vagueness. The "safe harbor" provision of section (b), which allows attorneys to describe the "*general* nature" of the defense "without *elaboration*," may mislead them into believing that they cannot be prosecuted for publicly discussing possible defenses even if they should reasonably know that the discussion might "materially prejudic[e] an adjudicative proceeding."

   Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), involved a Nevada supreme court rule (uncannily similar to the criminal statute in our example) that governed what lawyers may say about a case outside a judicial proceeding.

   The United States Supreme Court concluded that the Nevada rule failed to provide "fair notice to those to whom [it] is directed," and that a lawyer would have to guess at whether section (b) protected his discussion of his client's defenses. Section (b) was not sufficiently clear because the terms "general" and "elaboration" are classic terms of degree, which in this context have no settled usage or traditional legal interpretation. As a result, section (b) does not provide sufficient guidance for lawyers trying to fit within its "safe harbor." The Court held that the court rule as applied in Mr. Gentile's case was void for vagueness.[45]

   A statute can be constitutionally void on its face or as applied in a specific case. The standards are the same in each instance. The statute must (1) give adequate notice of what conduct is forbidden and (2) provide adequate enforcement standards. There is a difference between the two instances. A statute that is unconstitutionally vague *on its face* does not satisfy this two-part

test for *any* conduct. A statute that is vague *as applied* does not satisfy the two-part test when applied to *specific* conduct. However, there is some conduct to which the statute can readily be applied without violating the test. In our example the statute would be considered impermissibly vague when applied to what Gabriela actually did.

5. Russ would argue that this criminal law is unconstitutionally vague. While driving his car, he had no way of knowing whether the road came within 2,000 feet of one of these prohibited locations, and he certainly could not be expected to know that a child was physically present, especially this early in the morning. Thus, a reasonable person in these circumstances could not know when he is engaging in the forbidden conduct. Moreover, the statute interferes with his First Amendment right to travel and, because it is virtually impossible *not* to inadvertently violate this city ordinance with great frequency, it confers excessive discretion on police officers to decide when they will arrest sex offenders for doing what ordinary citizens do every day.

   The prosecutor would respond that a reasonable person would have no difficulty understanding what the law prohibits. Convicted sex offenders surely would comprehend that they cannot come near these specified sites when children are there and that it is their responsibility to take all necessary precautions to comply with the law. To be safe, Russ should simply avoid coming near these places. This is a reasonable measure to prevent sex offenders from committing more sex crimes against children.

   How would you rule?

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1. G. Fletcher, Rethinking Criminal Law 115-118 (1978).
2. Because it was an evolutionary process, however, there is no "starting point" to the common law, although Hale has urged 1192, the date of the ascension of Richard I to the throne of England, as the "best" starting date. Matthew Hale, The History of the Common Law in England (3d ed. 1739).
3. S. Pomorski, American Common Law and the Principle *Nulla Crimen Sine Lege* (1975).
4. House of Lords, [1962] A.C. 220.
5. Id.
6. See Jerome Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791 (1951).
7. Pomorski, supra n. 3; Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189 n. 15 (1985).

8. H. Packer, The Limits of the Criminal Sanction (1968).
9. U.S. Const. art. I, §9 (federal) and §10 (state).
10. *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798); *Bouie v. City of Columbia,* 378 U.S. 347 (1964).
11. *Bouie*, 378 U.S. 347.
12. 2 Cal. 3d 619 (1970).
13. Subsequent to this decision, the California legislature amended the state murder statute to include the unlawful killing of a “fetus.” 1970 Cal. Laws ch. 1311, §1. This amended statute would punish as murder what Keeler did.
14. 532 U.S. at 461.
15. 532 U.S. at 462.
16. Paul H. Robinson et al., *Criminal Law Case Studies and Controversies* 39 (5th ed. 2017).
17. Jeffries, supra n. 7, at 198.
18. *Keeler,* 2 Cal. 3d at 631.
19. Robinson, supra at 50.
20. Id. at 42.
21. Id.
22. Model Penal Code §1.02(3). Providing “fair warning” of criminal conduct is one of the general purposes of the MPC. §1.02(d).
23. Robinson, supra at 51.
24. Id.
25. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).
26. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).
27. *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966).
28. Packer, supra n. 8, at 93. But see Jeffries, supra n. 7, at 200-201.
29. Robinson, supra at 41.
30. Carissa Byrne Hessick, Vagueness Principles, 50 Ariz. St. L.J. 1137 (2017) (“Courts should instead revisit current doctrines which regularly permit insufficient notice, arbitrary and discriminatory enforcement, and unwarranted delegations in the enforcement of non-vague criminal laws.”)
31. *Papachristou,* 405 U.S. 156; *Kolender v. Lawson,* 461 U.S. 352 (1983).
32. *Papachristou,* 405 U.S. at 171.
33. 527 U.S. 41 (1999).
34. Hessick, supra.
35. Id.
36. Id. at n.15.
37. 229 U.S. 373, 377 (1912).
38. *Winters v. New York,* 333 U.S. 507 (1948).
39. See R. Bloom & M. Brodin, Criminal Procedure: Examples and Explanations (4th ed. 2005), for a discussion of many others. R. Singer, Criminal Procedure II: From Bail to Jail: Examples and Explanations (3d ed. 2012).
40. 397 U.S. 358 (1972).
41. *Addington v. Texas,* 449 U.S. 418 (1979).
42. Note, 108 Harv. L. Rev. 1955 (1995).
43. The Court recognized one exception — past criminal record — but its reasons for so doing are sui generis and need not detain us here.
44. See Richard G. Singer, Criminal Procedure II: From Bail to Jail: Examples and Explanations (3d ed. 2012).
45. Though agreeing that courts may adopt ethical rules that regulate what lawyers can say publicly about pending cases, the Court was also concerned that the rule as applied in this case could impermissibly infringe on Mr. Gentile’s First Amendment right to criticize public officials.

CHAPTER 2

The Purposes of Punishment

OVERVIEW

Why do we punish? Why isn't requiring a defendant to pay damages to his victim "enough"? These are hardly new questions; philosophers have debated them for millennia. This chapter explores some of the answers philosophers have given, upon which modern criminal law is founded. We explore two of the usual answers — utilitarianism and retributivism — and assess them within the context of current legislative efforts to broaden the reach of the criminal law.

DEFINING PUNISHMENT

In general discussions we often use the term "punishment" as the equivalent of any hardship or loss that a person endures. Thus, if *A* has recklessly killed his beloved child in a hunting accident, we may be loath to prosecute him criminally because "he has been punished enough." That usage of the term "punishment," however, is both inadequate and inaccurate in the law (and in philosophy, as well). Punishment is hardship (1) *purposely* inflicted (2) *by the state* (3) because one of its laws was violated.

Thus, if Carl negligently injures Alice, compelling him to compensate Alice for the injury he caused, while causing loss to Carl, it is not punishment.[1] Punishment, instead, connotes a *blaming*, a *stigmatizing*, of the perpetrator as a choosing agent.

In the criminal system, it is often said that the individual victim is not relevant, and that the actual victim is the state.[2] Compensating Alice,

therefore, does not compensate the victim of the criminal act, the state. Instead, the state *punishes* the offender — purposely inflicts discomfort upon him — *because* he has broken the law. In fact, no individual "victim" is required. Consider the fact that there are statutes punishing "victimless" crimes such as bribery, failure to pay taxes, or drug use.

THE PURPOSES OF PUNISHMENT

As we saw in Chapter 1, criminal law and tort law were once joined in the same proceeding. Even today, most acts that constitute crimes also constitute torts. Thus, if Charlie purposely hits Doug with a baseball bat, Charlie will have to pay Doug for the injuries for the tort of battery. Why, then, also punish Charlie criminally? What does criminal punishment add to the goals of the civil legal system?

Traditionally, two different responses are given to this question. One suggests that punishment serves *utilitarian* ends, such as (a) deterring persons who might be thinking about committing crimes, (b) incapacitating those who, if released, are likely to commit additional serious and violent crimes, or (c) rehabilitating those who have already committed offenses. The other explanation of criminal punishment (*retribution*), argues that persons who have committed crimes have acted immorally and must be punished to atone for the immoral action.

These two basic philosophies of punishment theory have clashed for centuries. Each has strong proponents, but each has significant weaknesses; supporters select one over the other based more on faith than proof.

Utilitarianism

The basic premise of utilitarian explanations of punishment is that punishment is itself an evil because it deliberately inflicts harm on a human being. Therefore, we should punish criminals only if some "good" is achieved by this act. That "good reason" is found in various social benefits to the law-abiding — primarily reduction of future

crimes, producing *unity*, or promoting social welfare[3] — that are said to result from punishing criminals.

Deterrence

Deterrence theory posits that punishment of a criminal should be set to most efficiently prevent, avoid, or deter future offenses. This theory can be divided into two categories: specific deterrence and general deterrence. Aiming to deter the offender at hand from committing additional offenses in the future is specific deterrence; aiming to deter other potential offenders is called general deterrence.[4] If Joan never speeds because she fears a ticket, this is general deterrence. If, just as Bob decides to speed, he sees a police car and does not speed, he demonstrates specific deterrence.

General deterrence and specific deterrence may rely on different factors in determining punishment. For example, general deterrence would impose greater punishment in cases receiving greater media coverage. The broad reach of the message sent by punishment in these cases would give a greater general-deterrent payoff for the punishment-cost investment. Specific deterrence has little reason to care or consider the degree of media coverage, as the target audience is only the offender at hand.[5]

Deterrence depends on an offender's consideration of the "costs" of punishment, and those costs depend on both the amount of punishment and the likelihood of punishment.[6] Both general and specific deterrence are based on the ability of the law to threaten potential *D*s with a penalty serious enough to dissuade them from acting. The pain threatened must be greater than the pleasure that *D* thinks he will attain by committing the crime. The premise is that criminals balance these pleasures and pains; indeed, Jeremy Bentham, the founder of utilitarianism, called this the "felicific calculus."[7]

There are simply too many variables to accurately measure the actual deterrent effect of a threatened punishment. For example, if the legislature increases the penalty for burglary, and the rate of burglaries thereafter decreases (assuming that we are relatively sure of that), it is very difficult to prove that the threat of increased punishment *caused* the

decline. After all, all the burglars may have already been put in jail, or (if unemployment is related to crime) the unemployment rate might have dramatically decreased, making fewer people "turn to" crime. After examining all the studies on this subject, the National Research Council of the National Academy of Sciences concluded that we "cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence."[8]

To be effective, deterrence requires that *D* receive *notice* of the threat of punishments. However, how members of society learn of the possible punishments threatened if they violate the criminal law is uncertain. Obviously, few citizens read the statute books to determine the possible punishments. Most of us probably learn simply by experience that crimes are "bad," and that some crimes are "worse" than others. We also sense that "worse" crimes are punished more severely than others.

The theory of deterrence requires not only that *D* hears the threat of the criminal law, but that he hears it *accurately*. Thus, if the law threatens a punishment of five years, but *D* believes the punishment is only three years, he will be less deterred than he should be. (On the other hand, if he believes that the punishment will be ten years, he will be overdeterred.)

A more sophisticated version of providing notice assumes that there are "target" groups who are more likely to commit certain kinds of crimes. Consequently, it is more important to ensure that they hear the threat than that the general public hear it. Thus, for example, to deter embezzlement, we might ensure that bank tellers or others entrusted with large amounts of funds are expressly and continuously reminded of the penalties associated with that crime.

In addition to being heard, the threat must be *credible*. This requires two further suppositions: (l) *D* thinks he will be captured; (2) *D* believes that, if captured, he will be punished as threatened.

Most criminologists believe that the *certainty of capture* deters much more than severity of punishment.[9] Unfortunately, both theory and practice undermine both hopes: The FBI Uniform Crime Report of 2015 indicates that police "clear" (believe they have found the guilty party) in only a small percentage of most crimes. For example, police "cleared" 61.5 percent of murders and 37.8[10] percent of rapes, but only 21.9

percent of larceny-thefts, 29.3 percent of robberies, and 12.9 percent of burglaries.[11] These figures remain distressingly consistent year after year. Changes in the crime rate do not appear to alter the clearance rate in any significant way.

Furthermore, every criminal, even if he knows that the capture rate is high "in general," believes that *he* is smart enough to avoid capture. If that were not the case, he would not commit the crime. Bentham's "felicific calculus" requires that the defendant accept the possibility of capture, but most actual criminals do not do so.[12] Indeed, critics of the deterrence theory point out that when pickpockets were publicly hanged, many pockets were picked at the public executions, thus suggesting that the pickpockets did not expect to be caught (since the penalty, if caught, was obvious).

Even when defendants are captured, these same FBI data show that most persons are prosecuted for and convicted of less serious offenses than those for which they were "cleared." Assuming for the moment that the police clearance rate is accurate, this means that many persons who actually commit crime A are punished for a less serious crime B; unless the threatened punishment for B is (almost) as severe as that for A, the threatened punishment for A has become irrelevant.[13] Thus, such practices as pretrial diversion, plea bargaining, early release on parole, and so on, all undercut the deterrent impact of the threatened punishment. These realities are exacerbated by the fact that the persons most likely to avoid punishment for crime A are those who know how to manipulate "the system." Paradoxically, a professional criminal (especially one with financial means) may well be more able to obtain a lesser sentence than the first-time offender.

Critics of the deterrence theory argue that many crimes are *not* crimes of calculation. Indeed, current analysis argues that deterrence theory is most applicable in white collar crimes, which often take long periods of planning, followed by long periods of implementation, and that "street crimes," such as muggings and burglaries, are far less amenable to the deterrence calculus. Yet most current concerns about crime focus on street crime rather than white collar crime.

Finally, though the evidence is slim, several studies have concluded that peer pressure and the threat of losing status among friends and friendships have much more influence on a potential criminal than does

the threatened criminal penalty.[14]

None of these criticisms necessarily demonstrates the invalidity of the deterrence model. Most likely, criminal punishment achieves some “general prevention” and “educates” us to both the threat and the morality of the criminal law as we grow up.[15]

Note that it is the *threat*, and not the actual punishment, that brings about deterrence. Under utilitarian theory, if it were possible to threaten punishment but never impose it and yet achieve the same amount of deterrence, punishment itself would be unnecessary. Thus, if Professor Wing convinces her students that she lowers grades on the basis of poor class performance — even if she never does — she may obtain better participation in class. And if Ezekial performs poorly, Professor Wing may merely have to *appear* to note his poor behavior in her class notes in order to increase preparation.

Incapacitation

A second utilitarian explanation[16] of why we punish is that those who commit criminal acts have rejected important social norms and have thereby demonstrated their willingness to continue to do so in the future. Thus, for the good of those who abide by the law, these offenders must be prevented (incapacitated) from reoffending via imprisonment, execution, or any other restraint or impairment that disables a potential offender.[17]

Incapacitationists must either (1) punish equally, for lengthy periods of time every person committing the same crime or (2) assume that they can accurately identify those who are most likely to reoffend and impose on them lengthy periods of incarceration. This latter premise partially explains the establishment of parole boards, which are theoretically composed of experts who can determine when an offender has “learned his lesson,” and no longer needs incapacitation.

Opponents of incapacitation pose several objections. First, they assert it is not possible to predict accurately who will recidivate. Thus, if incapacitation is to reduce the crime rate, many offenders must be incarcerated at very high cost for long periods of time. Assume, for example, that statistics indicate that 10 percent of all burglars actually

commit 80 percent of all burglaries. Out of a group of 100, unless we can identify the 10 high repeaters, we must incapacitate for long terms 90 who will not “seriously” recidivate. Some argue that this is too high a price to pay both economically and morally.

Supporters of incapacitation respond by saying that it *is* possible to predict some kinds of recidivism within “acceptable” limits. We have come a long way as far as prediction in crime before arrest, after arrest, and after conviction.[18] Furthermore, they suggest, if there *is* overprediction, and some offenders are kept unnecessarily long, the pain imposed on them is outweighed by the pain not imposed on those putative innocent victims of the 10 who would be “improperly” released.

A major critique of incapacitationist theory is that it ignores the so-called replacement phenomenon in crime. Many criminal activities are “market” driven. If there is a demand for contraband goods (drugs, prostitutes, stolen TVs), someone will supply them. Thus, when one supplier of goods is convicted and incapacitated, another supplier will replace him. While it may be true that when Aloysius is incarcerated, *he* will not push drugs on the corner, it is still likely, given no reduced demand, that someone else will.[19] Whether crimes of violence, rape, homicide, or robbery follow this same pattern is less clear. Some criminologists argue that even these crimes have “markets,” in the sense that the arrest of one robber simply widens the possibilities for those who have not been arrested. If so, incapacitating one robber will result in no reduction of the overall crime rate for that offense.

Rehabilitation

Between 1800 and 1975, American jurisdictions seemed dominated by a third utilitarian theory, rehabilitation. This theory holds that offenders can be “changed” into nonoffenders by taking away the offender’s desire or impulse to engage in criminal conduct if given proper “treatment.”[20] Common forms of rehabilitation include medical treatments, rehabilitation programs, psychological counseling, and education and training programs.[21] The idea of rehabilitation emanated from the Quakers who, in the first decade after the American Revolution (and as a reaction to the widespread use of capital punishment for

virtually all felonies), invented the penitentiary, where a criminal would become “penitent” by reading the Bible and renounce further criminality.

During its ascendancy, rehabilitation took several different modes. Between (roughly) 1800 and 1870, crime was often seen as a “social” disease generated by conditions in industrial cities. Hence, many prisons were built in places remote from those cities. From 1870 to 1900, crime was analogized to a medical disease, and the proper “care” would cure the offender. Parole boards, consisting of experts who could best detect whether a defendant was cured, would release the offender when he was no longer in need of treatment. In a subsequent wave from 1900 to 1940, criminality was seen as inherited. Many states provided for the sterilization of criminals to avoid crime by their progeny.[22] Finally, between 1940 and 1975, crime was seen primarily as a symptom of psychological disturbance; psychiatrists were added to parole boards, and “behavior modification” programs blossomed in prisons.

Each of these models resulted in other changes in the criminal justice system. The rehabilitationist theory (like an incapacitationist one) required an indeterminate sentence for each criminal because the “symptoms” and cure would differ with each individual. Similarly, judges would require “presentence reports,” which would inform them of the social background of the defendant, the likelihood that he needed rehabilitation, and for how long. Indeterminate sentencing was adopted in virtually every state.[23]

Critics of rehabilitationist theory generally argued that there was no evidence that “treatment” during punishment worked. No data showed that persons put in treatment programs while in prison were less likely to recidivate.[24] This skepticism was strongly supported by a landmark paper in the mid-1970s that, after reviewing studies of scores of such programs, was interpreted as concluding that “nothing works.”[25] In fact, that was not the conclusion of the piece, as its author thereafter recognized,[26] but by that time, it was too late. The “nothing works” message had been generally accepted by legislatures around the country.

Empirical Critiques

Each of the utilitarian theories claims to reduce the crime rate. When, as in the rehabilitation study cited above, the efficacy of the practice is questioned by empirical studies, the validity of the theory is similarly questioned. This may be unfair, since there are so many other variable factors that affect the crime rate (including, for example, the reporting rate) that have nothing to do with any of the theories. Moreover, much of the data may be soft. Assertions about the incapacitative effect, for example, often rely on self-reports by prison inmates concerning how many crimes they "really" committed before being captured. Therefore, the very claims about reducing crime rates that make the utilitarian theories attractive also tend to make them susceptible to empirical attacks. (The retributive theory, discussed below, is not subject to the same critique, since it explicitly rejects any claims of real-world effect.)

Normative Critiques

In addition to the practical questions that confront utilitarian theory, there is a separate issue: Is it fair? Retributivists argue that utilitarians are willing to use the defendant as a "pawn" for purposes other than fair punishment. It is sometimes suggested that utilitarians would even be willing to punish a person they know is innocent if they could hide that fact from the "target population."

The great philosopher H.L.A. Hart attempted to reconcile these problems by suggesting that the "General Justifying Aim" of the criminal law could be utilitarian, but that the "General Distributive Aim" could be retributivist.[27] That is, we would punish only those who, by committing crimes, deserve punishment, but we would punish them with utilitarian, rather than retributivist, goals in mind. Even if one accepts Hart's accommodation, it does not fully meet the critique made by Immanuel Kant of any utilitarian theory. Kant argued that the "categorical imperative" of morality forbade treating a human being for any social purpose whatever. Utilitarians, he argued, did exactly that, thereby ignoring the difference between civil law (which is utilitarian) and criminal law (which, he asserted, should be based on moral judgments).

Retribution

The alternative major explanation for punishment is *retribution.* Retribution argues that persons who choose to do wrongful (i.e., criminal) acts *deserve* punishment, and punishment should be imposed on them even if it serves no utilitarian purpose. Indeed, an argument accepted by many retributivists is that punishment *must* be imposed because the offender deserves to be treated as a moral agent who has earned punishment by his crime. Failure to impose such punishment refuses to recognize this moral capacity. Thus, there is a "right to punishment." An individual is punished if and only if they are blameworthy of the offense and the degree of punishment is determined by the degree of blameworthiness.[28] Furthermore, the degree of blameworthiness depends on the seriousness of the violation as well as the extent of the actor's accountability.[29]

Unlike utilitarianism, which looks to effects in the future to justify the imposition of punishment, retributivism looks at the *past* act that the criminal chose to commit. Retributive theory restricts punishment only to those who have made moral, willing choices; it would not allow the state to punish those who, such as the mentally ill or the duressed, had no (or little) choice. Nor would retribution allow *criminal* confinement based on prediction of *future* acts.

Most retributivists focus on the ability of the defendant to "choose" at the time of the crime. In the past few decades, however, a variation of retributivism has emerged that suggests that we can and should punish persons because of their *character* — as exemplified by their choices. This school of thought argues that if a "criminal" act is not "in character" for the defendant, then she should not be punished at all, or as gravely, as would be a "real" criminal.[30]

When the theory of retribution is pressed, however, many of its supporters seem to explain it by referring to the need to reaffirm society's mores, which seems like a utilitarian objective. Another weakness in the retributive theory is the difficulty with which it explains how punishing the criminal "makes up for" the injury that *D* inflicted on society. Some argue that *D* has obtained an unfair advantage through his crime, and that only by punishing him can that advantage be balanced.

But that claim surely is not clear: If *D* has stolen $100 from *Z*, and *D* has been captured and the $100 returned, it would seem that *Z* is already back in the status quo ante. One response to this is to suggest that *Z*'s psychological state has been affected in a way that requires that *D* be punished, but to some this seems like vengeance. Another response is that the rest of society, possible future victims of *D*, are put in psychological fear and need reassurance that *D* will not commit more crimes. However, this sounds like incapacitation, which retributive theory expressly rejects as a basis for punishment.

Yet another criticism of retributivism is its ambiguity. Retributive schemes of punishment require proportionality. While the *lex talionis* (an earlier version of retribution) established the notion of "an eye for an eye," retributivists point out that their theory is also one of limits. The principle of an eye for an eye is no longer allowed, even if total blindness would deter (or incapacitate) more offenders. Perhaps such a proportionality was possible when most crimes (and punishments) were corporal in nature, but when a society refuses to use certain methods of punishment — death, torture, maiming — even if the defendant used them, the concept is difficult to apply. Determining the "proportionate" length of imprisonment for theft or for bribery or, for that matter, the purposeful infliction of the loss of an eye — known as the problem of *cardinality* — is surely difficult if not impossible. Furthermore, proportionality requires *ordinality*, ranking crimes according to their seriousness. Again, while robbery is clearly more serious than jaywalking, there seems to be no objective basis for at least some ordinal rankings.

Notions of proportionality are extremely fluid. When retributivists argue that one should be punished "for the crime," the seriousness of the crime is in the eyes of the beholder. If *A* wishes to impose more punishment than would *B*, there is no obvious way to resolve that dispute except to say that one of these punishments "feels" wrong. Thus, capital punishment for jaywalking may "feel" disproportionate, but articulating why that is true is more difficult. In recent years, the United States Supreme Court has confronted several challenges, based on an alleged constitutional doctrine of proportionality, to punishments of life imprisonment for (1) three-time bad check passers, *Solem v. Helm*, 463 U.S. 277 (1984), and (2) one-time possessors of significant amounts of

drugs, *Harmelin v. Michigan*, 501 U.S. 957 (1991). The Court appears to have decided that there was a requirement of proportionality.

The Court has reaffirmed the existence of a proportionality principle in the Eighth Amendment but held that a state statute that imposed a minimum term of 25 years' imprisonment before eligibility for parole for a third felony (the latest of which was the theft of three golf clubs worth $400 each) did not violate that principle. *Ewing v. California*, 538 U.S. 11 (2003). During the same term, however, the Court also held that punitive damages awards in civil cases could be so disproportionate as to violate the due process clause. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

In addition to these concerns, critics argue that the theory validates hatred. Indeed, one major advocate of retributivism once said it was morally right for the public to hate criminals.[31] That view is often taken to justify vengeance. Phrases such as "an eye for an eye" seem to suggest not only that the anger raised by a crime is acceptable (which it may be), but that any actions taken as a result of that anger are also acceptable (which a retributivist would reject).

In the past three decades, retributivism has experienced a resurgence, in part because of the perceived empirical uncertainties of utilitarian claims, and in part because of the inherent attractiveness of a normative approach to punishment.

The Relationship of the Theories

Proper analysis of criminal law doctrines requires that we keep these various theories of punishment separate and assess doctrines according to each of these theories. In practice, however, the theories frequently reach the same result. A deterrence theorist would support a claim of self-defense because persons who are, or who believe themselves to be, under imminent attack cannot be deterred from defending themselves, and because allowing such a response might deter future aggressors (see Chapter 16). A retributivist would agree that the claim should be recognized, but on the grounds that an actor is not morally blameworthy for taking action to prevent injury to himself. A rehabilitationist would

probably conclude that the defendant is in no need of treatment, since he acted (ex hypothesis) as most persons would act. And an incapacitationist would not need to incarcerate a self-defender since he will use deadly force only in such situations. Thus, all four theories support a claim of "self-defense," but for different reasons.

It is when this harmony does not occur that the criminal law must choose among those conflicting purposes. A deterrence theory might support a claim of insanity because the insane cannot be deterred, and a retributivist would argue that the insane person is not blameworthy because he is not a freely choosing agent. However, the incapacitationist and the rehabilitationist might well want to confine the insane actor to prevent future harm to others or to have the opportunity to treat him. Therefore, whether we recognize a claim may depend on what we see as the purpose of the criminal law.

The Importance of Sentencing

The theories of punishment outlined above impact not only on doctrines of the substantive criminal law but on sentencing, as well. Far too often, courses in criminal law ignore the sentencing process and focus solely on assigning criminal liability. While we cannot here discuss that process in any detail, it is critical for students to recognize the way in which sentencing schemes can undo the doctrines of substantive criminal law.[32]

Much of the course in criminal law is spent in differentiating one crime, or one level of crime, from another. Thus, for example, criminal law usually treats persons who "purposely" commit some act as different from (and hence, deserving of more punishment than) persons who commit the same act "recklessly" or "negligently." Each offense will have a general classification or grade (for example, third-degree felony or first-degree misdemeanor) that will establish a range of possible punishments.[33] However, if the sentencing scheme in a particular jurisdiction allows both to be punished equally, the distinctions drawn by the criminal law are undermined. For example, substantive doctrine distinguishes between a premeditated killing

(Melinda wants to kill Bill, lies in wait for Bill, puts the gun to Bill's head, and pulls the trigger six times) and a reckless killing (Constance, while twirling a loaded gun, drops it; it discharges and kills Dudley). The first of these is called "first-degree murder," the second "manslaughter." However, suppose the sentencing system provides that either killer can be sentenced to zero to life. If a judge sentences Melinda to 5 years and Constance to 20 years, the doctrinal differences that are debated in criminal law courses become less important (one might say meaningless) to Constance. Conversely, to the extent that sentencing systems provide for no overlap between similar crimes (in the example above, 0-15 years for manslaughter and 20 years-life for first-degree murder), they reinforce the distinctions drawn by the substantive criminal law.

The criminal law is drafted to make the assignment of liability a matter of rules rather than discretion.[34] This articulation of liability rules is called the principle of legality.[35] Many jurisdictions have established sentencing guidelines that purport to limit judicial discretion in sentencing. It is not clear, however, that these guidelines were intended to, or will, lessen the tension between goals of the criminal law and those of sentencing policy. Uniformity in enforcing sentences imposed primarily for the purpose of incapacitation, for example, will not reduce the conflict if the goal of the substantive criminal law is seen as deterrence, or retribution, or rehabilitation.

The sentencing system should reflect the theories of punishment as much as the substantive criminal law. Thus, suppose that the reason substantive criminal law distinguishes between murderers and manslaughterers is that it endorses retributivism. It may turn out that Melinda really regrets her act, whereas Constance is not at all sorry that the gun discharged and would commit the same reckless act again if given the chance. Under an incapacitationist sentencing scheme, Melinda *should* receive a lighter sentence than Constance, but under the retributivist criminal law, Constance should receive less punishment than Melinda. This would seem to require that the substantive criminal law and the sentencing schemes be based on the same theories. If those two processes are based on different theories, a significant conflict can arise that undermines each part of the system.

The relative disappearance of rehabilitation as a goal of punishment

has resulted in the reduction of indeterminacy in sentencing. In the last three decades, at least half the states have adopted some form of restrictions on such discretion. Mandatory minimum sentences are one example. Sentencing guidelines, usually established by sentencing commissions, are another. These approaches do not necessarily avoid the clash between theories we have outlined above. Commissions can still use a different basis for setting sentences than did the legislature in establishing definitions of crimes. Many states are beginning to regret moves towards determinate sentencing that provide less flexibility when it comes to reducing sentences for offenders in jurisdictions facing overcrowded jails.

"CIVIL" VS. "PUNITIVE"

The Difference Between "Criminal" and "Civil" Confinement

Our constitutional system provides vigorous protection for individual liberty. Thus, under the criminal law, a person can lose his liberty only *after* the government proves beyond a reasonable doubt that he has committed a crime. But our system also allows the government, in limited situations, to take away an individual's freedom to *prevent* him from committing additional harmful acts. The government may civilly commit someone to a mental health facility to prevent such harm and to treat him if it can prove that he suffers from a *mental condition* that *causes* him to be *dangerous.* These laws are "civil" because they do not further either retribution or deterrence. Instead, they are intended to incapacitate and treat mentally disturbed and dangerous individuals who do not respond to the threat of criminal punishment. Every state has an involuntary civil commitment law.

A Contemporary Example: Sexual Predator Laws

Since 1990, at least 19 states and the federal government have also

enacted “sexual predator laws.” They allow the government to civilly commit sex offenders about to be released from prison if it can prove they suffer from a “personality disorder” or “mental abnormality” that makes them likely to commit another serious sexual crime. Commitment is to a secure mental health facility for an indefinite period. The government must provide treatment and periodically review their condition to see if they are no longer a danger to society and can be released. The Supreme Court upheld the constitutionality of these laws in *Kansas v. Hendricks*, 521 U.S. 346 (1997), provided the government can prove the person suffers from a condition that makes it “difficult, if not, impossible for the person to control their dangerous behavior.” The mental condition that causes loss of volitional control need not be recognized by mental health professionals. In *Kansas v. Crane*,[36] the Court clarified its earlier decision in *Hendricks* by requiring the government to prove that the defendant’s mental condition significantly impaired his ability to control his sexual conduct.

The *Hendricks* Court set forth criteria for determining when laws that deprive a person of their liberty to prevent crime should be considered “civil” rather than “punitive” and, thus, not violate either the constitutional prohibitions against ex post facto or double jeopardy:

> Where the State has “disavowed any punitive intent”; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired. . . . [*Hendricks* at 368-369.]

Supporters claim these laws are necessary to prevent dangerous sex offenders from committing another serious sex crime after they are released from prison. Critics argue they allow unconstitutional preventive detention under the guise of “civil commitment,” and cannot in theory be limited in their reach.[37]

Examples

1. After a spree of burglaries in a suburban neighborhood, the police work with city officials to put up neighborhood watch signs to try to avoid home break-ins. This approach most closely aligns with

which theory of punishment?

2. A number of towns in the United States have adopted ordinances holding parents criminally liable for the acts of their children. What are the theoretical arguments for and against such provisions?

3. Congress and many state legislatures have adopted “three strikes and you’re out” statutes, which provide that a person convicted three times of a felony (sometimes limited to violent felonies, sometimes not) must be sentenced to mandatory terms of life imprisonment. What are the theoretical bases for such provisions, and what are the critiques?

4. Recent developments in genetics have suggested that some violent conduct may be greatly influenced by genes. On the basis of such preliminary suggestions, some social critics have proposed testing all six-year-old children to determine if their genetic makeup or behavior suggests that they are likely to commit violent criminal acts. If the finding is affirmative, they would confine and (if possible) treat such persons. What theories support such a proposal?

5. State *X* provides a term of 0-20 years for burglary. Sentencing guidelines, which are very strict in the state, require a sentence of no more than 5 years for the “usual” burglar. If, however, the offender is proven to be a “patterned sex offender,” the judge must impose the maximum term of 20 years. What are the theoretical bases for this statute?

6. Kim has been convicted of aggravated assault of his wife with a weapon for a second time and is about to be released from jail. The prosecutor has filed a petition to send him to a mental health facility as a “dangerous, violent person” under a recently enacted law that authorizes involuntary civil commitment for any person “convicted of a crime of violence against the person who suffers from a personality disorder or mental abnormality that makes him likely to commit another serious assault.” A mental health professional will testify that Kim suffers from an “antisocial personality disorder,” a recognized mental disorder, which is based in part on a history of “irritability and aggressiveness, as indicated

by repeated physical fights or assaults." Otherwise, the law is identical to the one upheld in *Kansas v. Hendricks*. Is this law constitutional?

7. Most states have adopted "Megan's Laws," statutes requiring that communities be warned of convicted sex offenders about to be released from prison to that community. Are these laws "punitive"?

Explanations

1. The signs are aimed to deter all potential offenders, not necessarily the offender(s) at hand, from committing additional offenses. This approach most aligns with general deterrence, a subcategory of utilitarianism. The objective of general deterrence is to deter all potential offenders as opposed to specific deterrence, which aims to deter the specific offender at hand. In this case, there have been a number of burglaries in a suburban neighborhood. It may be possible that there is only one offender or that there are many offenders, however, the purpose of the signs is to discourage or intimidate *any* potential offender(s) from committing a burglary in that neighborhood.

   This approach does not align with specific deterrence because the main objective of the signs is not to punish or discourage the actual offender(s) from reoffending. Specific deterrence would be the correct answer had the police discovered who was offending and punished them directly.

   For example, police discover that Katey and Gabriela are responsible for the burglaries. Katey and Gabriela are convicted of burglary, a second-degree felony, and sentenced to 1-15 years in prison. Under the theory of deterrence, the purpose of the sentence is to prevent Katey and Gabriela from reoffending. Imprisonment will prevent them from reoffending while they are serving their sentence. Additionally, the conviction will discourage them from reoffending in fear of being convicted again.

2. Most retributivists would find such a statute repugnant because the parent has not, by their definition, committed any morally blameworthy act. Utilitarians, however, might support some

versions of these ordinances: The threat of imprisonment might coerce parents to supervise more closely their children. This would result in fewer juvenile crimes and thus less pain to the entire populace. (Some utilitarians might argue, however, that parents might *oversupervise*, thereby becoming disutilitarian.) A rehabilitationist might similarly argue that the parent needs "training" in how to supervise a child. An incapacitationist, however, would find it hard to support this approach, since the incarceration of the parent might mean less supervision of the child.

Some retributivists, and most utilitarians, might conclude that, although the parent has not affirmatively committed a criminal act, the failure to properly supervise may be morally blameworthy. This would be particularly cogent if the provision were restricted (as is tort liability) to parents who were on notice that their child had committed, or was likely to commit, criminal acts. If negligence can be a proper basis for criminal liability (see Chapter 4, infra), such negligence may be blameworthy.

3. Retributivists would oppose such statutes, since the punishment proposed is, by definition, in excess of that required *for this* crime. Deterrence theorists might argue that such statutes are desirable because the mandatory nature of the penalty might deter felons from engaging in even "minor" crimes. (Of course, since "major" crimes would already carry long penalties, the issue for the deterrent theorist is whether the life sentence carries sufficient "marginal deterrence.") The primary explanation for such statutes is, of course, incapacitationist: The confinement of all such offenders ensures they would not offend again in society. This, however, raises several empirical issues: (1) are we "over-incapacitating," in the sense that not all three-time felons will continue to commit future crimes? (2) can we accurately predict those who will recidivate a fourth time? Experts disagree on the accuracy with which such predictions can be made, although there is general agreement that accuracy increases with an increase in the number of prior felonies. In addition, there is the question of whether the economic cost of lifelong incarceration is outweighed by the hoped-for reduction in crime in the community. This is a normative, not an empirical, question.

4. No theory of *criminal* liability supports incarceration in this manner. There is no deterrence to be gained since, by hypothesis, the defendant's conduct is caused by noncognitive facts (his genes). Similarly, unless therapy can be an effective treatment, there is no rehabilitative support for confinement. And the retributivist would strongly reject the argument that the child is responsible for his genetic makeup. Only an incapacitationist approach supports such a proposal. However, this kind of confinement, if allowed at all, would surely not have to be "criminal" in nature. The child *may* be dangerous, but since she has done nothing yet to demonstrate that, civil incapacitation would serve society just as well. Indeed, since "criminal" confinement requires more procedural safeguards and hence more chance of not confining the child, it would be burdensome and hence, counter-utilitarian. There are other, perhaps determinative, arguments against such a project because the prediction of future behavior, even if highly accurate, would not be entirely certain. In a society that favors freedom, we have to take risks rather than incarcerate the child before she has injured anyone. However, these arguments go generally to the moral desirability (and possible constitutionality) of such a proposal, not its link to criminal law generally.

5. How can burglary be sexually motivated? Burglary is defined as the "breaking and entering of [a place] with the intent to commit a felony therein." In one case, decided under such a statute, the court found that the presence of a condom in the defendant's pocket was sufficient to warrant finding that his motivation for the break-in was sexual in nature. *State v. Christie*, 506 N.W.2d 293 (Minn. 1993). The question here is why sexual motivation justifies the quadrupling of the normal sentence. Again, incapacitationists would argue that sexually-motivated offenders might be less deterrable than others, and therefore more in need of longterm incarceration. Rehabilitationists might agree. Retributivists would argue that the sentence is disproportionate to the harm actually inflicted, since the legislature has determined that 5 years, not 20, is the appropriate penalty for non-sexually motivated burglary, and the defendant's motive is irrelevant.

6. The answer to this question depends on whether the court concludes the “dangerous violent person” law is “civil” or “punitive.” Under *Hendricks*, a court would probably uphold the law, provided it meets the requirements set forth in that case. The state must prove that Kim suffers from a mental condition that so impairs his ability to control himself that he is likely to commit another assault. It must also provide treatment, periodically review his condition, and release him when he no longer suffers from this condition *or* is not dangerous.

   Why do you think states would enact a civil commitment law that can only be used *after* the person serves his full prison term? To provide needed treatment? To extend incapacitation after the state’s authority to confine someone under the criminal law has ended? Other good reasons?

   Should an individual be considered both *criminally* responsible and punished for his conduct and then *civilly* committed to a mental health institution for care and treatment because of a mental condition that it defined in large part by the same criminal acts? (You might want to reconsider this example after you have read “The Insanity Defense” in Chapter 17.)

7. In *Smith v. Doe*, 538 U.S. 84 (2003), the Court held the Alaska statute (and presumably all other such registration and notification laws) to be nonpunitive and hence not governed by the ex post facto clause. In reaching this conclusion, the Court looked to the *intent* of the legislature, which it said was to protect the public from sex offenders, and not to punish sex offenders. The Court then considered whether the law’s *effect* was so punitive as to negate its civil purpose. Even though it required offenders to register periodically with local law enforcement authorities and to provide extensive personal information including where they lived (much of which is made available to the public), the Court concluded that the statute did not have a punitive effect. Instead the law simply imposed restrictive measures on sex offenders considered dangerous. Protecting the public is a legitimate government objective.

   What if convicted sex offenders could prove that, as a result of registration and notification laws, they were unable to get jobs, find

housing, live safely with their families, and return to a normal life in the community? Should courts consider those consequences in deciding whether they are punitive or regulatory? Are there any limits on what measures can be used to protect the public? What if a law prohibited convicted sex offenders from living near schools, parks, bus stops, and day care centers, effectively preventing them from living in most neighborhoods of a major city (like San Francisco), civil or punitive?

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1. Zedner, Reparation and Retribution: Are They Reconcilable?, 57 Mod. L. Rev. 228 (1994); Barnett, Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction, 76 B.U. L. Rev. 157 (1996).

2. There is a growing view that the individual victim should not be barred from some parts of the criminal process — e.g., at sentencing. Indeed, there have been attempts to enact a constitutional amendment explicating "victims' rights." See Richard G. Singer, Criminal Procedure II: From Bail to Jail: Examples and Explanations (3d ed. 2012).

3. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 80 (4th ed. 2017).

4. Id.

5. Id. at 81.

6. Id. at 80.

7. Principles of Penal Law, in J. Bentham's Works 396, 402 (J. Bowring ed., 1843).

8. Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (1978). See also Law Reform Commission of Canada, Fear of Punishment (1976).

9. See Fear of Punishment, supra n.4, at vi.

10. In 2013, the FBI's UCR Program revised the definition rape and removed the term "forcible" from the definition. (UCR Handbook, 2004, p. 19) The revised definition defines rape as: "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *Summary Reporting System User Manual*, Version 1.0 dated June 20, 2013. According to the FBI Uniform Crime Report, the clear rate is 37.8 percent for rape offenses (revised definition) and 36.2 percent for rape offenses (legacy definition).

11. Federal Bureau of Investigation, Uniform Crime Report (2016). These figures, of course, relate to "reported" crimes. There is wide consensus among experts that the reported crime figures are substantially below actual crime figures, except possibly for homicide. Estimates based on victimization studies suggest that only one-third to one-half of all rapes are reported, and that anywhere between one-third to four-fifths of all property crimes are unreported.

12. A 1996 study of nearly 500 armed robbers showed that 83 percent of them believed affirmatively that they would not be caught. R. Erickson, Armed Robbers and Their Crimes 38, 39, 89 (1996). This was true even though 48 percent had been previously imprisoned. An unspecified additional percentage had been caught and put on probation.

13. This, of course, is true only if *D knows* of these facts. To the extent that he overestimates either the possibility of capture or the possibility that the threatened punishment will actually be imposed, he is "overdeterred."

14. F. Zimring & G. Hawkins, Deterrence (1973).

15. Even here, however, there are cavils. What of the person who grows up in a "criminal" milieu? Can he be deterred? Suppose that, in his subculture, capture and punishment are *not* seen

as stigmatizing but are approved? These issues are now being raised in the area of “rotten social background” or “cultural defense.”

16. For a thorough study of this view, see F. Zimring & G. Hawkins, Incapacitation (1995).

17. Robinson, Baughman, & Cahill, 82.

18. See e.g., Shima Baradaran & Frank McIntyre, Predicting Violence, 90 Tex. L.R. 497 (2012).

19. This is also true, of course, if *A* is part of a gang, which will continue without him. If *A* is replaced by *B*, we may paradoxically have created a new criminal, *B*.

20. Robinson, Baughman, & Cahill, 82.

21. Id.

22. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Supreme Court invalidated an Oklahoma statute that provided for the sterilization of some thieves, but not all, on the grounds of *equal protection*, since the Court found no basis for distinguishing among thieves. There was no suggestion that the penalty itself would be unconstitutional (although that view might hold sway in today’s Court).

23. Prior to 1976, California adopted the most indeterminate adult system in which many crimes were punished by “0-life.” The most indeterminate system, of course, was the juvenile justice system, which was also seen as the most “rehabilitative” in nature. Juveniles would be sentenced to totally indeterminate terms (capped only by reaching their majority) without regard to the crime at all. Thus, assuming a majority age of 21, a 17-year-old would receive essentially a 4-year term for an offense for which a 12-year-old would receive a 9-year term.

24. Whether this is due to the inadequacy of resources devoted to rehabilitative programs or to some notion that criminality is “inborn” is unimportant to these critics.

25. Robert Martinson, What Works? Questions and Answers About Prison Reform, 35 Pub. Interest 22 (1975).

26. Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 Hofstra L. Rev. 243 (1979).

27. Punishment and Responsibility (1968).

28. Robinson, Baughman, & Cahill, 83.

29. Id.

30. Samuel Pillsbury, The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility, 67 Ind. L.J. 719 (1992); Dan Kahan & Martha Nussbaum, Two Concepts of Emotion in the Criminal Law, 96 Colum. L. Rev. 269 (1996).

31. James Fitzjames Stephen, A History of the Criminal Law 81 (1883).

32. We have here chosen to focus on sentencing discretion because it most obviously undercuts criminal law doctrine. However, at every stage of the criminal justice system, discretionary decisions can have this effect. Thus, if police do not arrest, prosecutors do not prosecute, or fact finders do not convict obviously guilty persons, the substantive law is frustrated. After conviction and sentencing, if parole boards release offenders “too early,” they arguably undermine the intended legislative effect of the statute.

33. Robinson, Baughman, & Cahill, 20.

34. Robinson, Baughman, & Cahill, 21.

35. Id.

36. 534 U.S. 407 (2002).

37. See Bruce J. Winick & John Q. La Fond (eds.), Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy (2003); John Q. La Fond, Preventing Sexual Violence: How Society Should Cope with Sex Offenders (2005).

CHAPTER 3

Actus Reus

OVERVIEW

The criminal law needs a practical and consistent method to describe the behavior for which its special power of arrest, conviction, and punishment may be used. Simply put, it needs a basic architecture to define crime. Although they may differ on their reasons, most utilitarians and retributivists agree on the basic elements of a crime.

Voluntary Act. Subject to some exceptions we will discuss shortly, the criminal law only punishes voluntary action; it does not punish inaction or mere thinking. The "voluntary act" element of a crime is usually called the *actus reus.*

Many utilitarians would argue that involuntary behavior should not be criminalized because it cannot be deterred. Retributivists would claim that an individual who did not choose to do a wrongful act does not deserve punishment. Moreover, other systems of care and control, such as involuntary hospitalization, are used for individuals perceived as posing an ongoing threat of harm by involuntary acts.

There are good reasons for why the criminal law does not punish thoughts without action. First, it is extremely difficult to tell what a person is thinking, let alone whether he will act on those thoughts by committing a crime. Second, without this limitation, perhaps most of us would be subject to the reach of the criminal law because we fantasize about committing a crime at one time or another! Note, however, that speaking words is usually considered an act rather than "mere thoughts" in the criminal law.

Intangible Acts. In some cases, "the law assumes that an act has occurred although the actor has performed no muscular movement."[1]

These circumstances will typically arise in the context of a conspiracy, where the party who physically commits the crime is indirectly instructed by another party. For policy reasons, the criminal law has created an avenue for holding the instructor culpable for the crime that he did not necessarily commit.

Omission and Legal Duty. The criminal law generally punishes an individual only for the affirmative harm she herself inflicts; it does not punish for failing to prevent harm caused by others or by natural forces.

In limited cases, however, the failure to act — usually called an *omission* — may be a crime if the defendant had a *legal duty* to act. Of course, the defendant must have been capable of doing the legally required act because "the law cannot hope . . . to stimulate action that cannot physically be performed."[2]

Legal duties may arise from a number of different sources. For example, sometimes a criminal statute explicitly requires an individual to act. A common example is the federal statute requiring most people to file an income tax return. Failure to file the return is considered a voluntary act rather than an omission because the statute specifically defines the failure to file as the prohibited "voluntary act."[3]

Mental State. Some type of mental state or attitude — i.e., *mens rea* — is usually (though not always) necessary for the commission of a crime. One exception is strict liability crimes, which do not require a mental state (see Chapter 6). The mental state requirement reflects a community consensus that the attitude with which the actor performed a voluntary act is important in determining whether to punish and, if so, how severely. Generally, the mental state component of a crime requires some degree of intentionality or carelessness. At common law, the mental state was called "mens rea"; the Model Penal Code calls it "culpability." We will discuss mental states more fully in Chapter 4.

Prosecutors often use the defendant's conduct or actus reus as their primary evidence in proving the defendant's mental state. This makes sense because human conduct is generally the product of mental processes. Moreover, an individual's behavior is usually easier to establish than her internal thought processes.

Summary. The definitional components of crime are straightforward. Most crimes consist of an actus reus and a mens rea. Both must occur together. In limited cases, an omission or failure to act, together with a

legal duty, may also be a crime.

THE COMMON LAW

Crime requires either a voluntary physical act or an omission when there is a legal duty to act.

Voluntary Act

A *voluntary act* is a movement of the human body that is, in some minimal sense, willed or directed by the actor. A straightforward example is when a professional killer deliberately points a loaded pistol at his victim's head and pulls the trigger.

A voluntary act can also be the result of habit or even inadvertence as long as the individual *could* have behaved differently. Driving to the child care center to pick up your child even though your spouse told you the child did not need a ride qualifies as a voluntary act. This is the case even though you made the trip purely out of habit or while you were daydreaming.

Involuntary acts are those over which the individual had no conscious control. These may include acts done while unconscious or sleepwalking or acts resulting from health conditions, such as an epileptic seizure. They also may include bodily movements caused by being struck by another person or object. If *A* pushes *B* off the dock, *B*'s plunge into the water is not a voluntary act. There is controversy over whether some behavior, such as that occurring while one is hypnotized, is voluntary or involuntary.

Usually, a voluntary act is essential for criminal responsibility — even for strict liability crimes that do not require any mental state (see Chapter 6). However, not all of the behavior must be voluntary before criminal responsibility attaches. As long as there is at least *one voluntary act* in the defendant's course of conduct, he may be criminally responsible. For example, in *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799 (1956), the defendant, knowing he was subject to epileptic

seizures, nonetheless voluntarily drove a car and subsequently killed four people when he lost control of the car during an epileptic seizure. He was convicted of negligent vehicular homicide even though the actual "act" that killed was itself "involuntary" because it occurred during a seizure. The *earlier* voluntary act of getting into the car and driving it satisfies the voluntary act element of the crime.

Sometimes people do harmful acts because they are threatened with death or serious injury or to avoid a greater harm or because of serious mental impairment. Though these acts are often done under a great deal of pressure, the criminal law usually considers them "voluntary." Whether someone will be punished in such cases usually depends on whether a defense based on justification or excuse is available (see Chapters 15-17).

Intangible Acts

Under certain circumstances, the criminal law has allowed a voluntary act to be assumed where no physical movement has occurred. "'Let me know if I shouldn't kill him like the rest, Boss,' may allow the Mafia chief to direct a killing by doing nothing."[4] Under this scenario, the Mafia chief may be held liable for the murder despite the fact that he made no literal physical movement to perpetrate the crime. This can also be observed in the context of conspiracies, where courts have held the "agreement" requirement of one party to be satisfied by an intangible act.[5] The policy for allowing culpability in these cases "focuses on the special circumstances that express the actor's intention and willingness to carry out the act"; these circumstances are "adequate to serve the primary rationales of the act requirement as effectively as an affirmative act does."[6]

Omission and Legal Duty

Though usually concerned with preventing individuals from doing affirmative harm to others, the criminal law is occasionally used to

motivate individuals to perform obligations imposed on them by other laws. The threat of criminal punishment may provide this extra motivation. Thus, the failure of a person to act when he is under a legal obligation arising from civil law also satisfies the actus reus requirement for crime.

The legal duty may be based on (1) *relationship* (e.g., a parent must provide food, shelter, and clothing to a child); (2) *statute* (e.g., many states have a law that requires medical providers and others to report suspected child abuse); (3) *contract to provide care* (e.g., nursing homes often enter into a contract to provide medical services to residents); (4) *voluntary assumption of care that isolates the individual* (e.g., taking a sick person into one's home may result in a duty to provide care); (5) *creation of peril* (e.g., someone who pushes another who cannot swim into a deep lake must take reasonable steps to rescue him); (6) *duty to control the conduct of another* (e.g., a business executive may have a duty to prevent the company chauffeur from speeding); and (7) *duty of a landowner* (e.g., a theater owner has a duty to provide reasonable emergency exits for his patrons). Limiting *criminal* liability to cases where the *civil* law imposes a legal duty at least provides "notice" to individuals that they are legally required to act and fail to perform that duty at their peril.

Generally, a defendant must know the facts from which the duty to act has arisen. However, he may not avoid criminal responsibility by claiming he was unaware that a legal duty to act arose from those facts. Thus, a nursing home operator who entered into a contract to care for elderly patients cannot claim he did not know he had a legal duty to provide them with care. Nor can he claim he did not know that he could be held criminally liable for breaching that duty by failing to provide such care. Such a claim is, in reality, a defense based on ignorance of the law and is not a valid defense (see Chapter 5).

What About Almost Family? Courts have reached different conclusions on whether to impose a duty to prevent harm on someone who is a member of the victim's "extended family." The Connecticut Supreme Court initially upheld a first-degree assault conviction of a live-in boyfriend who did not stop his girlfriend (and mother of the victim) from beating her child because he had a family-like relationship with the victim.[7] Subsequently, however, it reversed course, holding that

only individuals with a legally established family relationship with the victim have a duty to act.[8] Other courts would impose a duty of care on those who act as the functional equivalent of a parent in the household setting.[9]

Expanding the duty to act on a case-by-case basis may well protect more children from harm in the future. However, such fact-specific analysis makes it more difficult for individuals to know when they must act or face criminal prosecution. It might also discourage individuals from becoming part of an extended family.

What About When a Parent Is Also a Victim? Several recent cases have confronted the question of whether a parent can be criminally punished for failing to prevent someone else from abusing a child in situations where the parent also feared violence at the hands of the abuser. Some courts have found mothers who knew of ongoing sexual abuse of their young daughters by a father, stepfather, or boyfriend, guilty of child abuse for failing to take steps reasonably calculated to prevent the abuse. See, e.g., *Commonwealth v. Cardwell*, 515 A.2d 311 (Pa. Super. 1986). Other courts, however, have reached a contrary conclusion. See, e.g., *Knox v. Commonwealth*, 735 S.W.2d 711 (Ky. 1987). These tragic cases place victims of past violence in a difficult position: Should they protect their child and run the risk of violent injury, or face prosecution if they fail to intervene? Most courts conclude that a parent does have a legal duty to act, and that failure to prevent the abuse can result in criminal responsibility.

Moral Duty

In general, our society expects people to do the right thing, which includes fulfilling their moral duties. Moral duties are those obligations that, according to our basic sense of right and wrong, people should live up to. However, the criminal law does not impose responsibility for failure to live up to a moral duty to act unless it is embodied in a civil law duty. Though we may hope or even expect our fellow citizens to be good Samaritans and prevent serious harm to others when they can do so at little or no risk to themselves, the criminal law generally does not

impose this affirmative obligation.

Several arguments can be made in favor of this approach. They include a preference for personal autonomy and laissez-faire government. Law should only prevent individuals from affirmatively harming others; it should not compel citizens to help one another, especially when resources are limited. Moreover, requiring assistance may cause overreaction that could overwhelm or even harm the victim. Finally, the "slippery slope" argument asks where we should draw the line.

Some states, however, have enacted "good Samaritan" statutes that make it a criminal offense to refuse to help those known to be in serious peril when aid could be provided without danger.[10] Other states impose the duty only in more limited circumstances. These laws typically provide modest penalties, including fines only, or fines and very short sentences. This approach may strengthen a sense of community, make society safer, and prevent serious harm with little or no cost to the rescuer. It may also bring the law into closer conformity with our sense of moral decency and send a message encouraging cooperation rather than isolation.

Possession

Many criminal statutes forbid possession of specified items, such as laws punishing the possession of burglar tools or illegal drugs. In a sense, this type of law does not require the defendant to "do" anything. Rather, mere possession — or the failure to terminate possession once the defendant learns of the item's presence — is sufficient. Nonetheless, these statutes comply with the requirement of a voluntary act because they are generally construed as requiring active or constructive knowledge on the defendant's part of the nature of the item he has under his control or custody. Thus, knowingly taking or keeping a forbidden item is a voluntary act.

What if someone does not know he possesses a legally forbidden item? Suppose a drug smuggler sneaks heroin into an innocent person's luggage, hoping to steal the suitcase after the innocent traveler

successfully passes through customs. If the heroin is discovered in a border search, can the traveler be convicted of possessing drugs? Most courts require the defendant to be aware that he actually has whatever item the statute forbids possessing, even if he need not have the knowledge that the possession is illegal. But some courts do not require this awareness.[11]

Frequently, courts conclude that an individual or several individuals had "constructive possession" of forbidden items even though they did not individually exercise physical dominion and control over the items. Instead, courts often base their conclusion on the proximity of these individuals to the items or their ability to reduce an object to control and dominion.

THE MODEL PENAL CODE

Voluntary Act

The MPC defines an act or action as "a bodily movement whether *voluntary* or *involuntary*." MPC §1.13(2). It also provides that a person is not guilty of a crime under the MPC unless "his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." MPC §2.01(1). However, the MPC does not define a "voluntary act." The Commentary suggests that it is essentially behavior that is "within the control of the actor."[12]

In addition, MPC §2.01(a) describes certain types of action that are *not* voluntary acts. These include "(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestions; and (d) a bodily movement that otherwise is not the product of the effort or determination of the actor, either conscious or habitual."

Section 1.02(1) makes it clear that only the individual's *own* conduct will support criminal responsibility. Section 1.05 speaks of "conduct" that can "constitute an offense."

Omission and Legal Duty

Like the common law, the MPC permits an omission or failure to act to satisfy the conduct element of a crime in two different types of cases: (1) when the statute defining the offense expressly states that failure to act is a crime, or (2) the defendant has a duty to act imposed by civil law. MPC §2.01(3)(a) and (b). Failure to file an income tax return is an example of the first type; the law expressly states that such failure to act is a crime. A parent's failure to provide necessary food, shelter, and clothing to her child is an example of the second type because most states have laws that require parents to do this.

Though not entirely clear from the text, the MPC effectively requires a voluntary act — or an omission and legal duty — for criminal responsibility.

A More Precise Definition for Actus Reus

The MPC also provides a more thorough analytic framework for the actus reus component of a crime. It breaks it down into three separate components — conduct, circumstance, and result — called "material elements." MPC §1.13(9)(i), (ii), and (iii). These components or material elements describe more precisely what the defendant did. Since they are the basic building blocks for defining each crime and for assessing blame and imposing appropriate punishment, a prosecutor must show evidence for each material element to prove actus reus.

Conduct is the physical behavior of the defendant. Driving a car or shooting a gun, for example, would be considered conduct under the MPC.

A *circumstance* is an objective fact or condition that exists in the real world when the defendant engages in conduct. Many criminal statutes include circumstances in the definition of the crime. For example, if a defendant enters a residence at night to steal something inside, the fact that his conduct occurred "at night" is a circumstance that describes what he did with more precision. If the burglary statute so requires, the prosecution will have to prove that the defendant entered a

residence “at night.”

A *result* is the consequence or outcome caused by the defendant’s conduct. If a defendant points a loaded pistol at another human being, pulls the trigger, and causes a bullet to strike and kill him, the death of that human being is the result of defendant’s conduct.

Distinguishing Voluntariness Requirement from Act Requirement. As previously mentioned, MPC §2.01(1) requires a *voluntary* act. It is important to note when analyzing the above “material elements,” that even if an action fulfills the actus reus requirements, it may nonetheless be involuntary.[13] For example, imagine that a woman sleepwalks into a neighbor’s home. Her walking meets the conduct element; depending on the trespassing law in her jurisdiction, she likely meets the circumstance element; and the result of her conduct is a trespass. However, the woman may not be culpable if her actions are deemed to be involuntary. If her actions are involuntary, she would not establish actus reus.

Possession

The MPC explains when possession is an act or conduct. This provision applies when someone takes possession of an item — illegal drugs, for example. If the defendant knows that he is accepting custody of illegal drugs, then his “possession” is clearly a voluntary act under the MPC and he can be convicted of illegally possessing drugs.

What about someone who initially does not realize that he has drugs in his control but subsequently realizes that he does? The MPC states that the person’s possession is sufficient for criminal responsibility if, after becoming aware of the fact that he has drugs in his control, he does not terminate his possession within a sufficient period. His failure to act (i.e., terminate possession) is an omission in the face of the legal duty to do so.

Examples

1. Brooke is a loving single mother of three boys. One day while she is working from home, she allows the children to play at their

neighborhood park. A half hour later, two of her children run through the door frantically, informing Brooke that a man had kidnapped the third child. She then receives a phone call from an unknown number. The voice on the other end instructs: “I have your child. If you ever want to see him again, you will get me $300,000 dollars within the hour” and promptly hangs up. Brooke knows she does not have nearly that amount of money. In her desperate state, she decides her only option is to rob a local bank. She retrieves her gun, drives to the nearest bank, and successfully acquires the money — only to be apprehended by police when she runs out. When her child is safely recovered, she cries, “I thought I had no other choice.”

2. Sarah is the owner of the Sunshine Daycare Center, which is celebrating its twentieth year of being in business. As an anniversary promotion, Sarah is offering new families one day of care free of charge to try their services. One day, a mother brings in her five-year-old daughter to take advantage of the promotion. When the mother leaves, Sarah immediately notices the girl exhibiting some troubling behavior. The girl is withdrawn, seemingly depressed, and has several bruises on various areas of her body. When the girl’s mother returns at the end of the day, the girl kicks and screams, “I don’t want to go home!” Sarah recognizes these all as likely signs of physical abuse, but says nothing. The girl and her mother never return, and Sarah chalks the incident up to overthinking. Several months later, the girl’s mother is arrested for severe physical abuse of her daughter. Authorities interview Sarah, informing her that state law makes clear that daycare centers are requires to report signs of abuse and asking whether she observed any such signs when the girl was there. Sarah admitted that she did, but insisted she had no idea about the reporting obligations. Can Sarah be convicted of a crime?

3. Elizabeth, jealous that her boyfriend, Bob, was also dating Connie:

3a. drove her car directly at Connie while Connie was crossing the street, hoping to kill her while making it look like an accident. Her car struck and killed Connie.

3b. took a gun she knew was loaded over to Connie's apartment and waved it at Connie, yelling that Connie had better not see Bob again or else. The gun discharged and killed Connie.

3c. while driving her car, failed to see Connie crossing the street in a pedestrian crosswalk because Elizabeth was totally distracted by her own jealous rage.

3d. while driving her car, suffered a heart attack for the first time in her life and lost consciousness. Unfortunately, her car struck and killed Connie while Elizabeth was unconscious.

3e. while driving her car, started to feel drowsy. Rather than pull over, Elizabeth continued driving. Soon thereafter, Elizabeth fell asleep at the wheel and her car struck and killed Connie.

3f. while driving her car, started to feel drowsy. Pulling her car over to the curb, Elizabeth took a nap so she would not fall asleep while driving. She left the motor running to provide heat because it was so cold outside. Awaking suddenly from a deep sleep, Elizabeth's hand struck the automatic gear shift, putting the car into drive. Unfortunately, the car struck and killed Connie.

In which of these instances could Elizabeth have committed a voluntary act?

4. Jasmine is subject to a court order forbidding her from being physically present between the hours of 2:00 p.m. and 2:00 a.m. in an area designated as a known prostitution district. Failure to comply with this order is a criminal offense. At 10:00 p.m., Jasmine was released from the county jail after serving a 30-day sentence for prostitution. Unfortunately for Jasmine, the county jail is located within the district from which she is banned. While walking to a bus stop a few blocks away to catch a bus home, she is arrested and charged with violating the court order.

5. Gunter, a salesman, was driving along a road using his talking GPS to direct him to a company he had never been to before. Suddenly, the friendly voice of the GPS said, "Turn right now." Gunter did, running over a curb and getting stuck on a light-rail track. A few minutes later a light-rail train struck his stuck car and several

people were injured.

6. Jack is a highly respected golf pro. While on an airplane flight to California to play in the U.S. Open, Jack started to act very strangely, taking off his clothes and speaking incoherently. He then broke into the plane's cockpit and wrestled with the co-pilot, trying to grab the controls and yelling, "I'm going to kill you." Several passengers helped the co-pilot subdue and restrain Jack. After his arrest, doctors discovered that Jack was suffering from encephalitis, a viral infection of the brain that can cause confusion, altered consciousness, fever, and other symptoms. The disease is transmitted by mosquitoes and can be controlled by medication if the person knows he has it.

7. Scott is seated in a large auditorium with thousands of people watching his niece's college graduation. Halfway through the ceremony he thinks he smells smoke, so he shouts: "Fire! We all have to get out of here! There's a fire!" There is no fire. Unfortunately, everyone panics and, as a result, many people are injured and three people die. The smoke Scott smelled was actually the result of an uncinate fit — an episodic seizure of the uncinate lobe of the brain that can cause abnormal sensations of smell. This smell of smoke led him to believe that there really was a fire danger.

8a. Because Aaron had suffered through too many sleepless nights, his doctor prescribed Ambien, a top-selling prescription sleeping pill. He took the drug just before going to bed, as prescribed. At 3:00 a.m. that morning, Aaron was arrested for driving an automobile in the wrong lane while impaired. He had no recollection of awaking from a deep sleep, let alone driving a car. Recent studies show that Ambien increasingly is involved in similar impaired-driving cases. Drivers have no recollection of getting into their cars and driving them. Does Aaron have a viable defense?

8b. Sally was sleepless in Seattle. Her doctor also prescribed Ambien. Because the drug took a while to work, Sally disregarded the directions on the label and took a pill as she drove home late one evening so she would be ready to fall asleep at bedtime. Surprise!

The pill kicked in before she reached her home. Sally was arrested for hitting a telephone pole. She remembers nothing after taking the drug.

9. Seth was civilly committed as a sexual predator because he suffers from a mental abnormality or personality disorder that makes it difficult, if not impossible, to control his dangerous sexual behavior. He was on conditional release from a secure facility, living in a halfway house and working in a grocery store. Suddenly overcome by a sexual compulsion, he groped a women's breast for sexual pleasure. Can he be criminally convicted and punished for an act that is very difficult — perhaps even impossible — for him to control?

10. Ten years ago, Rusty, a graduate assistant at a major college football powerhouse, saw a senior assistant coach raping a 10-year-old boy in the locker room showers. Appalled, he immediately intervened and stopped the abuse. The next day Rusty told the head coach, a legendary figure at the university and Rusty's boss, what he saw the assistant coach doing and what Rusty did to stop it. To his dismay, the assistant coach continued to serve on staff for several more years. Even after retiring as a coach, he continued to have access to the university's athletic facilities where he continued to bring young boys. Recently, the senior coach was charged with sexually abusing many young boys. Some of these crimes occurred in the school's athletic facilities after Rusty had reported what he saw to his boss. State law only required Rusty to report suspected sexual abuse to a university superior; he was not required to inform the police. Can he be convicted of a crime?

11. Senator Duck Chainsaw was bird hunting with his rich buddies. Thinking he heard a flushed quail, Duck turned quickly and shot at a moving target. Unfortunately, he shot Daddy Warbucks in the chest. Duck told Daddy he would get help immediately, but first he called his chief political adviser, King Kove. Kove told Duck to treat the wound himself rather than summon medical aid, because the publicity could be very damaging to his upcoming reelection campaign. Duck and his buddies bandaged the wound, but the bleeding did not stop. Two hours later Duck called for an

ambulance, which arrived in 15 minutes. Unfortunately, Daddy died on the way to the hospital. Daddy would have survived if the ambulance had been called right after the accident.

12. Bishop Olson assigned Pastor Lothar to his fourth new congregation in six years. Yet another series of numerous, verified complaints about Pastor Lothar touching young children in an inappropriate manner in his current parish necessitated this new assignment. Bishop Olson did not inform the police of these allegations, nor did he inform any member of the new congregation about them. Shortly after taking up his new position, in which he had daily contact with young children, Pastor Lothar was arrested and convicted of sexual battery of two young children. Can the prosecutor bring any charges against Bishop Olson?

13. Stuart works for Harvey Made-Off, soon to be convicted of running a giant Wall Street Ponzi scheme. Harvey took money from investors telling them he would buy stocks and bonds for them; instead, he simply pocketed their money. He paid off early investors using money from later investors. Stuart's job is to prepare monthly reports, based on information provided by other members of the company, for individual investors, showing how much money they "made" and the current "value" of their investments. Stuart was completely unaware of the fraud being committed until one day he mistakenly received a memo from Harvey to his second-in-command, completely outlining the scheme and asking how it could be covered up should the SEC ever audit the company. Stuart quits immediately but does not report the scheme to any public authority.

14. Patricia wore her black leather jacket to school. During recess she accidentally put on a similar looking jacket that, unknown to her, had a gun in its pocket.

    a. Just as Patricia finished putting on the jacket, a school security officer noticed the gun protruding from the jacket Patricia was wearing. He took Patricia immediately to the principal's office where the gun was removed. Patricia was charged with possession of a gun on school premises, a strict liability offense

that has no mens rea element.

b. Feeling a hard object in her pocket, Patricia put her hand into the pocket and found a pistol. For the next ten minutes she walked around the school looking for someone who might have put her coat on by mistake so they could exchange jackets. A school security officer noticed the gun protruding from the jacket Patricia was wearing. He took Patricia immediately to the principal's office where the gun was removed. Patricia was charged with criminal possession of a gun on school premises, a strict liability offense that has no mens rea element.

15. At work during his lunch break, William frequently browsed the Internet for child pornography sites. William looked at child pornography on these sites very briefly so that he wouldn't be observed and then closed them. At one site, a small dialog box appeared on the screen. He entered it and then quickly closed it and left the site. Though William did not realize it, this command caused the computer to immediately download child pornography onto his computer's hard drive. An internal company audit uncovered child pornography on William's computer, and he was charged with the federal crime of knowingly possessing materials involving the sexual exploitation of minors.[14]

16. Roro, a member of an ethnic group trying to secede from a foreign country, inadvertently overheard several of his friends finalizing their plan to board a plane belonging to the national airline of their country later that evening with bomb material hidden in their clothing. At a predetermined time, they would assemble the bomb in the plane's toilet and trigger an explosion, causing the airplane to crash and killing many people. He knew in his heart they were deadly serious and would carry out their plan. Although he had not been involved in any way and learned of the plan accidentally, Roro did not report what he had heard to the police. His friends successfully carried out their plan. When interviewed by the police afterward, Roro told them everything he had heard about their plan.

Explanations

1. Unfortunately for Brooke, her actions in robbing the bank constitute a voluntary action in the criminal law. Recall that the law finds a voluntary action even when threatened with death or serious injury or to avoid greater harm. While one may certainly be sympathetic with Brooke because of the predicament she faced, these particular circumstances do not influence whether or not her actions were voluntary.

   Note, however, that finding an action to be voluntary is not equivalent to finding the perpetrator culpable. Brooke's attorney will certainly explore various options of defenses, such as those based on justification or excuse (see Chapters 15-17), which may ultimately relieve her of culpability. A possibility, here, might be an argument for duress.

2. Sarah's failure to report blatant signs of child abuse is an omission. And since the law in her state creates a legal duty for daycare employees to report any signs of abuse they observe, the omission will be considered a voluntary action. Given Sarah's decades-long experience in the child care industry, she should have been well aware of her obligation to report signs of abuse. However, even assuming Sarah truly was ignorant of her reporting obligation, ignorance of the law is not a valid defense (see Chapter 5) and does not negate the voluntariness of her action. There may be an argument Sarah can make that she didn't have a duty given the fact that the child was only under her care for one day. However, given what she observed, her experience in the industry, and her voluntarily undertaking the care of the child, this argument would not likely be successful.

3a. Elizabeth's driving the car directly at Connie is a voluntary act. She moved her hands on the wheel and pressed her foot on the gas pedal so that the car would collide with Connie. She consciously directed her body to engage in behavior that constitutes a "voluntary act."

3b. Elizabeth's waving a loaded gun at Connie is a voluntary act that satisfies the criminal law's requirement of an actus reus. The fact that the gun discharged "accidentally" (i.e., arguably without any mental determination on Elizabeth's part) does not preclude

criminal responsibility for a homicide charge. A voluntary act is not rendered involuntary simply because it may include an involuntary act or because it had unintended consequences.

3c. Elizabeth's driving her car is still a voluntary act for the same reasons described in 3a. The fact that the car struck Connie because Elizabeth inadvertently did not see her does not alter the essential nature of Elizabeth's driving as a voluntary act.

3d. Because Elizabeth lost consciousness as a result of an unforeseeable heart attack, her behavior during this time period is not considered a voluntary act. She did not, in any sense, control the vehicle and her physical incapacity to change or alter her conduct make this an "involuntary act" as far as the criminal law is concerned.

3e. Though Elizabeth was sleeping when her car struck and killed Connie and was not itself a voluntary act, Elizabeth has still engaged in a voluntary act by driving even though she was tired. Thus, this aspect of her behavior satisfies the criminal law's general requirement of at least one voluntary act in the course of conduct before criminal responsibility can attach.

3f. This is a tough call. Elizabeth may have been in an unconscious state when her hand engaged the gear shift of the car. The prosecutor would argue that this case is like the case in 3e above; that is, Elizabeth engaged in a voluntary act when she went to sleep leaving the car engine running. The defense would argue that the relevant course of conduct is Elizabeth's "act" of engaging the gear shift while sleeping; consequently, there is no act that can satisfy the criminal law's insistence on a voluntary act. It is not clear how this case would come out.

4. The prosecutor would argue that this is a strict liability offense (see Chapter 6). No mens rea or state of mind about being present in an area from which she has been judicially excluded is required. There can be no doubt that Jasmine was, in fact, physically present here in violation of a valid court order.

   However, recall that even strict liability offenses require a voluntary act to be punishable. The defense would argue that

Jasmine did not commit a voluntary act. Officials released her from the jail at 10:00 p.m. and had no choice but to violate the court order. Surely she cannot be required to stay in jail overnight, assuming this was even an option for her. Implicit in the court order under these circumstances must be a condition that she leave the district in a reasonable period of time. She was trying to do just that. Otherwise, the police could manufacture crime by simply releasing individuals subject to similar exclusion orders at a time that would automatically generate new offenses.

5. Gunter would argue that he did not commit a voluntary act. He simply obeyed the command of the GPS, assuming it knew a safe route. The prosecution would argue that Gunter still had a choice to turn or not to turn. Moreover, Gunter had to deliberately move the wheel so his car would make the necessary course adjustment. Gunter had no right to delegate important decision-making over a moving car to a machine. The prosecutor should prevail. But what if this were a self-driving car? Now that would be a different story.

6. Jack did not commit a crime if he did not perform a "voluntary act." The viral infection may have physically affected his brain and seriously impaired Jack's ability to engage in volitional and conscious behavior. Because he may have acted in a fugue state without any memory of the incident, Jack's conduct may not satisfy the actus reus requirement for committing a crime — even though his behavior seemed conscious and rational to other passengers. Note that the prosecution must prove a voluntary act beyond a reasonable doubt and that, without such proof, a defendant cannot be convicted of *any* crime, even a strict liability offense (see Chapter 6). If Jack was aware of his illness and could have prevented the symptoms by taking medication, he may be responsible based on his earlier "omission" (failure to take medication) and his duty to do so. This example is based on a real case.[15]

7. This is a real brainteaser. An uncinate fit, which consists of smelling or tasting hallucinations, has been connected by medical experts to a type of brain tumor. Scott will argue that he did not commit a voluntary act because he was subjectively experiencing

the "smell" of smoke. In fact, his defense attorney will argue Scott should be praised for his behavior because he acted as a "good Samaritan" and warned people of what he honestly sensed to be imminent danger to life. Thus, Scott cannot be punished for his reasonable response to an unwilled, but actual sensory sensation. (Of course, if Scott had experienced these false smells before and did not take steps to determine what caused them or to stop acting on them, he may have committed a prior "voluntary act" by not taking appropriate precautions; this would be similar to someone who drives a car knowing he suffers from epilepsy. See the *Decina* case in this chapter.)

The prosecution will argue that Scott voluntarily did yell "Fire!" in a crowded room when there was, in fact, no fire. She will insist that Scott's imagined smell of smoke should be analyzed as a "circumstance" element of actus reus rather than as a part of the "conduct" element. Consequently, Scott's criminal responsibility under the MPC will depend on what, if any, culpability or mental state is required with respect to this element (see Chapter 4). If it is a strict liability element, then Scott may be convicted if the prosecutor's analysis prevails. If, however, knowledge or recklessness about real danger is required, Scott will probably not be convicted. What if negligence is required? Should the objective standard of negligence include Scott's physical illness?

Under the common law, Scott might have a "mistake of fact" defense. But he must prove by a preponderance of the evidence that he honestly and reasonably believed that there was smoke in the room. As with negligence, should Scott's physical ailment be considered in the jury's determination of "reasonable"? How would you instruct the jury if you were the judge? Should the law emphasize the harm done or the actor's behavior and attitude?

Note how careful analysis is often required in determining what is included in the criminal law's definition of a *voluntary act*.

8a. Aaron would argue that he was "sleepwalking" while driving, through no fault of his own. The drug's label warns that it can, on very rare occasion, cause sleepwalking as a side effect, and experts have seen such cases. Nonetheless, Aaron had no reason to believe that the drug would affect him that way. Thus, he would claim that

he did not engage in the voluntary conduct of driving a car because he did not consciously decide to get into his automobile, start it, and operate it on a public road.

The prosecutor would claim that Aaron was faking, falsely using the drug as an "alibi" for his criminal act, or that, even if Aaron was sleepwalking, he was responsible for inducing this condition.

If you were the prosecutor, would you dismiss the charge, insist on a guilty plea with a light penalty, or prosecute to the full extent of the law?

8b. Sally did not follow the directions for taking this powerful drug. She consciously and voluntarily took the pill before she should have, and it caused the very condition she could reasonably expect. Thus, taking the pill while driving is a voluntary act sufficient for imposing criminal responsibility, even if she was, in fact, "sleepwalking" behind the wheel when she crashed.

9. The prosecutor would claim that Seth committed a voluntary act and is, therefore, criminally responsible for his conduct. He purposely put his hands on his victim's breast for his own sexual pleasure. His consciousness was not impaired in any way. He knew exactly what he was doing and why. His conduct was the result of a clear intention, determination, and desire and, thus, willful. Even hard choices are the result of "free will" and, consequently, constitute voluntary acts.

Defense counsel would argue that Seth's behavioral controls were so severely impaired by an underlying mental condition (which he did not cause) that the government had already established in a trial that he could not refrain from engaging in precisely this type of criminal conduct. Nor can the prosecution point to an earlier voluntary act, such as taking an intoxicating drug or substance that induced this mental condition. How can the government both civilly commit an individual because the criminal law is unable to deter this type of behavior, while at the same time insisting that he acted voluntarily? How would you rule?

10. Though conceding that Rusty complied with the law by reporting the sexual abuse to a superior and that there is no statutory legal

duty to report it to the police, the prosecutor would claim that Rusty's failure to inform the police after knowing the assistant coach was still on staff, had access to the school's athletic facilities, and continued to bring young boys there is an omission that allowed a known sex offender to commit numerous crimes that have caused enormous harm to many young and vulnerable victims. Surely, the moral duty to prevent this ongoing victimization is so compelling in this situation that Rusty can be criminally punished for his inaction. Even though Rusty did bring the coach's criminal conduct to the attention of a superior with authority to take appropriate preventive action, he knew that the coach was still in a position to commit more crimes like the one he saw. The criminal law cannot be powerless to prevent such tragic and predictable harm. There must be a duty to act here when the burden on the individual is so minimal — just call the police — and the harm prevented is so damaging.

The defense counsel would argue that the criminal law is clear: Without a legal duty to act, the failure to do so does not satisfy the necessary elements of criminal responsibility. Rusty did not affirmatively harm any of the victims. He actually acted to prevent future harm. He did exactly what the law required; he informed a person in the organization with authority over the coach of what he saw. Rusty must be able to rely on the law in determining his legal responsibility. Expanding criminal responsibility in this case would be a trap for the innocent and violate the principle of legality. Where would the "slippery slope" of extending criminal responsibility stop? Who would know the scope of her criminal responsibility? This is why there is no common law of crime in this state.

If you think Rusty is criminally responsible for not doing more, what should his punishment be? A modest fine? Conviction of the same crime as the perpetrator? Is this a just result?[16]

11. Duck is not criminally responsible for the accidental shooting of Daddy. Because he caused the injury to Daddy, however, Duck had a legal duty to summon medical aid immediately. Duck's failure to provide medical assistance to his victim was an omission that caused Daddy's death. Duck can be convicted based on his

inaction.

12. If there is a statute requiring clergy to report to the police known or suspected cases of child sexual abuse, Bishop Olson's failure to comply would satisfy the actus reus of a crime. Note that it would not be an "omission" because the bishop did not do what the statute expressly requires. His failure to report would be similar to not filing an income tax return when required by law. If there is no criminal statute imposing this duty on clergy, then the bishop's failure to report is a true "omission," which does not generate criminal responsibility unless there is a legal duty to report imposed elsewhere in law. Although he has a strong moral duty to report these past cases, the criminal law does not enforce every moral obligation.

    The prosecutor might argue that because of his status, Bishop Olson is under a legal duty to prevent Pastor Lothar from committing future sex crimes against children. Again, this would depend on whether there is a duty in civil law to take such action. If there is no such duty, Bishop Olson's failure to act is not a crime.

13. Stuart would argue that he is an "innocent agent" (see Chapter 11). Admittedly, he helped cause terrible financial harm to thousands of victims; however, he had no awareness of this fact. Thus, so long as he quit at once and did no further harm, he has no duty to prevent future harm. The government would counter that, although he was an innocent agent and therefore not responsible for his past acts, Stuart has induced reliance by the victims of this Ponzi scheme on the integrity and accuracy of the financial reports, and investors would rely on them even after Stuart quit. Thus, Stuart has a duty to undo this misplaced trust and inform authorities. Otherwise, he is responsible for these subsequent acts of fraud. Who has the better argument?

14a. In the first example, Patricia does not know or have reason to know that the jacket she has mistakenly put on has a weapon in it. Thus, in most states her physical possession is not a voluntary act, and she cannot be convicted of the charged offense, even if it is a strict liability offense.

14b. The second example is more difficult. Though Patricia does not know there is a gun in the jacket when she first puts it on, she soon realizes that a weapon is located in the jacket pocket. At this point Patricia is under a legal duty to terminate her possession within a reasonable time; failure to do so may lead to a possession charge. Patricia would argue that she was trying to terminate her possession by attempting to locate the original owner. The prosecution may argue that Patricia should have immediately removed the jacket or gone to school authorities to turn in the weapon. A conviction on these facts is possible.[17]

15. To be guilty of possession of child pornography, an offender must knowingly have the prohibited material. William intentionally searched for these websites and viewed child pornography. He also intentionally entered and closed the dialog box. However, he was unaware that this act automatically downloaded the prohibited pornography onto his computer's hard drive, and did not know that it was on his computer's hard drive until he was arrested. Thus, he will argue that he was never cognizant of this crucial fact and, therefore, did not "knowingly possess" the child pornography.

The prosecution may argue that simply viewing this material *is* possessing it; possession does not require downloading or printing it. This argument will probably fail. The prosecutor will then argue that William committed a "voluntary act" by opening the site, viewing child pornography, and entering and closing the dialog box. This satisfies both the actus reus requirement of the common law and the conduct element of the MPC. He may not have known the result of his conduct, but that should be construed as a strict liability element.

This is a tough case and could go either way. Because William did not voluntarily engage in conduct that would normally result in downloading material from a website onto a computer hard drive, he has a strong case that he did not engage in the voluntary act necessary for possession.

16. Roro's failure to tell the police what he had learned is clearly an omission, one that allowed his friends to cause the loss of many innocent lives. But does his failure to warn law enforcement

authorities trigger criminal responsibility?

The prosecutor would argue that Roro was under a legal duty to prevent this tragedy because of the incredible magnitude of the harm planned and because Roro could prevent it with no risk to himself (he could have called the police anonymously).

The defense would argue that Roro is not a co-conspirator (see Chapter 13) nor an accomplice (see Chapter 14) and there is no civil duty to report crimes planned by others. There can be no criminal responsibility for an omission unless there is a legal duty to act to prevent the harm. An individual is personally responsible only for the harm he causes; generally, he is under no obligation to prevent others from committing crimes. Only a duty to act imposed by civil law could provide adequate notice to Roro and others that failure to act in such situations carries the threat of criminal sanction.

Without a duty in civil law, an individual cannot be held criminally responsible for doing nothing. Roro's failure to interrupt human causal forces already at work is morally reprehensible and indefensible. But it is unlikely that he could be convicted of any crime. In states with Good Samaritan laws, which require individuals to prevent harm if they can do so with no risk, Roro could be convicted of a crime. But his punishment would be extremely light (a modest fine and perhaps a six-month sentence) given the number of people who die as a result of his inaction. Should the law criminal be used as an instrument to induce people to do the right thing when the stakes are so high?

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1. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 505 (New York: Wolters Kluwer, 2017).
2. Model Penal Code and Commentaries 214-215 (1985).
3. In the real world, we think of a failure to file as an omission because the taxpayer has not done what he was supposed to do.
4. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 505 (New York: Wolters Kluwer, 2017).
5. Id.
6. Id.
7. 715 A.2d 680 (Conn. 1998).
8. *State v. Miranda*, 274 Conn. 727, 878 A.2d 1118 (2005).
9. See, e.g., *People v. Carroll*, 93 N.Y.S.2d 564, 715 N.E.2d 500 (1999).
10. See, e.g., Vt. Stat. Ann. tit. 12, §519 (West 2006).
11. *State v. Bradshaw*, 989 P.3d 1190 (Wash. 2004).

12. Model Penal Code and Commentaries 215 (1985).
13. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 507 (New York: Wolters Kluwer, 2017).
14. 18 U.S.C. §2252(a)(4)(B) (2003). This statute prohibits: "(B) knowingly possess[ing] . . . any visual depiction that has . . . been transported in interstate or foreign commerce . . . by any means including by computer, if — (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct."
15. See "Illness Cited in Cockpit Attack," Kansas City Star, June 19, 2000, p. B-1.
16. This is factually similar to the Jerry Sandusky sexual abuse allegations at Penn State University.
17. See *In the Matter of Ronnie L.*, 121 Misc. 2d 271, 463 N.Y.S.2d 732 (1983).

CHAPTER 4

The Doctrines of Mens Rea

OVERVIEW

As we saw in Chapter 2, criminal law is distinguished from all other fields of law because of the sanctions it can impose: loss of liberty and moral stigmatization. We regularly incarcerate, or otherwise deprive of freedom, persons who are not morally blameworthy — the mentally ill, the addicted, the fatally contagious, and so on. However, only criminal punishment declares that defendants are to blame for their acts; the essence of the judgment is not that they should be incarcerated for our sakes, but that they deserve punishment because they have chosen freely to violate the criminal law. Such a free choice appears to require that they *knew* what they were doing, and were aware, or at least should have been aware, that it was morally blameworthy. For centuries, the law has captured this notion of free will and knowledge by looking for *mens rea* — Latin for "guilty mind." This chapter is concerned with the basic definitions of mens rea.

Until 1900 or so, many different terms were used to describe states of mind that seemed to reflect aspects of moral blame. However, behind each of these statutory terms stood the larger backdrop of mens rea itself: the broader notion of looking for a truly "immoral" person. We will refer to that notion as *traditional* mens rea. In the past century however the term "mens rea" has lost much of that moral connotation and has come to mean merely the mental state required by statute. We will call this *statutory* mens rea. Unfortunately, neither courts nor commentators differentiate consistently in their use of these concepts.

This chapter examines various aspects of mens rea: (1) defining the relevant mental states; (2) investigating the relation of mens rea to motive; and (3) interpreting statutes that use mens rea words.

Succeeding Chapters 5 and 6 continue this exploration in the specific contexts of mistake and strict liability.

The Model Penal Code effected many changes in both the substantive criminal law and in the way criminal statutes are interpreted. Beginning with this chapter, the text will constantly compare and contrast the positions taken by the common law with those of the Code. This kind of comparison should help you understand both approaches. Although the MPC is not "the" law in the majority of jurisdictions today, it cannot properly be understood without an awareness of how it differs from the common law and why its drafters took the approach they did.

THE CONCEPTS OF MENS REA

Criminal law is not tort law. While that may seem obvious, the point is critical to understanding the central importance of mens rea to criminal law. Because tort law also deals with conduct that often results in physical injury, and because, historically, criminal and tort causes of action were joined in the same proceeding, it is helpful to contrast the two systems of law. In tort, where the prime aim is to compensate the innocent plaintiff, an objective standard ("the reasonable person") is used to assess the actions of the defendant. Criminal law, however, has other concerns. Under most of the four theories of punishment discussed in Chapter 2, the defendant's mental state is critical in determining whether to punish him. The entire theory of general deterrence — especially as articulated by its preeminent founder, Jeremy Bentham — requires that the potential criminal "calculate" the gains and benefits of committing a crime and then *choose* to commit it. If the defendant does not know the punishment, or that the act is even criminal, the defendant is unlikely to be deterred. A utilitarian who seeks to rehabilitate the defendant needs to know whether the defendant *needs* "treatment," which means that he knew — or was capable of knowing — the harm risked by his conduct. If so, then the defendant needs to be trained to avoid such injuries; if not, he needs to be trained to be aware of possible injuries.

It might appear that an incapacitationist might think mental state is not relevant. If the defendant is dangerous, she should be locked up without regard to her mental state. However, the criminal process and criminal incarceration are a costly business. If we are only interested in confinement, we can use the less costly and less burdensome civil process. If the criminal process is to be relevant to an incapacitationist, it must be because the defendant will continue to be dangerous because she is dangerous.

The notion of blame, however, fits most easily in the retributivist's theory. To a retributivist, a person is morally culpable, and therefore properly subject to punishment, only if she had a "real choice" in her conduct and knowingly exercised her free will to execute that choice. As Justice Jackson put it in a frequently repeated observation:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as a child's "But I didn't mean to. . . ." Unqualified acceptance of this doctrine by English common law . . . was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."[1]

No state has fully adopted any one of these goals of punishment as "the" purpose. Indeed, most observers argue that the criminal law should adopt all these purposes, at one time stressing one purpose, at another time another. Where the legislature is silent on the purpose of a particular statute, and where the different philosophies would result in different interpretations, however, a real dilemma arises.

Suppose a statute prohibits "selling drugs," and Rob sold a white powder that he thought was salt, but was actually heroin. He would contend that the statute should be interpreted as requiring knowledge of the nature of the item sold. A deterrence theorist might argue that the statute should not be interpreted to require mens rea, because by punishing Rob, others might be deterred from selling white powder unless they assured themselves it was salt. An incapacitationist might similarly argue that the statute should not be interpreted to require knowledge because Rob's failure to perceive or check the nature of the powder makes him dangerous enough to be imprisoned. A rehabilitationist, on the other hand, would most likely contend that

persons who make these mistakes should be trained to be more careful, but not punished as though they knew the powder was heroin; the statute should be required to show knowledge. Finally, a retributivist would adamantly demand that the statute be interpreted to require that a defendant knew it was heroin; a person who sells what he believes to be salt is simply not morally culpable if it turns out that he was wrong.

"Traditional" and "Statutory" Mens Rea

Clearly heavily influenced by religious notions of sin, the criminal law as early as the thirteenth century encapsulated the need for a "vicious will" in the Latin term "mens rea." This view that a defendant could be punished only if he were a "sinner" influenced the common law, and created the *traditional mens rea* concept described earlier. Between that time and the middle of the twentieth century, both common law courts and legislatures used a dizzying variety of adverbs in an attempt to capture the notion of general malevolence and blameworthiness at the heart of the original, Latin term. These adverbs included "feloniously," "unlawfully," "maliciously," "corruptly," "fraudulently," "spitefully," and "willfully." The Model Penal Code found that there were 76 terms in federal statutes alone that were used to describe mens rea.[2] This abundance of terms might have been amusing except that, under the principles of legality (see Chapter 1), courts, faced with this wide variety of legislative terms, felt compelled to conclude that there must be differences among *each* of them.[3] Explaining the nuances between 76 different terms challenged the creative limits of the courts' ingenuity. As courts focused on the statutory words, however, the moral content of mens rea became diluted. If Mary, for example, is given a box to deliver to Jessica, and is told that it contains books, when she is charged with "intentionally transporting heroin" (the real content of the box), under traditional mens rea, she will claim lack of moral blameworthiness. As we will see, she will likely be exonerated. Under a *statutory mens rea* approach, however, the court might ask only whether she "intentionally" "transported" the box. If so, she will be found guilty. Again, as we will see, recent court decisions seem to be moving toward providing rules of

statutory construction that would “readopt” the common law approach and exculpate Mary.[4]

The distinction between *traditional* and *statutory* mens rea can work either to the benefit or detriment of a person charged with crime. Assume, for example, that recklessness is morally blameworthy. Under this premise, a defendant who is charged with “intentionally” doing *x* would be convicted under traditional notions of mens rea. But under statutory notions of mens rea, the defendant could be acquitted because he did not “intend” to do *x*. On the other hand, if “intentionally” doing *x* means that the defendant must intend only the conduct, then a non-blameworthy actor who intentionally does an act might be found guilty under the statute, even if they are not aware of the facts giving rise to culpability, and did not intend the result.

As discussed later in this chapter and in Chapters 15-17, it is now fairly clear that there is no federal constitutional requirement that states observe “traditional” mens rea notions of blameworthiness before imposing criminal liability. Nevertheless, the division between the two types is still useful, both theoretically and practically. An example may help. In *Regina v. Cunningham*, 41 Crim. App. 155 (Ct. Crim. App. 1957), the defendant tore a gas meter off the wall of a house. The gas escaped, and *V* (an occupant of the house) was nearly poisoned. Defendant was charged with “unlawfully and maliciously” causing *V* to inhale the gas, to which he responded that he had absolutely no intent that she inhale the gas. The trial judge instructed the jury that it would be sufficient for conviction if they were persuaded that the defendant had acted “wickedly.” The defendant’s conviction was reversed on appeal because, although he intended to remove the gas meter (and thus commit theft), he did not intend (even obliquely or by transfer) to hurt *V* in any way. In the terminology we are using here, the trial court instructed the jury that if the defendant had traditional mens rea (just plain wickedness), that was enough. But the appellate court held that that was not enough; the defendant had to have statutory mens rea, as well.[5] The moral: keep in mind “traditional” as well as “statutory” mens rea when analyzing criminal charges.

Motive and Mens Rea

A person's motive for committing a crime may tell us a great deal about her and particularly whether we should view her as a "criminal." But the law says that motive is not intent — and not even mens rea.[6]

Considering the defendant's motive complicates matters. If Robin Hood intentionally robs the Sheriff (statutory mens rea), the fact that his motive for doing so is to give the proceeds to the poor (arguably a morally good reason, and thus denying "traditional" moral blameworthiness) is irrelevant to his guilt.

Euthanasia raises most directly the difference between the two kinds of mens rea in dealing with motive. A person who (often with the victim's consent) intentionally disconnects life-prolonging devices or kills with a shotgun at point-blank range for the sole purpose of relieving that person's suffering certainly has statutory mens rea. However, is he blameworthy? Does he have traditional mens rea? Motive suggests he does not have traditional mens rea. Yet most courts today would exclude evidence of such a motive.

Motive is admissible, however, to bolster the prosecutor's case, since the jury may well infer mens rea from the motive. For example, Gertrude, who has just run over Jillian with her car, claims she did not see Jillian. So far as we initially know, they are total strangers. Charged with purposely killing Jillian, Gertrude is likely to be acquitted. We simply can't see why Gertrude would purposely kill the victim, even if the external evidence suggests that (1) it was a bright and sunny day; (2) Gertrude traveled over 500 feet before she hit Jillian, who was on the sidewalk; (3) Gertrude never hit the brakes. However, if we discover that Jillian is having an affair with Gertrude's husband, or that Gertrude stood to inherit from Jillian, or that Jillian was blocking Gertrude's advancement in her field, we might *now* be willing to infer that Gertrude purposely killed Jillian, *because she had a motive for doing so.* It is the lack of apparent motive that spurs Hitchcock's great film, *Strangers on a Train*, where strangers agree to "swap murders" in the belief that the police will not suspect them of "motiveless" crimes.

If motive is not relevant to the determination of guilt, the judge may — or may not — consider it at the time of sentencing. Even if Robin Hood and Smokey the Rat are both robbers, we may tend to think Robin deserves less punishment. Similarly, a bad motive may seem to warrant increased punishment. Assault alone may be a crime. If it is motivated

by racial animosity, we may consider it worthy of more punishment.

Motive and Defenses

If motive means the reason why the defendant acted with the requisite statutory mens rea, the criminal law sometimes does consider motive, but it has cloaked this consideration by calling some motives “defenses.” Thus, if Hillary claims that she purposely killed Andrew because Andrew had fired four shots at her, or that she purposely stole the painting because Andrew had a gun trained on her (or on her son), these *reasons* (motives) are relevant under standard criminal law doctrine because they constitute defenses (self-defense and duress, respectively). We will explore the rules as to those defenses in Chapter 16, but it is useful, even now, to at least recognize that there are motives that the criminal law does consider.

Specific Kinds of Mens Rea

In an attempt to define mens rea, courts divided the concept into three major sub-concepts: (1) intent; (2) knowledge; (3) recklessness.

Intent (Purpose)

In General

A person who *intends* harm is clearly a proper subject for punishment under any theory of punishment. He is dangerous, in need of rehabilitation, and a morally culpable actor. To the extent that general deterrence works at all, it is also likely that his punishment can deter others like him. It is the defendant’s subjective malevolence, not the likelihood of result, that determines his liability. Suppose, for example, that Hector wants to kill Achilles and, with this purpose in mind, aims at him a feather that is unlikely to harm him in any way. The feather, however, hits Achilles in a vital spot and, wonder of wonders, Achilles

dies. If Hector had not wanted to kill Achilles, this would be a tragic accident, and probably Hector would not be punished at all. Should Hector be able to claim that he did not intentionally kill Achilles because the physical facts made it unlikely, almost fantastic? The common law answer to this was no; if Hector really wanted to kill Achilles, the fact that he did so by what would ordinarily be ineffective means was irrelevant. If Hector intended the death, and the death occurred, Hector was liable for intentional homicide.[7]

However, it is not that easy. We must distinguish between *intending the conduct* and *intending the result.* Suppose that Peter Pumpkin has intentionally pulled the trigger of a gun, and a bullet from the gun has killed Lucretia. If Peter is charged with "intentionally killing a person," he may admit he pulled the trigger intentionally (intended the conduct) but still respond that he is not guilty of the offense for several reasons:

1. He did not intend to shoot the gun (e.g., he thought it was empty).
2. He did intend to shoot the gun, but he did not intend the bullet to hit anyone (e.g., he was aiming at a tree and did not know Lucretia was in the tree).
3. He did intend to shoot the gun but meant to hit not Lucretia but the Joker, who was assaulting him.
4. He did intend to shoot the gun and to hit Lucretia, but earnestly hoped that this would not kill her (e.g., he was trying to *wound* her in the heart).

Can one characterize Peter's mens rea as intentional? We will leave Cases 1 and 2 for Chapter 5, which treats the subject of mistake. However, in Cases 3 and 4, there is at least *some* intention on Peter's part to inflict harm. How should the law resolve these cases?

Transferred Intent: Case 3

The third case incorporates a fiction borrowed from tort law, transferred intent. Here, the conclusion is that the intent follows the bullet. Transferred intent, however, is limited to results that create *the same type of harm* as was actually intended. Thus, if Mary throws a stone at Jim and hits John, the intent is said to transfer, and Mary will be

convicted of intentionally hitting John. If, however, the stone misses Jim and breaks a plate glass window behind him, the intent is not transferred. *Regina v. Pembliton*, 12 Cox C.C. 607 (1874).

Some commentators argue that the doctrine is not necessary: Mary intended to assault a human being and she did just that. However, suppose that the actually injured party is not just “a” human being but a “specially protected” human being — the King, the Pope, a federal judge — for whose intentional assault the penalty is enhanced. Should Mary pay the extra penalty? At least arguably, no. Mary threw the stone intentionally, but did not hit the Pope intentionally; Mary should be punished for *attempting* to hit Jim and for negligently or recklessly assaulting the Pope. The transferred intent analysis ignores Jim as a victim, and concentrates all its attention on punishing Mary for hitting the Pope.[8] When the defendant aims at *A* but kills *B*, the intent is transferred; when he kills both *A* (his target) and *B* with the same bullet, some courts hold that the intent does *not* transfer because it is “used up.”

Oblique Intent: Case 4

Most courts deal with Case 4 by treating the defendant *as though* he had intended the actual result. Some courts explain this by using the term “oblique” intent. The defendant didn’t really “intend” the result but knew that if he acted, the result (death) was practically certain to happen if he achieved his actual goal (wound in the heart). In other cases, courts simply have said that if the defendant knew that the result was almost certain to occur, even if he did not in fact want it to happen, he would be deemed to have intended it.

The typical classroom hypothetical to illustrate “oblique intent” concerns John, who purposes to kill his wife by putting a bomb on a plane she is taking. The bomb explodes, and his wife is killed. But so are 30 other passengers. As to them, John will probably say that he did not “purpose” or “intend” their deaths — he would have been ecstatic had they somehow survived. Nevertheless, the law will treat him as though he intended their deaths, because those deaths were virtually certain to occur.

The policy behind the doctrine of oblique intent is fairly clear: The defendant is almost as morally blameworthy, or as much in need of

rehabilitation or incapacitation, as the defendant who *actually* intended to kill the person he shot. This explanation can also explain the transferred intent doctrine, which held Mary guilty of intending to hit John, but it will not explain her acquittal when she breaks the window. If anything, she is *more* morally culpable (and in need of rehabilitation or incapacitation) than a person who actually intends to break a window. Only adherence to the *statutory* meaning of mens rea and the view that this outcome is mandated by the principle of legality can explain that result.

"Specific" and "General" Intent: An Island of Confusion in an Ocean of Chaos

Every student must try to learn the difference between *specific* intent and *general* intent, although all criminal law scholars (and many courts) believe the distinction to be totally meaningless and unrelievedly befuddling. As one authority puts it, "In confusing circularity, a general intent offense can be said to be any crime that requires *mens rea* and that has no special or specific intent required."

Often, the legislature will help out by using the phrase "with intent to" when designating a specific intent offense. Thus:

1. Assault is a general intent crime, *People v. Hood*, 1 Cal. 3d 444 (1969); assault *with intent to rape* is a specific intent crime.
2. Breaking and entering is a general intent crime; breaking and entering *with intent to commit a felony* therein is a specific intent fix crime.
3. Burning down your house is a general intent crime; burning down your house *with the intent to obtain insurance* thereon is a specific intent crime.

Often, but not always. And therein lies the rub. While the presence of "with intent to" almost always indicates that a crime is a specific intent crime, the absence of that phrase does not necessarily indicate that it is a general intent crime. Moreover, the same conduct can often be described (and charged) as *either* a general or specific intent offense. For example:

1. Aggravated assault (a general intent offense) may also be described as assault with intent to kill or maim (specific intent).
2. Burglary is defined by common law as a breaking and entering (usually a dwelling house) with intent to commit a felony therein (and therefore a specific intent offense). However, aggravated (or second-degree) trespassing *can* be defined to reach the same conduct without using the magic words "with intent to."

Virtually no one — courts, commentators, defendants — thinks the specific-general intent distinction is very helpful. Only prosecutors, whose charging discretion is enhanced by these differences, seem to support the idea. However, courts sometimes candidly acknowledge that they will (re)define an offense as general or specific intent because of the effect of other doctrines on the charge. See *People v. Hood,* supra.

In mens rea terms employed by the common law, a specific intent crime is one done "purposely" or "intentionally." If the defendant can be convicted for "knowingly, recklessly or negligently" committing the offense, it is often referred to as a general intent crime.

What, then, is "general intent"? Often, courts define it as requiring that the defendant "intended to perform the physical act proscribed by the statute." But that is not very helpful, as we shall see. Suppose the crime is "possessing cocaine." Is the "physical act" "possessing"? Or is it "possessing cocaine"? We'll come back to that.

Knowledge

"Willfully" and "Knowingly"

In many modern codes, "oblique intention" is now called "knowingly." Knowingly, while close to intentionality, does not have the same exact meaning of intentionally. The defendant need not intend a result; she need only know that the result is virtually certain. In inchoate crimes (see Chapters 12-14) and in accessorial liability (Chapter 14), which are said to be "specific intent" crimes, a person who knows that a crime *might* occur, but does not intend that the crime occur, is not guilty. On the other hand, "knowingly" sometimes means *less* than meets the eye. Thus, if Tom is handed a glassine envelope of white powder, and told to

sell it to Helen for $100 a gram, and says he will do it, “just don’t tell me what it is,” he is treated as though he knew that the substance was cocaine. He is said to have made himself “willfully blind” to the facts.

Many statutes and common law crimes used the term “willfully.” “Willfully” was often interpreted to mean “by one’s will,” which, as discussed in Chapter 3, would reduce that term to mean only that the defendant acted in a voluntary way. This was too narrow a reading. Other courts required that the prosecution prove the defendant “knew” what the consequences of his action were likely to be.

Recklessness

The *Cunningham* decision discussed on page 67 is known for its holding that “recklessness” is the “lowest” mental state required for criminal mens rea. Recklessness is not a concept familiar to tort law, and therefore perhaps not even to law students who have struggled through torts. Some courts have used terms like “gross negligence” as a synonym for “recklessness,” but recklessness stands between intent on one side and criminal negligence on the other. It is usually defined as a *conscious decision to ignore a risk, of which the defendant is aware,* that a “bad” result will occur or that a fact is present. The essence of recklessness, therefore, is that the defendant *knows* injury is being risked but proceeds anyway.[9]

Not every risk, of course, is to be condemned. In everything we do — driving a car, walking down steps, hitting a golf ball — we knowingly take risks that serious bodily injury or death might ensue. However, these risks are acceptable because they are outweighed by the social good that occurs: commerce, autonomy, pleasure. Only if the social good does not outweigh the possible harm (e.g., speeding, walking down steps while carrying a loaded gun, hitting a ball with persons standing only ten feet in front of the ball) do we say that the risk is unacceptable.

Caveat. The term “recklessness” is often misused in general language and occasionally in court decisions, as well. As used in the criminal law, and particularly in the Model Penal Code, recklessness requires that the defendant recognize that there is a particular risk and *subjectively choose to disregard that risk.* Thus, as with negligence

(remember *Palsgraf* from your torts class?), there is no such thing as recklessness in the air. If LeeAnn drives 90 miles an hour on a crowded city street, she may be acting *dangerously* but cannot be accurately described as driving *recklessly* with regard to the risk of death or serious injury unless she *actually, subjectively recognized* and shrugged off that risk.[10] If LeeAnn did not consider the possibility of death, and she kills someone in such a situation, it would be incorrect to say that she killed recklessly. Again, it is important to distinguish between being reckless as to the conduct and as to the result. Do not be misled on exams (or in other contexts either).

Of course, when LeeAnn tells the jury that it never occurred to her that she might injure or kill someone, a jury could simply disbelieve her — based on its realistic sense that any person driving the way she did "must have" recognized the risk. But before they can convict her, they will still have to find that LeeAnn had the capacity, at the time, to recognize the risk and did so.

Take a classic example. In *Regina v. Faulkner*, 13 Cox C.C. 550 (1877), the defendant, a sailor, went to the hold of the ship to steal some rum. When he was finished imbibing, he attempted to replace the cork in the rum keg. To help him see where to put the cork, he lit a match, which then ignited the rum and the rum fumes, burning down the ship. If he were charged with "recklessly" destroying the ship, the prosecutor would seek to prove that Faulkner knew that rum was combustible. If Faulkner denied that charge, the prosecutor would have to rely on inferences from other evidence: (1) Faulkner had cherries jubilee every night for desert; (2) other persons had heard Faulkner talk about the flammability of rum; (3) all sailors know that rum is flammable, and Faulkner has been a sailor for 30 years.

Although there must be "a" risk of the result occurring, there is no minimum level of probability that must be met before a risk will render a defendant potentially liable. For example, assume that Peter Pumpkin is put in a room with 10,000 guns and told that one (and only one) is loaded. He selects one at random, aims it directly at Lucretia's head, and pulls the trigger. If death results, Peter is reckless with regard to that result, even if, statistically, the chances of the gun firing were very, very small (.0001).

Some courts and commentators have suggested that a balancing test

should be used to define recklessness. Thus, if the resulting harm is severe, a minimum degree of recklessness may be required; if, however, the resulting harm is less serious, the same defendant may not be found reckless. Thus, Peter may be a reckless murderer, but it is possible to argue that he is not guilty of "recklessly" discharging the gun in public.

Negligence as a Predicate for Criminal Liability

"Negligence," at least as the term is used in tort law, does not ask anything about the individual defendant's mind. It focuses only on whether the defendant *acted* as a reasonably prudent person would. If he did, then he's not liable, even if his *mind* was "evil." Similarly, a person who is merely negligent has not *subjectively* foreseen even the remotest possibility that harm may occur. This is the distinguishing factor between negligence and recklessness. Should persons who are merely negligent be punished as criminals?

Surprisingly, the different theories of punishment are divided on this question. Some retributivists argue that a person who has not paid attention to a risk has not chosen to create that risk, and therefore is not morally culpable. Other retributivists argue that a person who has the *capacity* to be non-negligent but fails to use that capacity *is* morally blameworthy, either because he has not used his capacity at the time of the event, or because he has not honed his skills and character better in the past to allow him to have perceived and avoided the risk when it arose.

Utilitarians are no more united on this issue. Some argue that punishing negligent defendants may encourage others to become more careful, thereby deterring future harms. Others, however, argue that persons rarely act without believing that they *are* acting rationally and reasonably, and that they will not teach themselves to be more careful than what they believe is reasonable. Therefore, there will be no educative (deterrent) effect, and the punishment of the negligent actor will have no beneficial effect in the real world.

Some utilitarians argue that if the law does not punish those who are negligent, nefarious evildoers will escape criminal liability by duping juries into believing that they were not reckless, but "merely" negligent. This argument, however, proves too much. At its most extreme, it would

require strict liability for all harm since any requirement of proof of mens rea, or even actus reus, could be abused by a duplicitous defendant and falsely believed by a sympathetic (or misled) jury.

Defining Criminal Negligence

The common law in very limited circumstances allowed *criminal* negligence as the basis of some liability. But what does the term mean? The basic definition can be easily stated: Mere tort negligence is insufficient to ground criminal liability; the negligence must be "criminal." This is obviously not helpful, so try these definitions:

1. "That degree of negligence or carelessness which is denominated as gross, and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man . . . as to furnish evidence of that indifference to consequences which in some offenses takes the place of criminal intent." *Fitzgerald v. State*, 112 Ala. 34, 20 So. 966 (1896).
2. "Negligence, to be criminal, must be reckless and wanton." *State v. Weiner*, 41 N.J. 21, 194 A.2d 467 (1964).

As these (not very helpful) "definitions" illustrate, many courts invoke words that are so close to recklessness as to make criminal negligence indistinguishable from that concept. Some decisions even talk about advertent negligence, a notion that is even harder to explain than jumbo shrimp.

Analytically, one might try to explain the concept of degrees of negligence in various ways. "Criminal" negligence might differ from "tortious" negligence by requiring (1) a subjective recognition of the harm, and/or (2) a risk of only some, very serious, harm (see below) and/or (3) a statistically greater risk of harm. While we might find the defendant tortiously liable if the risk were 40 percent, we would find her criminally liable only if the risk were 70 percent because *virtually every person*, not merely the average person, would see the risk. The cases seem to endorse something like this latter view: Only if the defendant's failure to recognize the risk was "really outrageous" or "really stupid" should he be convicted. We could refer to this as the "really stupid

reasonable person” test.

There is also some question about whether criminal negligence applies to most offenses. Most cases defining criminal negligence (including the two quoted above) involved charges of homicide. More modern cases involving charges of nonhomicidal acts, have allowed conviction on the basis of “tort” negligence.

For example, in *United States v. Garrett*, 984 F.2d 1402 (5th Cir. 1993), the defendant was charged with attempting to board an airplane with a concealed weapon. She claimed that she had forgotten that the gun was in her purse. Moreover, she had been late in getting dressed that morning and had hastily picked up a purse that she used only infrequently. The court held that a jury could nevertheless convict her if they found her mistake to be tortiously (civilly) negligent.

States have also allowed tort negligence to be sufficient for criminal liability in such areas as child abuse and neglect. Some state legislatures have enacted statutes dealing with very specific and discrete behavior and results — for example, negligent operation of a vehicle resulting in death, which is punished less seriously than other types of homicide.

As a general matter, courts will not permit mere tort negligence as a basis for criminal liability. If, of course, the legislature has unequivocally allowed conviction on the basis of such a low mens rea, the courts will enforce that. In *State v. Williams*, 4 Wash. App. 908, 484 P.2d 167 (1971), the defendants, poorly educated American Indian parents whose infant child had developed a severe abscess in his teeth, but who did not realize the severity of the illness, and who were afraid that the child would be removed from their home if they took him to a doctor for treatment,[11] were convicted of the death of their infant child based on a statute that appeared to allow such a conviction on mere negligence. That statute was later amended by the Washington state legislature to require at least “criminal” negligence.

Subjectivity vs. Objectivity

As every torts student knows, adoption of an objective standard is hardly the end of the question. Even in torts, where the prime objective is compensation to innocent plaintiffs injured by unreasonable defendants, the question constantly arises as to what characteristics of the defendant

are relevant in the test of the reasonably prudent person (RPP). Characteristics that increase the defendant's duty of care — higher degrees of expertise, training, or learning — are routinely added to the RPP (e.g., the reasonable brain surgeon). There are also relevant characteristics that lower the possible level of care. In torts, age (the children's rule) and long-term or permanent physical characteristics (e.g., blindness, deafness) are frequently added to the RPP standard.[12] It should not be surprising, therefore, that wherever the RPP test is used in criminal law, these kinds of characteristics are easily incorporated. Because the criminal law focuses much more on the actual subjective blameworthiness of the defendant, however, the impetus to further "subjectivize" the objective reasonable person test is strong, indeed virtually irresistible, particularly for the retributive — just deserts — theorist. As an example, American courts have held that in self-defense cases, the RPP defendant is the type of person who (1) reads police gazettes and has been the victim of a mugging, as has his doorman[13]; (2) has been socially acculturated to use only deadly force to reply to nondeadly force[14]; (3) has been battered by the victim's spouse over so long a period of time that (s)he suffers from "battered spouse syndrome."[15] We will examine these issues in more depth later on, especially when we deal with specific defensive claims.

Given this trend toward increasingly subjectivizing the RPP, there is now substantial debate whether the concept of objective criminal negligence using a tort standard is sensible.

Proving Mens Rea

The first three kinds of mens rea (intent, knowledge, and recklessness) require that the state prove the defendant's actual mental state with regard to facts and result. But how can the state prove that? Other fields of law have concluded that it is simply too hard and too costly to prove what was actually in the defendant's mind.[16] However, criminal law does focus on individual blameworthiness as a basis for punishing.

Can we ever know what someone else is thinking? Some philosophers and psychiatrists argue that we never even know what *we*

are thinking.[17] How, then, can we determine whether the defendant in a criminal case had the requisite mens rea for conviction?

The answer is *inference.* We can only infer, primarily from the defendant's conduct and words and secondarily from other facts that help us assess those inferences, what the defendant was thinking. Perhaps because we recognize the fallibility of such inferences we require that the jury be persuaded beyond a reasonable doubt that the inference of mens rea is a reasonable one to draw in this case.[18]

Again, an example may be helpful. Peter Pumpkin, who shot Lucretia, claims that he did not know the gun was loaded. If Peter is proven to be an expert gun handler, we may begin to doubt his denial. If the evidence also shows that Peter spent 10 minutes looking at the weapon before he fired it, we may find further reason to reject his claim. And if more evidence shows that Peter actually loaded the gun, we may think the case clinched. *But be careful.* Peter may claim that he thought the items he placed in the gun were blanks, and he may show us the box, marked "blanks," that he used. Much of our decision will depend on Peter's credibility, should he choose to testify. If we believe Peter about other items, we are more likely to infer that he is telling the truth about this item, as well. However, inference is our best, perhaps our only, guide.

CONTEMPORANEITY, PRIOR FAULT, AND TIME FRAMES

It is frequently said that a defendant is liable only if the actus reus and the mens rea coincide. Like many other truisms of the law, this is true only if it is understood properly. If not, it can prove to be a trap for the unwary.

A defendant is not liable if, at one point in time (T), she has formed the requisite mens rea upon which she does not act but, at a later time (T2) when that mens rea is not present, the harm that she had envisioned occurs. For example, Carmen, in a blue funk, decided to kill her toreador lover, Chuck, by shooting him the next time he brought her a rose. However, as (his) luck would have it, Chuck stops bringing Carmen

roses, and the thought disappears. Two weeks later, choking in daffodils, but fully reconciled with Chuck, Carmen is taking pot shots at a tree in the backyard. You guessed it: Chuck walks out from behind the tree (carrying a rose yet), and the next bullet terminates his breathing. Quite obviously, Carmen is not guilty of purposely killing Chuck, even though she has killed him (actus reus) and has previously intended to kill him (mens rea). To explain this result, the common law courts said that the mens rea and actus reus must coincide.

But take a different case. Sarah decides to kill her lover, Clancy, for exactly the same reasons that energized Carmen. She gets a vial of arsenic and pours the contents into Clancy's sugar bowl. She knows that, sometime within the next three weeks, Clancy will use the sugar. Immediately after this event, Sarah leaves the house and is trampled by a rogue elephant. She goes into a coma and is kept alive only by a respirator; no part of her body is acting voluntarily (see Chapter 3). Sure enough, two weeks later, with Sarah in the coma, Clancy takes the poison and dies. Miraculously, Sarah awakes from her coma 10 seconds after his death and shouts out: "Someone warn Clancy. I don't want him to die." If Sarah is prosecuted for murder, she will raise the doctrine of contemporaneity. At the moment Clancy died, she was not acting at all; the actus reus (Clancy's death) and the mens rea (purpose to kill) did not coincide. Nice try, Sarah. The *relevant* actus reus here is not Clancy's death, but Sarah's *act* of putting the poison in the sugar bowl although the *result* occurred much later. When *that* actus reus occurred, Sarah did have the requisite mens rea.

One way of conceptualizing this analysis is to say that we can move the time frame back to see if, at some relevant time, the defendant, with the requisite mens rea, acted in a way that ultimately caused the harm. Consider *People v. Decina*, discussed in Chapter 3. At the time his car hit the four school children (the time of the harm), Decina was suffering an epileptic seizure, and neither acting voluntarily nor entertaining a mens of any kind. However, by moving the time frame back to before the seizure (indeed, perhaps to the time he entered the car and turned on the ignition), the court found both an act (beginning to drive) and a mens rea (criminal negligence or recklessness as to the possibility that he would have a seizure, lose control of the car, and cause death or serious injury).

STATUTORY INTERPRETATION AND MENS REA

Principles of Statutory Construction

Because modern criminal law consists of interpreting statutes, it is important to have some grasp of general rules of statutory construction and how they apply to criminal cases. Writers and courts debate whether the "maxims" of statutory interpretation are meaningful, not only in criminal law, but in law generally.[19] We will not enter that debate here. Instead, we assume the general usefulness of such maxims, particularly in interpreting criminal statutes, where the policies of lenity and legality attain constitutional, or quasi-constitutional, status (see Chapter 1). Similarly, many of the rules of interpreting criminal statutes are generated by the substantive policy positions of the criminal law. For example, under the common law, courts require the prosecution to prove mens rea, even if the legislature has not explicitly required a mental state.[20] This specific result could be seen as an application of the maxim that *penal statutes are to be construed narrowly and against the state.*

Other maxims dealing with legislative silence are also important in construing criminal statutes. If, for example, a statute does not require an element of proof that the common law did require, courts would probably apply the general maxim that *statutes in derogation of the common law are to be construed narrowly* and require a mens rea.[21]

Furthermore, the general rule of *in pari materia* — statutes dealing with similar subjects should be construed similarly — often has particular impact.

Consider the following statutes:

A. Whoever sells cocaine shall be fined $1,000.
B. Whoever knowingly sells heroin shall be fined $1,000.

Can a person violate statute A without "knowing" that he is selling cocaine? The two statutes *seem* to deal with the same basic evil, the sale of drugs. Assume (for the moment) that statute B requires that the defendant know that he is selling heroin (and not merely that he is

selling something that turns out to be heroin). Since statute B tells us that the legislature has articulated a requirement of “knowingly” on occasion, should we infer that its failure to do so in statute A means that the omission was purposeful?

The argument that the two are to be read *in pari materia* because they deal with drugs is strengthened by the fact that the punishments are identical. However, suppose that statute B prohibited knowingly selling poisoned food (or stolen pencils) and specified the same fine of $1,000. It would then be harder to use the *in pari materia* approach because drugs and pencils (or even poisoned food) might not be seen as the same “matter.” On the other hand, if the punishment is the same, that might be the same “matter.” Or suppose that the punishment for selling heroin, in statute B, is raised to 5 years. Now it might be argued that statute A does not require proof of knowledge, because knowledge must be proved only if the punishment is “very” severe.

Another maxim of statutory construction tells us to read *any* statute in its “plain meaning.” As noted in Chapter 1, the rule of lenity holds that if the legislature has not clearly spoken, the statute’s ambiguities should be construed against the legislature and in favor of the defendant (and the defendant’s freedom).

The above remarks should be regarded as an introduction to the problems of interpreting statutes generally, and not solely those in the criminal law. General rules of interpretations may or may not be applicable to the exotic field you are about to enter. However, it won’t hurt to keep those rules in mind.

Element Analysis

Little Red Riding Hood has been instructed by her mother to deliver a package to her grandmother. Red, who had been planning a round of golf, is not pleased. As she is walking through the woods, she comes across a great bonfire. Herman is standing there and shouting “No more books” as he throws volume after volume of Charles Dickens on the fire. Angry that she cannot play golf, Red throws the package into the fire and watches it burn. It turns out that the package contains a first edition of *Dickens*! Red is charged under a statute that punishes anyone who

“purposely hides, destroys, or mars a book.” Is Little Red guilty under this statute?

If the prosecutor has only to prove that Red purposely destroyed the *package,* that hurdle is easily cleared: Red obviously purposely destroyed whatever were the contents of the package. But does the prosecutor have to prove that Red knew the package contained a “book”? This problem raises the issue of how far down the statute the mens rea word (“purposely”) goes. Prescient lawyers call this the “traveling” question.

The first approach to this problem is grammatical. “Purposely” is an adverb; “book” is a noun. Since adverbs modify only verbs, “purposely” cannot apply directly to the word “book” in the statute. A number of common law decisions therefore concluded that Red would be guilty of the crime, even though she did not know that it was a book she was destroying, since she “purposely” destroyed it.[22]

However, this result seems wrong. The legislature was not concerned with persons who purposely destroyed *packages,* only with persons who purposely destroyed *books.* No one would condone what Red did and she might be sent to bed without supper, but the issue here is not *only* whether she has acted in an immoral way (traditional mens rea) but whether she has also acted in a way proscribed by the statute (statutory mens rea). Whether *traditional* mens rea is always necessary, *statutory* mens rea *is* necessary to meet the principle of legality. To use our earlier terms, Red may have been *reckless* or *negligent* (even criminally negligent) as to what was in the package. If the legislature had prohibited recklessly or negligently destroying books, Red might (given further facts, such as the shape of the package or her ability to feel the contents) be guilty of one of those offenses. However, she was not acting “purposely” with regard to the result of a destroyed book, and is therefore not guilty under the statute. Moreover, to punish Red for purposely destroying the book would mean that she would be treated as being equally bad as Herman, who was well aware that the items he was throwing on the bonfire were books.

The common law’s response to this dilemma was to create a separate set of doctrines dealing with mistake. We shall investigate those doctrines in the next chapter. Here, however, we focus solely on statutory interpretation, apart from the independent question of the law

of mistake. One method of resolving this question would be to define in general terms what a particular mens rea word such as "purposely" *means* with regard to each of the words in the statute. For example, we could say that a person acts "purposely" with regard to the "book" in the statute only if she knows that the book exists. This approach of applying a statutory mens rea word to every significant part of the statute is now called *element analysis.*

The United States Supreme Court appears to have adopted element analysis in interpreting federal statutes. In *X-Citement Video v. United States*, 513 U.S. 64 (1994), the defendant distributed a sexually explicit film whose cast included minors. A federal statute punished anyone who "knowingly ships" such a film involving the "use of a minor." The Court held that the word "knowingly" modified not only the verb "ships" but the phrase "use of a minor." Thus, a defendant who knows that he is shipping a film, and even knows that what he is shipping is a sexually explicit film, is not guilty of this offense unless he *also* knows that the film includes a minor. Note that unless this approach to statutory interpretation is adopted (or an additional set of rules created), the statute essentially establishes strict liability (see Chapter 6) for the element of "minor" (or "book" in Little Red Riding Hood's case). Under that interpretation, any person who handled the film (the FedEx deliverer, the developer of the film, etc.) would be potentially liable, a result that the Court said would cast the net far too wide.

In 2009, the Court once again embraced element analysis, even calling it a "presumption" that a mens rea word modified everything in a statute. *United States v. Flores-Figueroa*, 129 S. Ct. 1886 (2009). The statute involved there made it a felony to "knowingly" use an identity card "of another person." The Court concluded that the trial court had erred by not requiring that the government prove that the defendant knew the identification number was that "of another." The decision is important because, unlike *X-Citement Video*, it did not involve a potential First Amendment issue. *Caveat: X-Citement Video* and *Flores-Figueroa* apply only to federal statutes — this does not mean that a state court must adopt the same approach.

Even if the common law requires a mens rea with regard to the "really important" parts of the statute, there may be "less important" parts to which such a requirement does not apply. Consider, for

example, a New York statute that makes “stealing a car in New York City” punishable by 5 years in prison, while another statute makes “stealing a car” punishable by 2 years. Even assuming the defendant has to know that what he is stealing is a car (as opposed to a minivan, which is legally a truck), does he have to know that he is in New York City? Many, if not all, courts have answered that question in the negative by differentiating between “real” and “jurisdictional” elements. Although the prosecution must prove that the crime occurred in New York, it need not prove that the defendant *knew* he was in that city.

This result is not as obvious as it may first appear. After all, the New York legislature doesn’t seem to care as much about cars stolen in places other than New York City. One might think that the fact that it happened in New York City really *is* important, and that a mens rea should apply to this fact, as well. That, however, has not been the general result in the courts.

Another example may be helpful. State statutes often distinguish between assaults upon persons generally, and assaults upon “especially protected persons,” such as law enforcement, firefighting personnel, and judges. In these statutes, the status of the person is *not* a jurisdictional element; the same court would have jurisdiction over both types of assault. Some statutes specifically require that the defendant know the protected status of the victim; where the statutes are silent, courts are divided on whether such knowledge is required.[23]

The “Default Position”

Suppose that Red Riding Hood had been prosecuted under a statute punishing “anyone who destroys a book.” This statute, unlike the first one, contains no mens rea word at all.

Courts confronting such a statute are faced with a dilemma. The plain words of the statute do not require a mens rea. Does the omission of a mens rea word reflect a firm legislative decision to impose strict liability? Should we assume that the legislature *intended* to omit mens rea? Or should we assume that the omission was a mere oversight? (Or, only somewhat more impishly, that the statute was drafted on a Friday,

when everyone was tired and wanted to get home for the weekend?)

The problem is that to argue about what the legislature *could* have done is sterile: Just as it *could* have written in the word "knowingly," it *could* just as easily have said, "Anyone who destroys a box, whether or not they know, suspect, or could have known it was a book, is guilty of an offense."[24] In the end, the legislative intent argument leads us nowhere unless we have a starting point. Some courts have provided that starting point by asserting that the legislative intent to do away with mens rea must be "patently" clear.[25]

When mens rea was used in its "traditional" sense, the problem was perhaps less evident. The basic question then was whether Red had acted in a blameworthy way. This revived the debate as to whether negligence could amount to blameworthiness (see supra), but beyond that, the courts did not need to go. Any level of blameworthiness would suffice. As the principle of legality took hold, however, and statutory mens rea became ascendant, courts could no longer ask merely whether the defendant was blameworthy. They had to decide as well which of the statutory mens rea words would apply. Traditional mens rea, even if necessary, was no longer a sufficient condition for liability. Since there were scores of statutory mens rea words from which to choose, this was a daunting task.

Most courts adopted the view that criminal punishment should not be imposed unless the defendant was at least reckless (actually foresaw a possibility of criminal harm) and went ahead anyway. The United States Supreme Court has gone beyond that. It now appears to have adopted the view that in interpreting federal statutes that are silent on the mens rea issue, it will begin with the presumption that the defendant must act *knowingly* as to each element of the statute. The case, *United States v. Staples*, 511 U.S. 600 (1994), involved a defendant who was charged with failing to inform the federal government that he owned an automatically firing weapon — an AR-14. Federal law did not require that all gun owners register all guns with the government; only owners of "firearms which shoot, or can be readily restored to shoot, automatically" had to register them. The statute contained no mens rea word at all. The defendant acknowledged that he had purchased an AR-14 but maintained that when he purchased it, it was not capable of firing "automatically," and that he did not know when or by whom the gun had

been altered after the purchase. The Court concluded not only that some mens rea would be required, but that the level of mens rea required was "knowingly." *Staples* is an important decision regarding strict liability, and we will discuss it in that context, as well. But it is important here because it appears to adopt "knowingly" as the default position — if Congress does not specify recklessness (or some lower standard of mens rea), federal courts should construe such a criminal statute to require actual knowledge of the facts.[26] This is not merely a statutory interpretation point; the decision carries significant moral weight, as well, because it appears to adopt the subjectivist view.

MENS REA AND THE CONSTITUTION

For decades, law professors (at least) have debated whether the Constitution requires that the government prove some form of mens rea for any criminal statute. Declarations, such as those in *Staples* and *X-Citement Video*, strongly suggested that mens rea would be read into every federal statute. But the most recent statements from the Court appear to put this question to rest, at least for the foreseeable future. In *Dixon v. United States*, 548 U.S. 1 (2006), the Court repeated that the decision as to whether to require mens rea at all was a legislative, and not a judicial, one. In *Clark v. Arizona*, 548 U.S. 735, the Court held that state legislatures have the authority to define (and limit) mens rea, and the defenses to crime, virtually without limit. See also *Montana v. Egelhoff*, 518 U.S. 37 (1996).

THE MODEL PENAL CODE

Perhaps the greatest contribution that the Model Penal Code has made is in the area of providing rules for statutory interpretation. The Code:

1. distinguishes between "elements" and "material elements" of a statute
2. reduces statutory mens rea culpability to four mental states

3. adopts element analysis by applying the four mental states to each of the material elements of a statute (indeed, the Code really invented the idea of element analysis)
4. adopts subjective liability (recklessness) as the default position.

“Elements” vs. “Material” Elements

In order to apply the four mental states (see infra) and “element analysis” (see infra), the Code first establishes the distinction between (nonmaterial) “elements” of a statute and “material elements.” Under section 1.13 of the Code, “nonmaterial” elements are those terms “unconnected with the harm or evil, incident to conduct, sought to be prevented by the law defining the offense.”

Consider the Red Riding Hood statute, which made it a crime to “destroy a book.” What is the “harm or evil” sought to be prevented by this statute? Clearly, the legislature here is concerned with books. It does not care, at least in this provision, about the destruction of movies, porcupines, or buildings. And it is concerned not with the mutilation, or the hoarding, of books — only with their destruction. Thus, the “harms or evils” about which this statute are concerned is “destroying” “books.” These, then, are the “material elements.” Most words in a statute are likely to be “material” elements — after all, why is the legislature acting at all and using these words if it is not concerned with all of those words? On the other hand, had the statute added “in New York City,” it is arguable that this is not a “material element,” but only an “element.” Indeed, the Code expressly says that words relating to “venue, jurisdiction, or the statute of limitations” are not “material” elements (although, as we saw earlier, an argument could be made that the statute shows that the legislature is only concerned with New York City books, rather than Albany books).

Defining the “material” elements in some statutes may be more difficult. A statute that punishes any person “who discharges a gun in public” may be concerned with (1) loud noises in public places *or* (2) possible endangerment of persons in public. The statute is unclear. Usual approaches to statutory interpretation may assist, but the courts will have to try to interpret the statute as the legislature wanted them construed. Here the “statutory maxims” mentioned, above, may be

useful. For example, a court might rely on the legislative history, or the placement of the statute (is it in a section on noises or on harm to the person) in deciding whether an "element" is a "material element."

Kinds of Material Elements

Having defined what the "material elements" are, the Code then subdivides these into (a) conduct, (b) attendant circumstance, and (c) result, and applies each of the four mental states to these material elements. Before discussing the mental states, however, we should differentiate the kinds of material elements.

Conduct and Result

Clearly verbs are "conduct," so "destroys" is conduct. But, like many other verbs in the English language (kill, touch, hide), it can also describe a result. This can sometimes create a problem. Suppose a statute declares that "Whoever employs fire and destroys . . . " has committed a crime. Even if "destroys" is both conduct and result, what is "employs"?

Attendant Circumstances

An attendant circumstance is any material element that is not a result or conduct. If most "conduct" words are verbs, most attendant circumstances are nouns or adjectives. In the statute in question, "book" is a material element, and since "book" is rarely a result or verb except to a theater entrepreneur ("book that act"), it is an attendant circumstance. Similarly, had the legislation prohibited destroying (only) "purple" books, "purple" would also be a "material element" since the legislature didn't care about whether orange or green books were destroyed.

Be careful here. The state must prove, beyond a reasonable doubt, ALL the "elements" — material or nonmaterial — in the statute. Thus, it must prove that the item was a "book," that it was "destroyed," and that it was destroyed "in New York City." With regard to "material" elements, however, the state must also prove one of the requisite mental

states, to which we now turn.

Levels of Mental States

Section 2.02 of the Code replaces the confusing and innumerable mental states used by state and federal legislatures in a plethora of criminal statutes with four, in "descending order" of culpability[27]:

1. purposely
2. knowingly
3. recklessly
4. negligently.

Purposely

This is roughly the equivalent of the common law term "intentionally." To prove that a defendant had "purpose" with regard to an attendant circumstance, the Code requires that the defendant "be aware or hope or believe" that fact is true. If the material element is a "result" element, he must entertain the "conscious object" to achieve the proscribed result. Note that, unlike the remaining three levels of mental state, likelihood of a consequence is never part of the "purposely" analysis. If Steve — who has never shot a gun before — shoots at his wife 400 yards away, the likelihood that he will hit and kill her is slim. However, the low probability of success would not be a defense if his ultimate purpose was to kill her. As a practical effect, "reckless conduct, as manifested in risk taking, can be elevated to purposeful conduct if the actor hopes that the risk will come to fruition."[28] In the above example, a prosecutor would not have a difficult time making an inference to the jury that Steve's shooting in his wife's direction was evidence of his intent to kill her, despite a low probability of doing so.

Knowingly

This Code term is essentially the equivalent of "oblique intention" under the common law. The critical distinction between "purpose" and "knowledge" is that the purposeful actor *desires* a specific result,

whereas the "knowing" actor foresees the result as highly likely but doesn't really care whether it occurs or not. The Code also expressly provides that "willfully" is equivalent to "knowingly" (§2.02(8)) and adopts the general notion of "willful blindness." Section 2.02(7).

Recklessly

As with the common law, the Code provides that the defendant is reckless only if he *actually foresees* that a harm may occur or that an attendant circumstance is present. Thus, subjective liability is continued. There is, however, one major possible problem with the Code's approach to recklessness. The Code requires that the risk that the defendant foresees (and thereafter consciously disregards) be "substantial and unjustifiable." The latter term is understandable, and it clearly puts on the prosecution the burden of proof as to lack of justification (see Chapter 15). The difficulty, however, is in the apparent requirement that the risk be *substantial*. Taken literally, this requirement might lead to a different result in the hypothetical, discussed above (page 74), where Peter Pumpkin takes the one loaded gun out of 10,000 and kills Lucretia. There, we concluded that Peter was reckless. However, a chance of .0001 is not really "substantial." To avoid the absurd result that Peter is not reckless as to death under the Code's definition therefore, requires that the word "substantial" be read as qualitative ("of real importance") rather than merely quantitative ("highly probable").

Negligently

Section 2.02(2)(d) of the Code proposes criminal negligence as a possible predicate for criminal liability — that is, not tort but criminal (or wanton or culpable) negligence, as understood under the common law. However, the Code, in fact, only allows criminal negligence in one crime, homicide, in which case the penalty is less than that for manslaughter (which is usually the level of punishment for negligent homicide in common law jurisdictions). Thus, while appearing to embrace negligence as a basis of liability generally, the Code really uses this approach as a way of mitigating punishment for those who might

otherwise be convicted of manslaughter (see Chapter 8).

The Code also retains two of the subsidiary doctrines of the common law of mental states. Transferred intent is now viewed as a matter of causation (§2.03(2) and (3)) (see Chapter 3). Similarly, while the Code generally rejects the “specific-general” intent notions, it does occasionally talk in terms of a crime being committed “with the purpose of” achieving a result, a rough analog to specific intent. But the common law rules relating to general versus specific intent, and mistake (see Chapter 5), are essentially eliminated.

Also note that the key distinction between “negligence and recklessness is the actor’s *awareness of the risk*.”[29] If a substantial risk is present, but the actor was not aware of the risk, she was not capable of ignoring the risk so as to meet the recklessness mental state. In such a case, the actor would only be liable for a negligence offense.

Faultless (Strict) Liability

On some occasions, no level of mental state is required to impose liability for a crime. These are called strict liability crimes. These types of crimes generally arise from conduct that the legislature has deemed such an interest to the public that it warrants the potentially harsh outcomes that arise from eliminating the mental state requirement. For example, in most statutory rape statutes, an offender may be punished without regard to otherwise mitigating circumstances or mistake of fact. As the Supreme Court noted, there is an important interest there to protect that can only, or best, be accomplished through strict liability.[30]

Element Analysis

Now comes the Code’s monumental achievement — “element analysis.”[31] The Code merges its definitions of culpability with its establishment of material elements, and provides that *every material element in every statute must be modified by one of the mental culpability states* (§2.02). This simple but elegant move solves many of the dilemmas we have confronted in the earlier sections of this chapter. The result is best shown graphically in Table 4.1.

Let's take the case of Little Red Riding Hood, who is charged with "purposely destroying a book." Since the statutorily stated mens rea is "purposely," and since "book" is an attendant circumstance material element, the state must show that Red either was "aware of the existence of such circumstance or believe[d] or hope[d]" that it exists — i.e., that the package contained a book. We have already posited that Red did *not* know, or even suspect, that the package contained a book. Thus, she does not meet the Code's requirement and is not guilty of the crime charged. Herman, on the other hand, *did* know that he was burning a book and it was his conscious object to cause the destruction of the book. He is guilty under the statute.

4.1 Mens Rea and Section 2.02 of the Model Penal Code

Culpability Level	Conduct	Attendant Circumstances	Result
Purposely	Defendant's conscious object is to engage in such conduct.	Defendant is aware or hopes or believes the circumstance exists.	Defendant's conscious object is to cause this result.
Knowingly	Defendant is aware his conduct is of this nature.	Defendant is aware the circumstances exist.	Defendant is aware that the result is practically certain.
Recklessly	Defendant consciously disregards a substantial and unjustifiable risk that he is engaging in this proscribed conduct.	Defendant consciously disregards a substantial and unjustifiable risk that the proscribed circumstances exist.	Defendant consciously disregards a substantial and unjustifiable risk that the result will occur.
	This disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe, considering defendant's purpose and the circumstances known to him.		
Negligently	Defendant fails to recognize a substantial and unjustifiable risk he is engaging in this conduct.	Defendant fails to recognize an unjustifiable risk that the proscribed circumstances exist.	Defendant fails to recognize a substantial and unjustifiable risk that the result will occur.
	The failure to recognize the risk, given defendant's purpose and the circumstances known to him, involves a gross deviation from the standard of care a reasonable person would observe.		

Suppose, instead, that Little Red was charged under a different

statute, punishing anyone who "recklessly" destroyed a book. Here, the analysis is the same: "Book" is an attendant circumstance material element. Under the recklessness provision, Red is guilty if she "consciously disregards a substantial and unjustifiable risk" that the item she is destroying is a book. That disregard must involve "a gross deviation from the standard of conduct that a law-abiding person would observe" in Red's situation. So if Red manipulated the package and it felt like a book, or she saw that an attached sales receipt was from a bookstore, she might be found guilty of violating this statute. Note that the difference between her possible liability under "knowingly" and "recklessly" depends on the degree of probability that Red recognizes that the item might be a book. If she is aware that it is a book or that there is a high probability that the package contains a book, she is "willfully blind" under §2.02(7) of the Code and hence acts "knowingly." If, on the other hand, she is aware of a substantial (but not highly probable) risk that the package contains a book, she is reckless, and not knowing, with regard to that material element.

In the Red Riding Hood statute, "purposely" is the only mens rea word articulated in the statute, and thus modifies all the material elements in the statute. But the legislature may require different mental states with regard to different material elements in a statute. Thus: "Whoever, while purposely destroying a package, recklessly destroys a book, is guilty of a crime." Here, purposely requires that the defendant *know* (or hope) that it is a package, but merely be reckless as to whether it contains a book. If the statute read "Whoever, while destroying a package, recklessly destroys a book," the defendant obviously must be reckless as to (1) whether a book is involved or (2) whether the item was "destroyed." But what is the mens rea as to whether a package is involved? This involves the default position.

The Code's analysis makes statutory interpretation easy. In *X-Citement Video*, for example (see page 83), it is clear that "minor" is a material element — the "harm or evil" here is using minors; Congress couldn't care less if adults were involved in pornography. And "minor" is an "attendant circumstance." The adverb "knowingly" modifies every material element of the statute wherever found; the defendant is guilty only if he "is aware" that the person in the film is a minor.[32] Rather than the very long opinion it filed, the Supreme Court could have solved this

issue in two paragraphs — if Congress had adopted the MPC (which it has not).

The Default Position Under the Code

The Code establishes recklessness as the default provision of mens rea. Section 2.02(3) provides that if there is no mens rea stated in the statute, the element is proved if a person acts purposely, knowingly, or recklessly with respect thereto. In our cocaine statute, for example, there is no mens rea stated. Thus, the prosecution will be successful only if it proves the defendant was reckless (or worse) with regard to the item being cocaine. In the case suggested above, the government would have to prove that Red was reckless as to a package being involved (and as to whether she was destroying it), *not* because "reckless" is used somewhere in the statute, but because the default provision applies.

The Code's position on default does two things (at least). First, it rejects the view, apparently adopted by the United States Supreme Court in *Staples*, supra, as a matter of interpreting federal criminal statutes, that "knowingly" is the presumed mens rea requirement. Thus, the Code seems to accept a lower default standard of culpability than did *Staples*. Second, the Code rejects, at least as a presumptive matter, imposing criminal liability on the basis of criminal negligence; all criminal liability is *presumed* to be based on subjective moral culpability. Unless the legislature expressly allows criminal negligence as a predicate for criminal liability, the statute will be interpreted as requiring subjective culpability.[33]

In *United States v. Flores-Figueroa*, 129 S. Ct. 1886 (2009), the Court seemed to adopt "element analysis" for interpreting federal statutes. In 2000, to secure employment, Flores gave his employer a false name, birth date, and Social Security number, along with a counterfeit alien registration card. The Social Security number and the number on the alien registration card were not those of a real person. In 2006, Flores presented his employer with new counterfeit Social Security and alien registration cards; these cards (unlike Flores' old alien registration card) used his real name. But this time the numbers on both

cards were in fact numbers assigned to other people. The federal statute that he violated provided, additionally, that:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years. 1 8 U.S.C. §1028A.

The Court, in an opinion by Justice Breyer, held that the "natural reading" of the statute was that the government had to prove that the defendant knew that the false papers and numbers he used belonged to "another person." Thus, the mens rea term (knowingly) "traveled" throughout the statute to the "material attendant circumstance" of "minor."

Summary

It would be too much to say that the Code solves the issues of interpretation raised earlier in this chapter. However, it gives more guidance and more serious consideration to these problems than any other tool we know. Moreover, since the Code has been adopted in a majority of states, and has influenced common law courts even when the legislature has not adopted the Code, it may now be suggested that element analysis is part of the American law of crimes.

Examples

1. Lisa's parents were incredibly wealthy entrepreneurs who earned hundreds of millions of dollars through the course of their careers. After her mother passed away recently, her father's health began declining rapidly. It was no secret that he likely would not make it much longer. Lisa secretly anticipated his death. Her relationship with her parents was always turbulent, and she assumed she had half of a large fortune coming her way. Lisa visited her father one day and found his will, which left most of his and his wife's estate to Tom — the golden child — and a modest sum to Lisa. The will stipulated that if either child was not alive upon the will's

execution, the living child would inherit everything. Furious, Lisa ran home and began plotting to kill Tom. She knew his wife would be out of town that weekend, so she bought a gun and made plans to stage a robbery gone wrong. That weekend, she broke into his house, snuck into his room, and unloaded her entire gun in the direction of his bed. Unfortunately for Lisa, she is a horrible shot and missed Tom entirely. Also unfortunate was that she struck and killed Tom's wife, who had cancelled her weekend plans. What result if Lisa is charged with intentionally killing Tom's wife?

2. Gilberto — a disturbed police officer — has recently begun having fantasies of killing and cooking various women. The idea thrilled him so much that he spent hours in online chatrooms discussing how to kill (and then eat) over 100 women with other similarly interested people. He even goes so far to discuss cooking and eating his wife (slowly) but never engaged in any of these actions. His wife happens to find these chats and reports her husband to the FBI right away. Has his behavior risen to the level of a crime?

3a. One fine October day, Napoleon, an avid hunter, goes hunting for deer. An animal scurries across the path, and Nappy, in a flash, shoots. He discovers that he has killed a rabbit, which is prohibited in this jurisdiction. Just at that moment, Odie, the friendly game warden, appears and arrests him. Nappy is prosecuted for knowingly killing the rabbit.

3b. Same facts, except that the charge is "recklessly" killing the rabbit.

3c. Same facts as in 3a, but this time the statute prohibits "negligently" killing a rabbit.

3d. Same facts as in 3a, except that it is a child who is killed. Is Nappy guilty of any form of homicide ("purposely," "knowingly," "recklessly," or "negligently" killing a human being)?

4. Later in October, Napoleon again goes hunting, this time in the woods in Smith County. Unbeknownst to him, his trek takes him across the county line into Jones County. As (good) luck would have it, he spots a rabbit and kills it with a single shot. As (bad) luck would have it, however, as he goes to pick it up, Odie, the

friendly game warden, shows up again, and again arrests him. This time the charge is "knowingly killing a rabbit in Jones County"; killing a rabbit is not illegal in Smith County. What result?

5. In Stephen King's book *Misery*, an obsessive fan of a mystery writer nurses him back to health when he is injured in an automobile accident. When he informs her that he intends to leave her house, she smashes his legs with a sledge hammer. If she is prosecuted in a common law jurisdiction for (1) assault with intent to kill or (2) aggravated assault, defined as "assault with a deadly weapon, inflicting great harm," is she guilty of either offense?

6. Barney goes into FAO Schwarz to buy toy dinosaurs for his children. He pays for the toys with a VISA credit card. Unknown to Barney, the card has expired. He is prosecuted under a statute that punishes anyone who "purposely uses an expired credit card to obtain goods or services."

7a. Jacob is a devout Snaker. His religion teaches him that no bite of a snake will be harmful, much less deadly, if the handler of the snake has true belief in God. Jacob does. He therefore takes his six-month-old son to church one day and, handling the snakes himself, allows them to bite the boy three times. The boy dies. Assume that a statute penalizes, in varying degrees, anyone who "intentionally, purposely, knowingly, maliciously, or recklessly" causes the death of another. Of which of these crimes, if any, is Jacob guilty?

7b. Same facts. The statute penalizes anyone who "causes the death" of another person.

8. Diana, an actress, picks up a gun and, just as the script requires, carefully and deliberately loads it with bullets from a box plainly marked "bullets." She then walks over to Charles, who is studying pictures of his newest polo ponies, and, holding the gun to Charles' temple, pulls the trigger, shouting, "And that's for Camilla, you bastard!" Charles drops to the floor, blood spurting from the wound. Diana immediately screams, "Someone get a doctor!" When she is charged with "purposely" killing Charles, she claims she did not know the gun was loaded. What result?

9. Cary is driving his new Rolls Royce one night at ten miles per hour *under* the speed limit. He is keeping a careful watch on the road. Suddenly, a child runs out in front of the car. Cary presses his foot to the brakes, but there is no response. Desperately, he screams at the child and veers his car hard to the left, applying the emergency brake at the same time. Nothing works. The child is killed. Cary is prosecuted for "reckless homicide." What result?

10. Helen, a burglar, has decided to burglarize a warehouse. She has "cased" the place for three weeks and is sure that everyone leaves by 10 p.m. On the night in question, she double-checks the parking lot and waits until 2 a.m., just in case anyone has stayed late. She then breaks in to the building by smashing a window and jumping through. As she lands, her foot hits the windpipe of Harry, a homeless person who has sneaked in through the back door and is sleeping there. Harry dies. Has Helen killed Harry "purposely, knowingly, recklessly, or negligently"?

11. Louis carefully "cases" a bank for two weeks, noting the times that every employee enters and exits. He knows that by 2 a.m., the only person in the bank is a guard. He arranges for someone to call the guard at 1:45 a.m. and tell him that his wife has just been taken to the hospital. Sure enough, the guard leaves by 1:50 a.m., giving Louis at least two hours to commit his theft. He breaks though the back door, opens the vault, and begins removing money, when he discovers a bank teller who was unwittingly locked inside the vault. Louis calls the hospital and waits until the paramedics arrive. The teller is saved. Louis is then prosecuted for "knowingly breaking and entering a building which is occupied by one or more persons." Is he guilty (a) under the common law? (b) under federal law? (c) under the Model Penal Code?

12. Abbie enlists in the United States Army in November 2002. Six months later, while stationed at Ft. Riley, Kansas, he is ordered to a post in Iraq. Convinced that the invasion of Iraq constitutes a war crime, he leaves Ft. Riley and appears on numerous television shows condemning the war and denying its legitimacy. Three months later, he returns to Ft. Riley. He is charged with "desertion with intent to avoid hazardous duty and shirk important service."

He seeks to introduce evidence that he wished to protest the Iraq war, not to avoid hazardous duty. May he do so?

13a. Riffi is charged with intentionally (purposely) running down and killing Constantine. Riffi argues that Constantine was a complete stranger, and that the death was an accident. The prosecutor seeks to introduce evidence that Riffi is of Armenian background, and that Constantine is Turkish American. The prosecutor's theory is that Riffi is seeking revenge on the Turks for the genocide committed against the Armenians in the early twentieth century. Riffi argues that motive is not relevant to the criminal law, and that the evidence should be precluded. What result?

13b. Riffi is charged with intentionally murdering Constantine. Riffi wishes to introduce evidence that Constantine is the lead hit man of the "Turkish mafia," and has personally killed 25 people. He argues that his motive should suggest that the killing was not socially undesirable.

14a. Al has a license to carry a concealed .45 Colt revolver. On Mother's Day, he takes his entire family, including his wife, two children, and both his and his wife's mothers, to Boliva's, his favorite family restaurant, which he has frequented at least monthly for the past two years. As he sits down to dinner, he is tapped on the shoulder by Pablo, the local sheriff, who charges him with violating the following statute: "It is illegal to carry a firearm in an establishment licensed to dispense alcoholic beverages." It's a fourth degree felony, punishable by a maximum sentence of 18 months. It turns out that Al forgot that his Colt was in his jacket pocket. What result?

14b. Al knows that he has the gun on his person. What he doesn't know is that that on May 1, Boliva's obtained a liquor license, which it had never had before. This is Al's first visit since May 1. What result?

15. Miniver has been sitting in a plane on the tarmac for over two hours, waiting for his "one-hour" flight to Boston to take off. As he rises to stretch his legs, Louis, the flight attendant, says to him, sternly, "Sir, you must remain in your seat so that we can taxi as

soon as possible." "As soon as possible," rages Louis. "I'm already supposed to be in Boston," and he swings at Louis, missing him. He is charged with violating 49 USC §46505, which provides that "[a]n individual on an aircraft . . . who, by . . . intimidating a flight crew member . . . interferes with the performance of the duties of the members, or lessens the ability of the member of attendant to perform those duties, shall be fined . . . imprisoned for not more than 20 years, or both." Miniver argues that the government must prove he had the specific intent to interfere with Louis's duties. He urges two grounds: (1) one cannot "intimidate" without having the specific intent to do so, and (2) the predecessor statute prohibited assaulting "so as to" interfere with the attendant's performance. That statute, he contends, required specific intent to interfere, and the successor statute should be so construed, as well. How should the judge rule?

Explanations

1. It is clear from the facts that Lisa did not intend to kill Tom's wife. In fact, she took active precautions to ensure that his wife would not even be home when she committed the murder. For this reason, it is unlikely that she even recklessly killed Tom's wife Lisa. However, Lisa will still be on the hook for the crime. Under the common law, the prosecutor will rely on the doctrine of transferred intent. Here, Lisa intended to kill Tom but, in an effort to do so, ended up killing Tom's wife. Recall that this doctrine requires that the actor's actual harm matches the intended harm. Lisa's intent was to cause death, which matches the ultimate result — death.

   The result is the same under the MPC, although it is not explicitly referred to as transferred intent. Instead, the MPC specifies that an element is established even if the actual result differs from the intent, if the only difference is the person injured or affected. (Section 2.03(2)).

2. Sadly, this example is based on a real case. Gilberto Valle, known as the Cannibal Cop from Queens, New York was arrested and served jail time for conspiracy to commit kidnapping. He claimed that he was simply fantasizing and never committed a crime. Many

experts agreed that his activities did not amount to anything criminal, but were simply "mens rea" without adequate actus reas. Gilberto's state of mind showed that he would be culpable for a purposeful murder if he went through with his plans to kill any of these women. However, the problem here is that after planning and plotting to eat and kill over 100 women, he never went through with any of his plans. Thus, a murder charge is out of the question, and so is conspiracy if he never commited any "overt acts" in support of his fantasies. It will make you feel really safe that Gilberto is now home still fantasizing and discussing killing and eating women in the safety of his home. See https://nypost.com/2017/02/08/cannibal-cop-still-fantasizes-about-being-an-actual-cannibal.

3a. Under the common law, Napolean would likely be found to have had the requisite mes rea, but he'll clearly be exculpated under the Model Penal Code. Many common law courts concluded that the mens rea word modified only the verb. Napoleon has clearly "knowingly" killed something — indeed, he wanted to kill what he shot at. Thus, under this common law approach, he has "knowingly" killed the rabbit. Don't despair, however — under that same common law, most courts developed a separate doctrine of mistake, which we will examine in Chapter 5. Suffice it here to say that if Nappy's mistake was "reasonable," he may ultimately be exculpated.

Under the MPC, the answer is easy — Napoleon has a good chance of being acquitted. "Rabbit" is clearly an attendant circumstance material element. Thus, under a statute requiring "knowingly," the Code allows conviction *only* if the defendant was aware that the attendant circumstance existed. Since Nappy was not aware that the animal was a rabbit, he is not guilty. Reasonableness is not — at this point — a relevant consideration.

3b. Again, we have to know what was going on in Nappy's mind, and what was reasonable for him to believe, depending on the language of the statute in this jurisdiction. One consideration here is whether the factual circumstances might have alerted a "reasonable person" that she was shooting a rabbit. Another way to think about it is

whether the defendant himself, with all his foibles, weaknesses, and incapacities, was consciously aware of a substantial and unjustifiable risk that what he was shooting was a *rabbit*. If not, he was not reckless, under either the common law or the MPC.

Caveat. The problems of proof go both ways here. If the prosecutor shows that the area was infested with rabbits, that there was only one deer, that deer are much larger than rabbits, that Nappy had plenty of time to see the animal, and so forth, the jury might not credit Nappy's statements as to his ignorance. But they cannot convict him on the basis of what an RPP would have figured out; they must be convinced that he really knew the risk.

3c. Here, the problem is the same under the common law and the Code: Does "negligently" require tortious, or criminal, negligence? Most courts required "culpable" negligence, but in most instances, those decisions involved homicides (of people, not rabbits). Moreover, since only "reasonable" mistakes of fact exculpated when there was no mens rea word (see below), some courts in nonhomicide cases concluded that "tortious negligence" could suffice here. Under the MPC, the resolution of this question is clear: Nappy's acts must constitute a "gross" departure from the conduct of an RPP. Mere tortious negligence is insufficient. Of course, trying to distinguish between "tort" and "gross" negligence is not easy, but the prosecutor could try. In addition to the facts suggested in 3b, the prosecutor would try to prove, for example, that the papers were full of stories about the influx of rabbits and that rabbits are easy to spot because of their white tails.

3d. Almost certainly not. Under the common law, Nappy's mistake will exonerate him; under the MPC, while Nappy clearly intended the death of what he shot, he did not hope or believe that it was a child, nor was he aware that it was. On the question of recklessness or negligence, we would have to explore the possibility that a child would be in the middle of a forest without a parent. This risk seems so unlikely that its disregard is neither reckless nor negligent.

4. Napoleon may have met his Waterloo. He obviously knew he was killing a rabbit. He did not know that he had wandered into nearby Jones County, however. Many common law courts concluded that a

mens rea word modified only the verb, thereby imposing strict liability (so far as mens rea is concerned) as to the remaining parts of the statute. This was especially true in the later words related to "jurisdiction," which seems to be the case here.

Caveat. No one doubts that "Jones County" is an element of the offense, and the prosecution must prove that the killing occurred there. The issue here is whether the prosecutor must also prove, beyond a reasonable doubt, a relevant mens rea (here, knowingly) with regard to that element.

The Model Penal Code will provide the same result, but for a different reason. It requires culpability with regard to any "material" element, but not with regard to an "element." The Code's distinction, however, is stated in the negative: a material element is an element that "does not relate exclusively to the statute of limitations, jurisdiction, venue, or any other matter similarly unconnected with (i) the harm or evil incident to conduct, sought to be prevented by the law defining the offense." This would seem to mean that only if the prosecution can show that Jones County is exclusively related to jurisdiction, it is not a "material element"; if the prosecutor cannot carry that burden, then the item *is* a material element, and mens rea must apply.

But how does one determine that? One position is that nothing can relate "exclusively" to jurisdiction: that by prohibiting rabbit killing only in Jones County, the legislature was after an evil unique to Jones County, and therefore, that the location is incident to the conduct sought to be prevented by the law defining the offense. This argument, though appealing, is certainly wrong, for it would make the Code's attempted distinction between an "element" and a "material element" meaningless. Thus, one must conclude that "Jones County" (which certainly sounds as if it is solely related to jurisdiction) is not a material element, but only an element, and mens rea does not apply to that element. So long as Napoleon knew he was killing, and that what he was killing was a rabbit, he's a gone goose.

5. Because the common law required a "specific intent" when a statute used the words "with intent to," the defendant will not be guilty, assuming she can convince the jury that her intent was only

to make sure that the writer remained in her house. On the other hand, aggravated assault, which may carry an even greater penalty, does not use the term "with intent to," and is likely to be construed as a general intent crime, requiring only that the defendant intended to assault, and knowing that she was using a sledge hammer (assuming that the sledge hammer is a "deadly weapon" within the meaning of the statute, which it almost surely is).

6. Barney seems like a nice enough chap, but he may well have violated this statute under the common law. Different common law courts might have defined "purposely" differently; for this example, we will equate it with "intentionally," a much more frequently used adverb, whose meaning is more or less self-evident. The first question, of course, is whether Barney "purposely used" the credit card. This seems fairly straightforward: Barney used what he knew to be a credit card and therefore "purposely" used it. But is that sufficient for liability? Or must Barney's "intent" be to use an "expired" credit card? How far down the statute does the word "purposely" run? Many common law courts would conclude that "purposely" does not modify "expired" or even "credit card"; as long as Barney "intentionally used" something that was in fact a credit card, and that was in fact expired, that would have been enough. His mens rea as to what it was, or whether it was expired, would have been irrelevant. Moreover, if "purposely" modifies "expired," what does "purposely" mean? Would it require that Barney intended to cause the card to be expired? Or would it require that he know that it was expired? Or that he know that it "might be" expired? Common law courts wrestled with these statutory interpretation problems and came to different conclusions.

   Under the Model Penal Code, the answer is easy. The mens rea word modifies every material element of the statute. Obviously, it is material that the card be "expired." If it were *not* expired, there would be no harm (assuming, for example, it was not stolen). Under §2.02(1), "purposely" modifies every material element. Since "expired" is not a result (at least not of Barney's conduct), it must be an "attendant circumstance" material element. And, by §2.02(a)(ii), Barney must "be aware of the existence of such

circumstances or . . . believe or hope that they exist." Unless Barney knows or hopes the card is "expired," he is home free.

7a. Surprise. Under the Model Penal Code, Jacob is not guilty of any of these crimes. Each of these mens rea words requires, with regard to the result element of death, that the defendant either "consciously desire death," "know that it is practically certain," or "consciously disregard a substantial . . . risk" that death will occur. None of these describes Jacob's mental state with regard to death. Jacob honestly believed that there was no risk to his son. Therefore, he did not "consciously disregard" any such risk.

Under the common law, the question is closer because Jacob did "intend" that the snakes bite the boy. However, at least in homicide cases, the courts looked beyond the "statutory mens rea" and often inquired about the "traditional mens rea" issue of moral culpability. From his own viewpoint, certainly, Jacob is not "morally culpable." That may mean that he did not have the requisite mens rea. See the discussion of homicide in Chapter 8. See also *People v. Strong*, 37 N.Y.2d 568, 338 N.E.2d 602 (1975).

7b. More difficult at first blush. Clearly, Jacob "caused" his son's death. However, common law courts, certainly when faced with a severe punishment (possibly execution), would usually read into a statute like this some level of mens rea. Almost certainly they would have required at least recklessness. *Staples*, discussed in the text, adopted "knowingly" as the position in a nonhomicidal (federal) case. Even if recklessness were the requisite mens rea, Jacob is not guilty, since that mens rea requires subjective awareness of the risk. The result under the Code is the same. Section 2.02(3) establishes recklessness as the "default" position in such statutes. Since, as discussed above, Jacob did not consciously disregard the risk of death for his son, he was not reckless.

This is an unsettling result. Obviously, Jacob is a dangerous person, at least to his own children. Is there nothing the law can do? There is, in fact, much that the "law" can do. Jacob might be civilly committed for mental illness (assuming the jurisdiction has the properly drawn statutes and Jacob fits within them). The state could also take away Jacob's other children. Very frequently the

undoubted need of society often persuades courts or legislatures to "find" some crime of which Jacob could be convicted, rather than rely on processes of civil commitment, confinement, quarantine, reeducation, and so on. See, e.g., *State v. Williams*, 4 Wash. App. 908, 484 P.2d 167 (1971).

There is one crime of which Jacob is almost surely guilty (aside from child abuse). If "negligent" homicide were punished in the state, and negligence were measured by an objective, rather than a subjective, standard, Jacob would almost certainly fall within that statute.

8. Whether or not Diana will be convicted will come down to how successful the prosecution is in proving the requisite mens rea. If the prosecutor cannot show, beyond a reasonable doubt, that Diana knew the gun and bullets were real, she will likely be acquitted. Our first inclination, of course, is to believe Diana — after all, as she claims, she was just following the script. Her claim that she did not know the bullets were real seems perfectly acceptable. The prosecution's best strategy will be to find additional facts from which a jury may make an inference that Diana did in fact act intentionally.

   Suppose, for example, that we were to discover that, in addition to being thespians, Diana and Charles were longstanding competitors in art collecting, and that only moments before the play began, Diana had discovered that Charles had destroyed all of her Picassos. Or that Diana and Charles were brother and sister, and that Diana had just learned that their ailing mother had left everything to Charles, but if Charles died first, then the entire $100 million estate would go to Diana. From these facts about motive we might begin to reevaluate our first inference (and our willingness to believe Diana) and draw others.

9. It depends. At the time of the injury, Cary is anything but reckless. However, if his brakes fail because he has consistently refused to have them adjusted, and they have been slowly deteriorating, then his prior fault (indeed, his getting into and driving the car that night, if he took cognizance of that risk) could render him liable. Remember that the principle of contemporaneity does not require

that the mens rea coincide with the *harm*, but with the *act* that causes the harm. (Of course, if the evidence shows that even if the brakes had been in superb condition, the child would have been killed, then Cary's negligent act is not a cause in fact of the death.)

10. Helen is surely not guilty of any kind of homicide that requires a mens rea. Her care that there be no one present demonstrates that she did not even consider that there was a risk, much less consciously disregard such a risk, that injury, much less death, could result from the burglary. She took every precaution that injury would not happen. Moreover, given all the circumstances, it is hard to say that she was "negligent" or criminally negligent *with regard to the risk of death. Caveat:* In Chapter 8, we will discuss Helen's possible liability under the felony murder doctrine, which does not require mens rea of any kind as to a death occurring during a felony.

11. The question, of course, is whether Louis must "know" that there was a person in the building. (Contrast the Model Penal Code definition of "occupied structure," which includes any building that MAY be occupied, whether or not it is at the time of the crime. MPC Section 221.0(a).) Louis did not "know" that — indeed, he was convinced that no one was in the bank. Under the common law, the answer is unclear: While most courts would say that "knowingly" modifies that phrase, some courts have held that the adverb stops at the verb, and that it is enough if the defendant knows the "general nature" of his conduct, rather than the specifics.

    If the statute is federal, the answer will revolve around whether the decision in *Flores-Figueroa* (discussed in the text, at page 83) applies to this statute. Although the court relied upon legislative history and intent, it also announced the general proposition that the "natural reading" of any criminal statute is that the adverb (mens rea word) applies to all the critical parts of the statute. Therefore, it is *likely*, but *not assured* that Louis will not be guilty of the crime.

    Under the Model Penal Code, the answer is really easy. Surely "occupied by one or more persons" is a material element of the offense, and Louis is off the hook.

    Caveat. At least so far as the common law response, there is

one possible hook — the “greater crime” theory, discussed in more detail in Chapter 6. That theory is that if the defendant knows he is engaged in a crime (and breaking into the bank would itself be criminal trespass at least), then he is guilty of any “greater” crime that he happens to commit. We’ll get to that question when we get to it.

12. Held, in *United States v. Huet-Vaughn*, 39 M.J. 545 (1994): yes. While motive is not relevant to whether Abbie “deserted,” it may be relevant to the actual charge, which requires the government to prove that his “specific intent” (reason) was to avoid hazardous duty. It is possible that this holding may be limited to military law, and may not apply to civilian law, but the military court in this case cited many non-military decisions. Indeed, the court found that there was enough evidence to support the lesser (general intent) charge of being absent without authority.

13a. Motive is not an element of an offense — any offense — and so one would think that Riffi’s motive would be inadmissible. But Riffi’s motive here supports an inference that he acted “intentionally,” and not accidently. The evidence is likely admissible.

13b. If evidence of motive is relevant in (a), surely it’s also admissible here — right? No. Riffi’s claim does not dispute that he killed Constantine intentionally — only “why” he did so. And while his motive may well be considered in assessing Riffi’s sentence (although taking the law into one’s own hands is rarely considered mitigation even in sentencing), it’s not relevant to his guilt (consider, as well, that once again Riffi’s motive supports the prosecution claim of intentionality).

14a. At least in New Mexico, Al will be back on the ranch in no time. Even though the statute doesn’t use the term “knowingly,” the court in *State v. Powell*, 115 N.M. 188, 191 (Ct. App. 1993), noted that the intent to possess a firearm requires “the knowledge that the object possessed is a firearm.” The same result will be reached under the MPC — under §2.02(3), the default provision is recklessness, and there are no facts here to suggest that Al

"consciously disregarded" the risk that he was taking the gun into the restaurant.

14b. Al will be spending Mother's Day in prison next year. The statute does not require that Al "know" that the restaurant has a liquor license. *State v. Torres*, 134 N.M. 194, (N.M. App., 2003). The *Torres* court held that the knowledge requirement did not apply to the liquor store; as to that, the statue was a "strict liability" offense (see Chapter 6).

If New Mexico were a Model Penal Code state, however, the result would be different. Under the MPC, the mens rea requirement applies to each material element. Given the specificity of the language in the statute, which singles out "establishments licensed to dispense alcoholic beverages," it is clear that the location is material to the statute's overall purpose — i.e., the evil sought to be prevented. Therefore, Al must have known that the establishment was licensed to dispense alcoholic beverages to be culpable under the MPC.

15. There's absolutely no doubt that waiting on the tarmac is exasperating — and waiting for two hours may have other consequences. Nevertheless, courts have been clear that this is a crime of general, not specific, intent. In *United States v. Grossman*, 131 F.3d 1449, (11th Cir. 1997), the court concluded that even if the prior statute *might* have been interpreted to require a person to actually interfere with the attendant, the amendment made clear that no such specific intent was required under the statute as rewritten. It may not be irrelevant that intoxication can exonerate a defendant charged with a specific intent crime, and many "airplane rage" instances occur after the passenger's gotten a lift out of spirits (see Chapter 17). Miniver, drunk or sober, will be grounded for a significant period of time.

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1. *Morrissette v. United States*, 342 U.S. 246 (1952).
2. Model Penal Code §2.02, commentary at 230 n. 3 (1980).
3. Thus, in *Rex v. Davis*, 168 Eng. Rep. 378 (1788), a statute prohibited "wilfully and maliciously" shooting, but the indictment charged that the defendant "unlawfully, maliciously, and feloniously" shot. The indictment was ruled invalid because "wilfully" must mean something different than "unlawfully and feloniously." There was certainly no doubt that the indictment charged the defendant with having *traditional* (i.e. blameworthy) mens rea, but that was

insufficient: There was a requirement that the prosecution charge and prove *statutory* mens rea as well.

4. “Once upon a time, mens rea meant culpability. . . . During the Enlightenment, its essential normativity remained, wrapped in the language of evil and wickedness, malice and passion. . . . For much of the past fifty years, the conventional view has tried to bury this judgmental feature. It has attempted to isolate the individual as the object of mens rea and to make mens rea look less like ‘guilty mind’ than simply ‘mind.’” V.F. Nourse, Hearts and Minds: Understanding the New Culpability, 6 Buff. Crim. L. Rev. 361, 365-6 (2002).

5. *Cunningham* is often interpreted as saying that whether the defendant has traditional mens rea is irrelevant, but that is not the holding. The holding is that traditional mens rea is not sufficient; whether it is necessary is not raised by the case.

6. Elaine M. Chiu, The Challenge of Motive in the Criminal Law, 8 Buff. Crim. L. 653 (2005); Martin Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 Utah L. Rev. 635; Michael Rosenberg, The Continued Relevance of the Irrelevance-of-Motive Maxim, 57 Duke L.J. 1143 (2008).

7. Of course, this hypothetical rests mostly in the minds of law professors: Imagine that someone sees Hector aim a feather at Achilles, and Achilles dies. Unless Hector admits his intent, no one, including the witness, is likely to deduce Hector’s actual mens rea.

8. One might find an echo in the theory of transferred intent of the “greater crimes” theory. See Chapter 6. Under that approach, since Mary was willing to engage in some criminality, she should be required to take the risk that her actual crime is greater than she expected it to be.

9. If the defendant does not know that there is such a risk, then the defendant is not reckless but at worst, criminally negligent. See the next subsection.

10. Many statutes, of course, use the term “recklessness” to describe such driving, but that usage is incorrect, at least under most definitions of recklessness, because there is no requirement that the government prove that the defendant had a mens rea with regard to any injury.

11. These fears were not necessarily unreasonable. Even Congress later recognized that many American Indian families had been “unnecessarily” broken up by overly aggressive employees of the Bureau of Indian Affairs.

12. On the other hand, in tort law, the defendant’s mental illness or insanity is irrelevant, whereas in criminal law, insanity is a full excuse (see Chapter 17).

13. *People v. Goetz*, 68 N.Y.2d 96 (1986).

14. *State v. Wanrow*, 88 Wash. 2d 221 (1977).

15. Schopp, Sturgis & Sullivan, Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse, 1994 U. Ill. L. Rev. 45.

16. In *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837), for example, the court explicitly rejected a subjective standard of negligence because it would require “measuring the feet” of every defendant. Thus, tort law uses an objective, fictitious person to assess the defendant’s liability and does not actually care what was actually going on in *this* defendant’s mind.

17. See I. Buford, Essays on Other Minds (1970); Comment, Motive, Crimes and Other Minds, 142 U. Pa. L. Rev. 2071 (1995).

18. Prior to the twentieth century, defendants were generally prohibited from testifying in their own behalf. The common law, seeking some way in which to allow the prosecutor to establish mens rea, and particularly intent, established a “presumption” that a person “intends the natural and probable consequences of his act.”

19. K. Llewellyn, The Common Law Tradition (1960) (maxims of statutory interpretation can conceivably be manipulated to include or exclude anything).

20. Exceptions to this practice are considered in Chapter 6.

21. *Morrissette v. United States*, 342 U.S. 246 (1952).

22. *Cotterill v. Penn*, 1 K.B. 53 (1936).

23. A federal statute that prohibits assault against "a federal officer" may well be different; a federal court would not have jurisdiction over an assault against a nonfederal person. See *United States v. Feola*, 420 U.S. 671 (1975). In that event, the status of the victim is in fact jurisdictional and might not require a mens rea.
24. For example, the New Jersey "drug-free school zone" statute expressly provides: "It shall be no defense . . . that the actor was unaware that the prohibited conduct took place while or within 1000 feet of any school property." N.J. Stat. Ann. 2C: 35-7.
25. *People v. Hager*, 476 N.Y.S.2d 442 (Nassau Cty. Ct. 1989).
26. Again, the same caveat as with *X-Citement Video* and *Flores-Figueroa: Staples* applies (at best) only to interpreting federal statutes; it has no applicability (except as persuasive authority) in interpreting state statutes.
27. The greater culpability includes the lesser. Thus if a prosecutor proves that the defendant "purposely" destroyed the book, the defendant is guilty of "recklessly" destroying it.
28. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 131 (New York: Wolters Kluwer, 2017).
29. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 131 (New York: Wolters Kluwer, 2017).
30. See Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 130 (New York: Wolters Kluwer, 2017).
31. See Paul H. Robinson & Jane Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681 (1983); Kimberly Ferzan, Don't Abandon the Model Penal Code Yet! Thinking Through Simon's Rethinking, 6 Buff. Crim. L. Rev. 185 (2002).
32. Note that if the statute had used the adverb "purposely," the defendant could be guilty not only if he was "aware" of the actor's age, but also if he "hoped or believed" that the actor was a minor.
33. At least 11 states have adopted the Code's use of recklessness as the default provision, six use negligence, and one uses knowledge. Holley, The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine, 27 Sw. U. L. Rev. 229 (1997).

CHAPTER 5

Mistake

OVERVIEW

We all make mistakes — even criminals. However, suppose someone who thinks that what he is doing is legal turns out to be mistaken, and the act is a crime. Is he guilty? The common law answered this question as it often does: “It depends.” Consider a *factual* mistake. As a general rule, if Angelica reasonably thinks the white powder in her vial is salt, though it is really cocaine, she is not guilty of transporting cocaine. The law treats *legal* mistakes, however, strikingly differently. Arthur has been told by a state EPA director that he may, without a permit, dump what he knows to be toluene. The advice turns out to be a misinterpretation of the environmental statutes. Such a mistake would never exculpate. This tension between legal and factual mistakes and the exceptions to these general rules create ulcers in law students — not to mention in clients.[1]

The Model Penal Code takes a somewhat different, more subjective view. Angelica’s *factual* mistake will exculpate her unless the statute punishes “criminally negligent transportation,” and then only if her mistake was a “gross deviation” from the Reasonably Prudent Person (RPP) standard of care. Arthur’s *legal* mistake, if constituting a reasonable reliance upon the agency’s advice, would likely be a defense under the Code.

MISTAKE AND IGNORANCE OF LAW

Perhaps no rule of criminal law is better known than the doctrine

ignorantia lexis non exusat — "ignorance of the law is no excuse." Thus, in the example in the Overview, even if Arthur has gone to five lawyers, four priests, three government officials in charge of pollution control, and read the statute books himself, he is still liable if the advice he has received has been erroneous. He will be convicted and punished as though he were just as culpable as Dave, a midnight dumper who dumped toluene in the river, knowing it was illegal and dangerous.

Supporters of the ignorantia rule argue that people *should* know the law and not act until they do. They argue, further, that anyone could claim reliance on the advice of others, and that this would either be too hard to (dis)prove or generate collusion between defendants and others, who would claim to have given such advice. (As one writer said nearly three centuries ago, "Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will plead, and no man can tell how to confute him." J. Selden, Table Talk — Law 61 (3d ed. 1716).) A more recent argument sustaining part of the doctrine is that persons who are, or should be, aware that their conduct might be regulated have a "duty to inquire" about the law and are morally blameworthy for failing to ascertain its reach.

Opponents of the doctrine contend that failure to know every statute and administrative regulation, and the interpretation of every statute and administrative regulation, does not reflect moral blameworthiness. (Indeed, if it did, every lawyer, indeed every judge on every court, should beware.) A person who is truly ignorant or mistaken about whether his conduct is unlawful, particularly one who has actively and fairly sought to determine the law, is neither morally culpable (in the "traditional" sense of mens rea) nor purposeful or reckless about breaking the law (in the "statutory" sense of that term).

The rule is sometimes rephrased as saying that everyone is conclusively presumed to know the law. When Blackstone wrote, such a view was at least plausible. A claim that one did not know that rape, murder, robbery, or mayhem was illegal (or immoral) would hardly be taken seriously. Yet the rule continues to be followed today, when criminal law applies to many new areas of activities, and encompasses literally hundreds of thousands of administrative regulations, as well.[2] If this explanation of the rule were tested against modern methods of assessing presumptions,[3] it would be clearly unconstitutional.

The argument that the claim of ignorance is too easily made and too difficult to refute was rejected by Justice Holmes, who pointed out that that concern was present for virtually all defensive claims. To the extent that it was easier to make than some of those other claims, the law could place on the defendant the burden of persuasion. O.W. Holmes, The Common Law (1881).

Holmes proffered another support for the rule, however — that we wish to encourage people to learn what the criminal law is. Moreover, as an ardent utilitarian, he argued that it is occasionally necessary to sacrifice the morally innocent person to achieve the better good of establishing an incentive for learning the law. However, the doctrine has been applied even where the defendant has actively sought legal advice from various sources, including court opinions, judges, prosecuting attorneys, and lawyers. Still, there is the problem that Selden raised: Even if Arthur at trial produces those lawyers, priests, and government officials, and they affirm *their* advice, how will the prosecutor ever find the 30 lawyers, priests, and officials who gave Arthur different advice? Should he put Arthur's picture in the newspaper with the caption "If you gave this man legal advice on dumping toluene, call my office"?

Similarly unsuccessful has been the argument that, even if ignorance of the *criminal* law should not excuse (in order to encourage persons to learn what the criminal law is), ignorance (or mistake) as to other laws, which are then incorporated into the criminal law, should excuse.[4] Suppose the criminal law prohibits blocking public roads, and Yehudi knows that he is blocking a road but he believes the road to be private. Unknown to him, the road has become "public" under condemnation just a few hours before. Yehudi should not be punished, the argument goes, because he has learned what the criminal law prohibits. His mistake is about condemnation law, not criminal law.

Until very recently, the rule has reigned virtually unchallenged. However, the Model Penal Code and several recent United States Supreme Court cases discussed below suggest that future decisions may be more open to changing the rule, at least in some contexts.

Ignorance of the Law

We can distinguish between a defendant who does not know that a particular act is even arguably criminal and a defendant who knows that there is a law generally applying to his area of activity, but believes that the law does not cover his particular act. The first is *ignorance* of the law; the second, *mistake.*

The few reported decisions of ignorance of the law usually involve aliens to a particular culture[5] and epitomize the injunction, "When in Rome (or at least a common law country) do as the Romans do." Thus, in *In the Matter of Etienne Barronet and Edmund Allain*, 118 Eng. Rep. 337 (1852), the defendants, Frenchmen who had taken political asylum in England, acted as seconds in a duel fought on English soil. Dueling was not merely legal in France; participation was a "matter of honor." The defendants were unaware that dueling was illegal in England. The court declared their ignorance of the law to be irrelevant.

This rigor is still in force. In *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989), the defendant, who lived in Italy and who was interested in pornographic pictures, was contacted by an undercover FBI agent in the United States and induced (but not entrapped) to send such pictures to the agent. When the defendant arrived in the United States for unrelated business, he was arrested and charged with "using the mails to send child pornography." He contended that since dissemination of such materials was not a crime in Italy, he should be excused in the United States, as well. The court rejected his claim of ignorance of the law.[6]

A more recent opinion of the United States Supreme Court *may* suggest a slight movement away from this doctrine, at least in interpretation of federal statutes. In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the defendant owed over $100,000 to a gambling casino in Reno, Nevada. When he tried to pay off most of this debt in cash, he was informed that if he paid $10,000 or more in one lump sum, the casino would have to report this to the United States government under anti-money-laundering statutes. For reasons known only to Ratzlaf, he did not wish the government to know of his transactions. The casino thereupon drove him (in a limousine) to a number of banks in the town, at each of which he could obtain a cashier's check for an amount under $10,000, in which case neither the casino nor the bank would have a duty to report the transaction. Ratzlaf agreed that he had willfully structured his transactions so as to avoid reporting, but argued that he

did not know that this was illegal. The trial judge instructed the jury that this ignorance was irrelevant, as long as Ratzlaf in fact “willfully structured” the transaction. The Supreme Court reversed, holding that his ignorance of the legal duty not to structure the transaction made his act “nonwillful” under the statute.[7]

Mistake of Law

In many cases, defendants “rely” on their own “understanding” of the law, informed by either “general custom” or a “hunch,” although in some rare instances defendants will attempt to find and read the applicable criminal statute. Far more common are cases where a defendant suspects that his activity may be subject to government, even criminal, regulation, but concludes, as the result of advice that he has sought, that his actions are not criminal. In all of these cases, the defendant has sought to discover what the law is, as Holmes hoped. Yet in virtually none is he exculpated. For example, a minister charged with erecting in his front lawn a sign declaring that he performed marriages was precluded from presenting evidence that he relied on advice from a county attorney that the sign was acceptable. *State v. Hopkins*, 193 Md. 489 (1959). Similarly, a restauranteur who relied on the judgment of a municipal court (given in another proceeding) that the device he was installing was not a “gambling device” within the meaning of the criminal law was held liable for his mistake of law. *State v. Striggles,* 202 Iowa 1318 (1926). And a fisherman was precluded from introducing evidence that he had obtained advice from both an attorney and a commissioner of fishing licenses that his method of fishing for smelts was not illegal. *State v. Huff*, 89 Me. 521 (1897).

Reliance on a lawyer’s advice was never an acceptable defense under the common law. In *Staley v. State*, 89 Neb. 701 (1911), the defendant and his cousin, both of whom lived in Nebraska, wanted to marry but knew that their marriage would be illegal under Nebraska law. They then were married in Iowa, which did not prohibit marriages between cousins. When they returned to Nebraska, the county prosecutor told the defendant that he would be prosecuted for

fornication if he continued living with his cousin. The defendant then went to three attorneys, each of whom informed him that the Iowa marriage was indeed not valid in Nebraska. Consequently, the defendant left his cousin. A year later, he married another woman in Nebraska and was then prosecuted for bigamy. It turned out that the Iowa marriage *was* valid in Nebraska, and that he was therefore still married to his cousin when he "remarried." On the basis of "ignorantia lex," the defendant was precluded from presenting any evidence of the legal advice given him by the three lawyers or by the county prosecutor concerning the (in)validity of his marriage to his cousin.

Thus, under common law, the defendant's mistake of law was usually held to be irrelevant to his guilt. A recent decision from the United States Supreme Court, however, casts doubt on this rule, at least in federal cases involving the statutory word "willfully." In *United States v. Cheek*, 498 U.S. 112 (1991), the Court held that even an *unreasonable* mistake of law could negate liability. Cheek, an airline pilot, was repeatedly told that his wages constituted "income" for purposes of the federal income tax laws. However, he was also told by anti-income tax zealots, and by lawyers who agreed with them, that this was *not* the proper interpretation of the tax laws. He was also told (notwithstanding numerous court decisions to the contrary) that the income tax law, as well as the amendment that allowed it, was itself unconstitutional. He claimed he honestly relied on this advice, but the trial court instructed the jurors that unless his reliance was reasonable, they could not consider it. In reversing Cheek's conviction for "willfully" failing to file tax returns and pay taxes, the Supreme Court concluded that the jury should have been instructed that *any* reliance, however unreasonable, on *any* advice would exculpate.[8]

Some have argued that if mistake of law is to exculpate, it is because it is an excuse, rather than a justification (see Chapter 15 for a discussion of the difference). However it is characterized, mistake — particularly one generated by reliance on what appears to be a reasonable source, such as a court opinion, government official, or even a lawyer — should be granted, since the defendant has not acted in a morally blameworthy way.[9]

Exceptions to the Rule

"Specific Intent" Crimes

Common law courts carved out minor exceptions to the harsh rule of "ignorantia lex." One was the rule that any mistake of law, no matter how unreasonable, would be a valid "defense" to a specific intent crime (but not to a "general intent" offense). Larceny is a "specific intent" crime (see Chapter 10). If Abraham believes, however unreasonably, that by law he is the owner of Esau's car and proceeds to take it "back," Abraham is not guilty of larceny because larceny requires that one intends to take the property of "another." Since Abraham thinks that he is the owner of the car, he has not intentionally taken property he knows to be "another's."

It may well be that Abraham is not morally culpable, given his belief, and therefore should not be punished. *Ratzlaf* and *Cheek* both involved the mens rea word "willfully," and might be seen as examples of the "specific intent" exception. Yet it is uncertain whether legislatures actually think about the specific-general intent division when writing statutes — surely the best result would be for legislatures to adopt a general statutory interpretation rule regarding the impact of mistake or ignorance of law, whether the crime is considered one of "general" or "specific" intent. And, once again, our caveat: It is easy to think that a decision of the United States Supreme Court is "the law of the land." But not if, as in *Ratzlaf* and *Cheek* (or even other cases discussed in this book), the Court is merely interpreting federal statutes. Be careful to distinguish *constitutional* decisions from *statutory interpretation* decisions.

Most crimes are NOT specific intent crimes — although many "economic" and "white collar" crimes, such as most tax offenses or frauds, are. Defendants in those crimes cannot only claim their own lack of specific intent, but, as well, rely upon advice of lawyers and others because any advice could negate their "specific" intent.

Noncriminal Law Mistake

Commentators have suggested another possible "exception" to the

ignorantia lex doctrine. If the defendant is mistaken (or ignorant) not as to the criminal law, but as to a part of the civil law that is incorporated in the criminal law, they contend that the doctrine should not apply. Here, the reason for the rule (enhancing knowledge of the criminal law) does not apply. Suppose that Abraham, in the car problem above, has adversely possessed the car for 11 months, believes the law requires 10 months to possess adversely a chattel, but the time period is really one year. His mistake then is not one of criminal law. He knows there is a law against *larceny*, but he believes that, as a result of *property law doctrine*, the car is his.

Staley is an even more attractive case for this exception. Staley knew that there was a criminal law against bigamy. He also knew that, under Nebraska domestic relations law, cousins could not marry. His mistake, and that of the three attorneys he consulted and the county prosecutor who threatened him, was one of *federal constitutional law*. They all failed to understand that, under the full faith and credit clause of the United States Constitution, Nebraska had to honor a marriage that is valid where it was performed.[10] While it may be desirable that citizens know the criminal law, and perhaps even the domestic relations law, of their home state, it seems unduly optimistic to think that we can encourage every citizen to become a constitutional law scholar.

Estoppel

When a defendant relies explicitly on the advice of a government official in charge of a particular activity, the government may sometimes be “estopped” from prosecuting an individual. This is a relatively new idea, and is a sea change from the ancient notion that “the king can do no wrong.” Although the Court itself has never used the term “entrapment by estoppel,” one of the leading United States Supreme Court cases involved a witness who was told by the commission of a legislative committee that he could invoke the privilege against self-incrimination, at which point he was held in contempt of the committee. *Raley v. Ohio*, 360 U.S. 423 (1959). And in *United States v. Pennsylvania Industrial Chem. Corp.*, 411 U.S. 655 (1973), the Court held that a defendant charged with discharging refuse into navigable waters without a permit (often seen as a strict liability offense — see

Chapter 6) should have been allowed to show that it was affirmatively misled by the Corps of Engineers — the responsible administrative agency.[11]

The Model Penal Code

Retention of the "Ignorantia Lex" Doctrine

The Code retains the basic doctrine. Section 2.02(9) expressly provides that "neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense unless the definitions of the offense or the Code so provides." There is one exception to the "no ignorance" position of the Code. If the statute or regulation in question "has not been published or otherwise reasonably made available" to the defendant, the claim is allowed. See §2.04(3)(a).

The "Reasonable Reliance" Approach to Mistake

In General

On the other hand, the Code takes a significant, though cautious, step to protect defendants who "reasonably" rely on advice as to the legality of their proposed conduct. Section 2.04(3) provides that a defendant has a defense[12] to a charge if he can show that he has acted "in reasonable reliance" on:

> (b) an official statement of the law, afterwards determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by the law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Notice that this provision helps persons in Striggles' position because it allows reliance on *any* judicial opinion. And it probably helps Hopkins, if the county attorney falls within the words of subsection (iv). But Staley's reliance on his lawyers is not relevant even under the Code, for reasons we will explore in a moment.

First, however, let us assess the general purpose of this provision. Surely, in a maze of government bureaucracy, citizens have come to rely on all levels of government bureaucrats to help them stay within the law. The Code provides some amelioration of the common law rule in light of this reality, but *only* if the defendant relies on persons whose *official tasks* involve statutory interpretation or enforcement. This seems unduly narrow.

Consider Butch, who goes to his local zoning ordinance office to get advice about building an addition to his house. Jocelyn, an employee there, tells him, incorrectly, that he needs no permit for it. She's wrong, and he is prosecuted. If Butch *knew* that Jocelyn was not so authorized, his reliance on her advice might be unreasonable. However, few citizens would be likely even to raise the question of whether the person behind the desk who gives them the answer to their question fits the statutory definition: To consumers, persons working in a government office are probably fungible.[13] And even if they asked, could they be sure that they have gotten "the right person"? Furthermore, is *any* prosecutor sufficient under subsection (iv), or must the interpretation come from "the" county prosecutor? Laymen are unlikely to make such a distinction. Also, the reliance must be on "an *official* interpretation" by that office. What makes the interpretation "official"? The Code and Commentary are silent. Surely, however, any reliance by a citizen on the word of a governmental official who works in the relevant office or *appears* authorized should be sufficient to exonerate.

Some courts have interpreted the MPC provision so narrowly that it is almost irrelevant. In *Hawaii v. DeCastro*, 913 P.2d 558 (Haw. App. 1996), for example, DeCastro, driving a van, stopped to write down the license plate of a patrol officer who, in DeCastro's view, had been recklessly chasing a speeding motorist. The officer then threatened DeCastro with arrest. DeCastro called a 911 operator, who "gave him permission" to leave the scene. When DeCastro did so, the patrol car followed and arrested him. The court, interpreting its version of the MPC, concluded that, even if the operator's authorization to leave the scene was a "statement of the law . . . contained in . . . an administrative grant of permission," the statement was not "official," and DeCastro's reliance therefore was unreasonable as a matter of law.

Reasonable Reliance and Lawyers

The Code confirms the common law rule, exemplified by *Staley*, that reliance on a lawyer's advice is not a defense. Supporters of this position argue collusion may occur between a lawyer and his client. However, this is a dubious explanation: Some government employees, like some lawyers, may collude with clients, but the Code does not blanketly prohibit reliance on their advice.

A better explanation, perhaps, is not that lawyers are too ready to break the law, but that they are trained to assist the client to obtain what she wants. Lawyers, some argue, will be too tempted (subconsciously) to give the "desired" advice. And certainly law students know that there are at least two possible interpretations and arguments to every legal question. Thus, to be not snide but realistic, it may be that *no* reliance on the word of an attorney is "reasonable."

New Jersey, however, allows *any* reasonable reliance, including on the advice of an attorney, as a defense. N.J. Stat. §2C:2-4d (1994). (Perhaps, because New Jersey has more lawyers per capita than any other state in the country, it is impossible *there* to avoid advice from a lawyer.)

Does the Code really change everything? Does it change anything? The fear that the Code's reasonable reliance doctrine would exculpate too many defendants seems overdrawn. Mr. Ratzlaf would be worse off under the Code than under the United States Supreme Court decision. He relied on no "official interpretation," and his claim of ignorance of the law is not explicitly recognized in the statute (unless one interprets willfulness as a "specific intent" word). Moreover, it is quite possible that many of the defendants in the other cases summarized above would still be found liable under a "reasonable reliance" doctrine.

MISTAKE OF FACT

Reasonableness and Specific Intent

In stark contrast to the doctrine of mistake of law, the common law

acquits persons who, because of mistakes of *fact*, commit what turn out to be crimes. Thus, Little Red Riding Hood (see Chapter 4) would have been held not guilty of "knowingly" destroying a book, because she had made a "mistake of fact" (i.e., she didn't know she was burning a *book*). Although most statutes were silent as to the importance of mistake, the common law courts created a whole doctrine of mistake, which held that some mistakes of fact "negated" mens rea.[14]

The reasons for not finding Red guilty seem obvious: A retributivist would not convict her because she is not morally blameworthy; and because people will not be deterred from doing what they believe to be innocent acts, there is no utilitarian need to punish either. The one possible exception to this last statement has created much uncertainty in the law of mistake of fact, and involves the question, already discussed, whether negligence is a proper basis for criminal liability. Prior to the nineteenth century, if Red honestly believed that she was not burning a book, Red was exculpated whether her belief was reasonable or not.[15] Within the last 200 years, however, this view has changed dramatically.

In the nineteenth century, the courts embraced the emerging notion of the "reasonable person" as a standard in both tort and crimes. People who made unreasonable mistakes would not be acquitted; only reasonable mistakes would now acquit. However, if the defendant were charged with a "specific intent" crime, the legislature had effectively indicated that only the "really" bad (not merely the unreasonable) should be convicted. Thus, in these crimes, an unreasonable mistake of fact, if honestly held, became a relevant claim.

As in other areas of the law, the invocation of a term such as "reasonable" only begins the inquiry: What does it mean? As discussed in Chapter 4, when the crime is defined as "negligently" doing *x*, the criminal law requires more than a showing that the defendant was "merely" (tortiously) negligent; he has to be "criminally" negligent. By analogy, if the criminal law wanted to punish only the "really negligent" defendant, then even an "unreasonable" mistake, unless truly outrageous and one that "everyone" (certainly not just the reasonable person) would have avoided, should exculpate.

As in some other areas of the common law, the view here is "all or nothing." If the defendant makes a reasonable mistake, she is exculpated. However, if she makes an honest, but unreasonable,

mistake, she is punished for the crime as though she had made no mistake at all. Thus, if Paul sells what he knows to be cocaine, he will be punished for doing so. If Hermione honestly though unreasonably believes the white powder she is possessing is salt, but it turns out to be cocaine, then (if her mistake must be reasonable) she is convicted of possessing cocaine, and assumedly punished as much as Paul. Those who oppose the requirement that the mistake be reasonable argue that the unreasonably mistaken person is significantly less culpable than the knowing actor and, if convicted at all, should be punished less.

One final reminder — a mistake will not necessarily exonerate if the fact is a "jurisdictional" element (see Chapter 4 supra, page 86), and goes only to where the crime will be prosecuted, rather than if there is a crime. Thus, if Melissa, who knows she possesses cocaine, believes she's in Albany, but she's really in Poughkeepsie, and the penalty in Poughkeepsie is twice as high as that in Albany, she'll be prosecuted in Poughkeepsie. There aren't too many real cases where this issue arises — but sometimes it turns up on law school exams.

Knowledge and Willful Blindness

In the Red Riding Hood hypothetical, we assumed that Herman *knew* that he was burning a book. And in Red's case, we have concluded that if she did not "know" it was a book, she should be exculpated. However, suppose the defendant strongly suspects a fact but purposely avoids actually "knowing"? For example, suppose that Red knew that her grandmother loved books, that her mother had just bought a book for the grandmother the day before, and that the package was "big enough" for a book. Red doesn't actually "know" that it's a book inside the package; it could be a box that "feels like" a book. Can Red claim a mistake of fact or lack of knowledge?

The common law's commonsense answer was no. Red has made herself "willfully blind" to the facts and should be treated as though she knew the facts. This fiction allows us to punish Red on the ground that anyone confronted with facts that should alert them to the "relevant" facts is as morally blameworthy as someone who actually knew. In essence, it establishes a duty to inquire when the facts are highly

suspicious. Because this is a fiction, however, the idea of willful blindness, while generally accepted in every jurisdiction, has been severely criticized by many commentators as vague and unfair. The danger here is that the willful blindness principle, sometimes called the "ostrich" doctrine,[16] may lead the jury to convict if they find that the defendant "should have" known it was a book — a negligence standard.[17] Some courts, in fact, appear to use an objective "reasonable person" standard, but most take care to instruct the jury that guilt clearly requires something very close to knowledge. Compare *United States v. Alston-Graves*, 435 F.3d 331 (D.C. Cir. 2006), with *United States v. Carrillo*, 435 F.3d 767 (7th Cir. 2006) ("A reasonable person standard is not the proper measuring stick for deciding whether to give an ostrich instruction . . . the instruction 'calls for a subjective inquiry, rather than an objective one'"). The doctrine has been criticized by many commentators.[18]

	Statute Requires Specific Intent	**Statute Requires General Intent**
Reasonable Mistake of Law	Exonerates	Guilty
Unreasonable Mistake of Law	Exonerates	Guilty
Reasonable Mistake of Fact	Exonerates	Exonerates
Unreasonable Mistake of Fact	Exonerates	Guilty

MISTAKE OF LEGAL FACT

A defendant's liability for a mistake (reasonable or unreasonable) thus depends on whether that mistake is characterized as one of fact or law.

The doctrinal difficulties become even more complex when the defendant’s mistake is one of “legal fact” — a word or phrase that is defined by law in a strange way. But be careful. The law can, for various purposes, define a word to mean something other than its usual meaning. And there are many “facts” in our lexicon that depend, in whole or in part, on the implicit incorporation of a legal norm.[19]

For example, “we all know” whether a person is a “female” or a “male.” But do we? The definition of that term may depend on the context. Years ago, a male professional tennis player underwent a sex change operation. There was then a dispute as to whether she could play in women’s tournaments. Was she a female? The Lawn Tennis Association said yes. However, that same person may not be a “female” for purposes of inheriting money (“I leave all my money to be divided among my female descendants”). Similarly, “we all know” whether a person is “married” or “single.” However, that status is not a “natural” one. It depends solely on a legal norm — whether the ceremony (or the divorce) followed specific legal requirements. Consider as well:

1. Whether a person is “Caucasian” or “Negro” was explicitly a matter of legal definition in this country during the Jim Crow days of the nineteenth century.
2. Whether the gun that Staples (see Chapter 4) owned was a “firearm” was purely a matter of legal definition; as the dissenters argued, no one would have even questioned whether the AR-14 was a “firearm” in the usual meaning of that term.
3. Whether property is “stolen” or not usually depends on a legal definition.
4. Whether a liquid is “intoxicating” or a “hazardous waste” may depend not on our common experience with the particular liquid but on a legal (almost chemical) definition.

These examples could be multiplied endlessly, but the point here is how these issues affect the mistake doctrine. Suppose that I snub the tennis player and am prosecuted for snubbing a “red head”? My liability may well depend on how the question is characterized rather than on my culpability as such. If it is viewed as a *legal* mistake, no amount of reasonableness on my part will exculpate. If it is viewed as a *factual*

mistake, however, reasonableness may exculpate.

THE MODEL PENAL CODE

The Code's approach to mistake of fact is straightforward. Section 2.04(1) provides that "ignorance or mistake as to a matter of fact . . . is a defense if: (a) [it] negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense." This approach rejects the idea that mistake of fact is a separate doctrine and treats it as being among the basic notions of mens rea. A reference back to Chapter 4, and especially to the table on page 91, will show that as to crimes committed purposely, knowingly, or recklessly, the defendant must *know* either that a fact (attendant circumstance) exists, or that there is a substantial probability that it exists. Definitionally, a defendant who honestly, no matter how unreasonably, believes that the fact does not exist (the white powder is not cocaine, but salt) does not know the contrary. Thus, at least for these three states of mind, any mistake "negatives" the requisite mental state. In cases of "negligence," however, a mistake as to fact that is a "gross deviation" from what a reasonable person would understand will suffice for liability.

The Code also retains willful blindness, treating those who see a "high probability" of a fact as "knowing" that fact. See §2.02(7).

A NOTE ON THE FUTURE OF MISTAKE

The doctrines regarding mistake of both fact and law, however, seem to be changing. The Model Penal Code is one harbinger, but common law courts on their own have increasingly reverted to the nineteenth century view of the impact of mistake.

The Supreme Court also appears to be adopting the subjectivist approach, at least for federal statutes. Throughout this chapter and Chapter 4, we have referred to four United States Supreme Court cases[20] that portend changes, at least in the way in which the Court approaches issues of mistake in federal statutes. It is possible to state narrowly the

holding of each of these four cases. *Ratzlaf* and *Cheek*, each dealing with legal mistake, involved a statute that proscribed a mens rea of "willfulness." This is a form of "specific intent" mental state, and the cases might be limited to such statutes. Similarly, *X-Citement Video* trod near First Amendment issues; had the shipment been of contraband cigarettes rather than free speech materials, it is possible that the Court would not have required the mens rea word to travel all the way down the statute, thus holding the defendant liable for his mistake. And although *Staples* could be read as endorsing a requirement of knowledge in all federal statutes, thus establishing mistake as a defensive claim in all such instances, it could also be read as a case where the government conceded that if mens rea were required at all, the proper level would be knowledge.

But a fair reading of these cases, individually and collectively, suggests that this is too narrow a view.[21] In each of these four cases, the Court exhibited a concern with "innocently" mistaken behavior. In each case, the Court interpreted the statute to require mens rea because a contrary holding might criminalize thousands of innocent persons. The Court rejected the argument that the defendant was "nefarious" in his acts or his motivations.

Just as important for the purposes of this chapter, the Court seemed to see no difference between *legal* and *factual* mistake; the "innocence" rationale was enunciated in each case. It is, of course, too early to be sure whether these cases are indications of future decisions or merely isolated instances. But if you like to gamble, bet that they will be followed again. A recent United States Supreme Court case seems to affirm the view that the Court is moving even further toward subjectivity. In a unanimous opinion, the Court, in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), reversed the conviction of the accounting firm of Arthur Andersen for destroying hundreds (perhaps thousands) of papers that were relevant to an SEC investigation of its client, Enron. The Court spoke of the "level of culpability . . . we usually require in order to impose criminal liability." It appears that this language is not limited to the statute's wording, but embraces a broad notion of moral wrongdoing as a predicate for criminal sanctions.

Examples

1. Officer Steiner observed Cottrell give Nath three or four chunks of what he believed to be rock cocaine in exchange for money. Nath was then observed a few yards away smoking the chunks in a pipe. After Officer Steiner observed what appeared to be another sale of rock cocaine by Cottrell, Cottrell was arrested. While Cottrell believed that Nath was about 19-20 years old, Nath was in fact a minor. As such Cottrell was charged with selling cocaine to a minor. Does Cottrell's mistake about Nath's age provide a defense to selling cocaine to a minor?

2a. Sylvester manufactures widgets. As a side effect of the manufacturing process, he creates "crud," a messy looking but otherwise apparently innocuous substance. For years, Sylvester has simply put the "crud" in a barrel with other trash and had it carted off to the local dump. Unknown to Sylvester, the Environmental Protection Agency, after years of internal debate, has just issued a regulation that lists "crud" as a substance that must be disposed of according to specific procedures. Weeks after publication of this new rule, Sylvester puts some of the "crud" into his garbage can and is prosecuted for "willfully disposing in an improper manner of a substance designated by the EPA. . . ." Does Sylvester have a defense?

2b. Would there be a different result if the statute omits the word "willfully"?

2c. Same facts as in 2a, except that Sylvester has kept apprised of the regulations, which require only that crud A, which has a specific percentage (20 percent) of toluene, be disposed of as required; crud B is not covered. Sylvester is not sure, however, whether the substance he has is crud A or crud B. He calls in his chemist, who tells him that the material is not crud A. The chemist's conclusion, alternatively (1) is wrong because the material contains 24 percent toluene, but he believes that only material containing more than 30 percent toluene is crud A; (2) is wrong because his analysis erroneously shows that the material Sylvester has contains less than 20 percent toluene, and therefore is not crud A. What is the result?

3. Julio, a guard at a federal prison, is charged in state court for carrying, while off duty, a weapon in a grocery store in violation of a state law. He argues that the state statute allows "peace officers" to carry a weapon, and that he carried the weapon in reliance upon the wording of the statute. If Julio is not, as a matter of statutory interpretation, a "peace officer" within the meaning of the statute, is he guilty of the crime?

4. Five years ago, Boris was convicted of larceny, a felony punishable by 2 years in state prison. He was put on and successfully completed probation. Today, Boris and his friend Fyodor went hunting with shotguns, where they were accosted by a federal agent, who arrested Boris and charged him with a violation of 18 U.S.C. §922(G)(1), which prohibits anyone who has been convicted of a felony from possessing a firearm. Boris was unaware of the statute, and also believed that his successful completion of probation meant that any collateral consequences were abolished. What is the likelihood that he will be successful?

5a. Harold Homeowner wishes to avoid another sultry summer by installing an air conditioner in his study. He installs one and is then prosecuted for not having obtained a building permit. He claims he did not know, and could not reasonably have known, of the requirement for a permit. Will he succeed in this defense?

5b. Now assume that Harold is told by a friend that if he installs a unit that has a rating of more than 500 BTUs, he must obtain a building permit. Careful not to break the law, he calls the local housing authority and speaks to a Mr. George Pepper. Mr. Pepper tells him that the limit is not 500, but 1,000 BTUs. Harold puts in a unit of 450 BTUs, only to learn, to his horror, that the limit is actually 400 BTUs. The violation is a felony. May Harold successfully defend his actions if prosecuted?

6a. Joan is prosecuted for "knowingly killing a homing pigeon." She seeks to introduce evidence that she believed the bird was a golden eagle. She concedes that her mistake was unreasonable. Should the evidence be admitted?

6b. Same facts, but the charge is "killing a homing pigeon."

These examples demonstrate the link between common law doctrines of mistake and current definitions of mens rea. In addition, a statute such as the one in 2b would raise questions of strict liability, discussed in Chapter 6. You must keep the interrelationship of Chapters 4-6 in mind whenever confronting a mens rea problem, be it of statutory interpretation or common law liability.

7. Michelle is indicted under a federal statute that makes it a felony for "any person to . . . knowingly deliver or cause to be delivered . . . any false or misleading or knowingly inaccurate reports concerning" certain kinds of information. She concedes that she knowingly delivered reports that, as it turned out, were false, but she claims that she did not *know* the reports were false, and that this is a valid defense. Is she right?

8. Johnboy is vacationing with his family near the Painted Desert, which is, as he knows, a national park. He sees a particularly attractive shard, about the size of a dime, which he puts in his pocket. The shard turns out to be more than 100 years old and is therefore an "artifact." He is prosecuted for "removing an artifact from a national park." What results under the following three circumstances? (a) Johnboy honestly and reasonably believes that he is not in the park. (b) Johnboy honestly and reasonably believes that the shard is a piece of plastic. (c) He honestly but unreasonably believes that the shard is a piece of plastic.

9. Dorothy asks Megan to deliver a transparent package, obviously containing some white powder, to George, and she says (a) "Remind George he owes me $10,000"; (b) "Tell him it's $10,000." Is Megan guilty of "knowingly" transporting (or selling) cocaine if she transports the powder without asking more?

10a. In 2009, the Obama Administration announced that it would not criminally charge CIA and military officers who had arguably tortured detainees in Guantánamo Bay and Iraq. The relevant statute, 18 U.S.C. §2340, defines torture as an "act . . . specifically intended to inflict severe physical or mental pain or suffering." The Administration gave several different reasons — either the actions

were not torture under international or domestic law or the actual interrogators had relied on opinions from the Department of Justice's Office of Legal Counsel (OLC) assuring them that the methods they were using were not illegal. That memorandum, signed in 2002, declared: "Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture. . . . We have further found that if a defendant acts with the good faith belief that his actions will not cause such suffering, he has not acted with specific intent." Was OLC correct?

10b. If so, was the Obama Administration correct in not charging those who relied on the OLC memo?

Explanations

1. No. In *People v. Williams* (1991) 223 Cal. App. 3d 407, 284 Cal. Rptr. 454, the Court of Appeal held that Cottrell Williams' mistake about Nath's age was not a defense to the charge of selling cocaine to a minor. The court noted that a prior decision, *People v. Lopez* (1969) 271 Cal. App. 2d 754, 77 Cal. Rptr. 59, held that a "mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed." The *Williams* court further explained that the specific intent required for selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. Since the requisite intent is not negated by the mistake of the buyer's age, Cottrell Williams' mistake about Nath's age was not a defense.

2a. Under the traditional common law, Sylvester would be convicted. His ignorance of the regulation would be no defense. Under the common law, some courts interpreted the term "willfully" to require "specific intent" (which means that Sylvester would have a claim), while other courts would simply require that he act "voluntarily" (as a matter of will) (in which case he would not have a claim). After *Cheek* and *Ratzlaf*, however, the result is even more clear. Given that this statute establishes "willfulness" as the mens rea, the court would interpret that word as essentially requiring a "specific intent." This would require that the government prove that

Sylvester *knew* that he had a duty to dispose of crud in a particular way. Since those decisions are not based on the Constitution, however, they do not necessarily affect the interpretation of state statutes. Thus, the usual ignorantia lex rule might apply, and Sylvester would be convicted. The Model Penal Code would reach the same result as the states. Under §2.02(9), ignorance of the law is irrelevant, where the statute establishes knowledge, recklessness, or negligence as the mens rea. The implication, not expressed in the Code, is that ignorance might be relevant if the statutory mens rea were purpose. Because that is not the case here, Sylvester's ignorance, however reasonable, is irrelevant.

2b. If *Cheek* and *Ratzlaf* are limited to statutes involving the word "willfully" (and a requirement of specific intent), Sylvester is in trouble. However, if the cases apply to "complex" regulatory schemes, Sylvester still might be exculpated. Under the Model Penal Code, the requisite mens rea under §2.02(3) is recklessly, knowingly, or purposely (see Chapter 4). Since, by operation of §2.02(9), ignorance of the law is irrelevant unless purposely is the requisite mens rea, Sylvester will have no defense of ignorance of law.

Note that the entire difference depends on the legislature's use of the word "willfully," and the assumption that the presence or absence of this mens rea word was intended to change dramatically the defendant's liability, even though his behavior is exactly the same.

2c. These variations raise the question of the relation of mistake of law and mistake of fact. In (1), Sylvester's "mistake" is one of law, derivative of the chemist's mistake of law. Since the mistake really involves a definitional error (what is the legal meaning of "crud"?), it can be characterized as a mistake of legal fact. Under earlier common law views, this would not have been relevant; Sylvester's error would be seen as one of law, and it would be irrelevant. Under *Staples*, however, the mistake might be exculpatory. *Staples* requires that the government show that the defendant knew every "fact" that gave rise to his legal obligation. Since the definition of crud A is a "legal fact," one could argue that *Staples* gives

Sylvester a plausible claim of mistake. If the statute requires "willfulness," then *Cheek* and *Ratzlaf* arguably affect the case as well and allow Sylvester's claim that he did not know of the duty to dispose. On the other hand, Sylvester's reliance on his own employee might be unreasonable per se, since employees are likely to tell the boss what he wants to hear. At least in one New York case, *People v. Marrero*, 69 N.Y.2d 382 (1987), a state court required an official interpretation of law (rather than an employee's) in order to justify a mistake of law. This would require an official interpretation by the state attorney general of a statute, and an employee's view of the statute would not suffice.

In (2), Sylvester's claim comes closer to a mistake of fact. *He* knows that he must dispose properly of anything that contains more than 20 percent toluene, and is told that this substance does not contain that percentage of toluene. He may have a mistake of fact (or a mistake of "legal fact") here; his action looks reasonable, and most people would (or could) rely on a chemist for this information.

3. Held, in *People v. Marrero*, 69 N.Y.2d 382 (1987): Julio is guilty, both under the common law and under the state's version of the Model Penal Code. The opinion, which is scathingly criticized in Comment, 54 Brook. L. Rev. 229 (1988), rejected any weakening of the ignorantia lex rule because "Any broader view fosters lawlessness." Under the MPC, which is somewhat different from New York's version, Marrero will still be guilty, since §2.04(3) does not allow mistakes of law that are simply the defendant's personal misinterpretation of law; only official (mis)interpretations, reasonably relied upon, are relevant. Prof. Kahan has argued that Marrero was properly convicted because he was looking for a "loophole" rather than legitimately believing he could carry the gun into the bar. See Dan Kahan, Ignorance of Law Is an Excuse — but Only for the Virtuous, 96 Mich. L. Rev. 127 (1997).

4. Zero. The Circuit courts are unanimous that Boris need not know of the federal statute, nor of the effects of his felony conviction. Boris's failure to know of the statute constitutes ignorance of law, which, as we know, is never (well, almost never) a relevant claim.

His failure to understand the impact of his conviction is, at best, a mistake of law, which is also never a claim. See, e.g., *United States v. Leahy*, 473 F.3d 401, 408 (1st Cir. 2007). Jeffrey A. Meyer, Authentically Innocent: Juries and Federal Regulatory Crimes, 59 Hastings L.J. 137, 170 (2007) (collecting cases); Brian E. Sobczyk, 18 U.S.C. §922(G)(9) and the *Lambert* Due Process Exception Requiring Actual Knowledge of the Law: *United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000), 80 Neb. L. Rev. 103 (2001).

5a. No. Harold's ignorance of the law is no excuse. Even in a day and age when there are literally thousands of city regulations and ordinances that govern our lives and with which we cannot possibly be familiar, the ignorantia lex doctrine lives on. These are also examples of strict liability crimes that are discussed later in the book. The same result holds under the Model Penal Code, so long as there is no potential jail time (see Chapter 6).

5b. Harold still loses at common law, unless Pepper's misstatement could be found to be intentional, in which case, under a very few scenarios, the government might be "estopped" by Pepper's words from prosecuting Harold. Under the Model Penal Code, Harold will still have virtually no chance of exculpation. Although he relied, perhaps reasonably, on Pepper's words, those words have never been reduced to a *written* interpretation, which the Code requires before a defendant can claim reasonable reliance on a misstatement of the law. Harold will just have to sweat this summer out — hopefully not in the cooler.

6a. Under common law, unless "knowingly" is interpreted as a specific intent requirement, Joan's evidence is irrelevant, since only reasonable mistakes "negate" "general intent" crimes. If she's free (as a bird?), "knowingly" is interpreted as a specific intent requirement. This is particularly true after *Staples* and *X-Citement Video.* Thus, her mistake, even though unreasonable, will exonerate. This result, of course, should be reached even without deeming the statute one requiring "specific intent." It seems clear that Joan, whatever her faults, is not the evil malefactor — purposeful killer of homing pigeons — that the legislature is after. Perhaps she should be required to wear glasses or take bird

recognition courses, but sending her to prison is unlikely to achieve any goal, including deterrence.

Under the Model Penal Code, Joan must be "aware" that the bird was a pigeon (as required by the word "knowingly"). Since her actual belief contradicts that requirement, the evidence is admissible.

6b. Under the Code, "recklessness" is the default position when the statute contains no mens rea word (see Chapter 4). Since recklessness requires that Joan be aware of a substantial risk that the bird could be a pigeon, the evidence should be admitted. Under the common law, the evidence appears inadmissible, since there is no statutory mens rea. But under the separate doctrine of mistake of fact, Joan's mistake would be relevant if reasonable. Since she concedes it is not reasonable, Joan is heading for the big house.

7. This example, based on *United States v. Valencia*, 394 F.3d 352 (5th Cir. 2004), demonstrates the problems of statutory interpretation created by an ambiguous statute. Clearly, the legislation requires that the defendant "knowingly" deliver information and that the information be "knowingly" inaccurate. But the word "knowingly" does *not* appear before "false." Since the legislature *could have* written the statute to prohibit delivery of "knowingly false and knowingly inaccurate" information, it can be argued that it did not intend to require the government to prove that Michelle knew the information to be false. In *Valencia* itself, the court concluded that *X-Citement Video* (see page 83) required construing the statute as mandating that the government prove that Michelle *knew* the information was false.

Under the Model Penal Code's "element analysis," this is an easy case. "Falsehood" of the information is clearly a "material element," and the mens rea word "knowingly" clearly modifies "false."

8. This scenario demonstrates the (indefensibly) different results the common law gave between unreasonable and reasonable mistakes as to fact and law. In (a), Johnboy will not be allowed to present evidence as to his *reasonable* belief as to his location, because he was ignorant of the law that applied where he actually was. Under

the MPC, because "national park" is likely to be determined to be an element "exclusively related to jurisdiction," which does not require a mens rea, he's guilty. Johnboy will be held guilty under the common law under (c) but not (b) because the mistake in (b) is reasonable, whereas the mistake in (c) is unreasonable. If the statute had proscribed "willfully" removing the artifact, however, the question is then (1) whether *Cheek* and *Ratzlaf* apply, in which case even an unreasonable mistake would seem to exculpate, or (2) whether "willfully" otherwise connotes a "specific intent" crime, in which case an unreasonable mistake of fact exculpates. Under the MPC, since there is no stated mens rea, the "default" position of "recklessness" applies, and Johnboy's mistake now negates the mens rea, since recklessness requires a conscious disregard of a substantial risk that the shard might be an artifact (which, by hypothesis, he could not entertain if he honestly believes it is plastic).

Claims by the Johnboys of the world — that they failed to recognize an object as an "artifact" — have been treated as a mistake of fact, which, if reasonable, will be exculpatory. See *United States v. Quarrell*, 310 F.3d 664, 184 A.L.R. Fed. 625 (10th Cir. 2002). Closer analysis, however, suggests that even the mistake as to whether the shard was an "artifact" is, at best (or worst), a "legal fact": Johnboy may know that the shard is old, but unless he's a law student, he is unlikely to know that the statute defines how old a shard must be to be an "artifact." Nevertheless, surely the *Quarrell* court (and others) are right: Congress did not intend to make felons out of casual visitors who pick up items that are not obviously protected. The example shows, moreover, the thin line between mistake of law (which does not exculpate, no matter how reasonable), and mistake of fact (which does exculpate, often even if unreasonable).

9. The concept of willful blindness (or "ostrich culpability") allows conviction for a crime of "knowledge" even if the defendant did not actually know the facts. Courts have differed as to the wording of the test, concerned that the use of wording, such as "should have known," would risk punishing a merely negligent (or reckless) actor as seriously as one who actually knew. The cases require that

the government not merely show facts from which a reasonable person could have deduced the relevant fact, but also show that the defendant strongly suspected the facts. In neither (a) nor (b) is there any evidence that Megan actually suspected that the powder was cocaine. But the statement in (a) could easily be interpreted as relating to a preexisting debt, while the statement in (b) is more likely to be construed by the jury as putting Megan on notice that the $10,000 was in payment for the white powder actually being delivered. Contrast the situation where, in response to either statement, Megan had said, “That’s a lot of money for a canister of sugar.” Or suppose she had merely said, “That’s a lot of money,” not explicitly connecting the $10,000 with the powder.

10a. It is true that if the interrogators did not intend to inflict severe harm, the statute was not violated. But if they did intend to inflict pain, but thought their doing so was legal, then their mistake of law would be a defense only if the statute required specific intent to violate the law, that is, if the statute was either interpreted as were the statutes in *Cheek* and *Ratzlaf* (which required “willfulness,” a word which is not present in this statute), or the statute was otherwise interpreted to require specific intent to violate a “known legal duty.”

10b. Whether the interrogators could rely on the view of OLC that the actions were not torture is a different question. Reliance on anyone is not a relevant claim, unless the crime is one of specific intent, which is what OLC appears to be arguing. The specific intent exception, however, operates where a crime requires a specific intent and the mistake or ignorance of law negates that intent. Moreover, as we have seen in the text, the law is especially averse to allowing reliance on counsel; the MPC excluded even reasonable reliance on counsel as a relevant claim.

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1. For a careful and nuanced discussion of the various kinds of mistake, see Kenneth W. Simons, Ignorance and Mistake of Criminal Law, Noncriminal Law and Fact, 9 Ohio St. J. Crim. L. 487 (2012).

2. E.g., *United States v. Freeman*, 535 F.2d 1251 (4th Cir. 1976) (ignorance of any rule in the Federal Register is irrelevant). See also *United States v. Freed*, 401 U.S. 601 (1971); *United States* v. *International Minerals and Chemical Corp.*, 402 U.S. 558 (1971). In *Freed* and *IMCC*, the holding was that the prosecutor need not allege in the indictment knowledge of the law, which

leaves open the possibility that the defendant could raise ignorance; who then would carry the burden of persuasion was not discussed. The language of each opinion, however, certainly leaves the impression that ignorance of the law is still irrelevant. *Cheek* and *Ratzlaf*, more recent cases discussed in the text below, may narrow the implications of these two decisions.

3. See Chapter 15.

4. Professor Jerome Hall argued that to allow a defendant to exculpate himself by simply claiming his interpretation of a law would negate the law and elevate that defendant to the status of lawmaker. J. Hall, General Principles of the Criminal Law (2d ed. 1961).

5. *Star Trek* fans will recall that in both the original series and in *The Next Generation* the issue of ignorance is raised. In *Star Trek*, a crew member, while visiting a planet for recreation, picks a flower; this turns out to be a capital offense in that culture, and he is accordingly tried for that crime. In *The Next Generation,* Wesley Crusher inadvertently enters an area that, under the law of the planet, is forbidden. He, too, is tried capitally. In both episodes, the Captain (Kirk or Picard) persuades the rulers that the doctrine is too harsh. Fortunately for the crewmen, they never landed in a jurisdiction governed by the common law.

6. The court did note that, even in Italy, the kinds of photographs involved, while not illegal, were regulated, thereby putting the defendant on notice to inquire about the laws of other jurisdictions to which he might send such pictures. Although not critical to its holding, the court's position could be read as portraying the defendant as reckless and hence morally blameworthy in this regard.

7. One other ignorance case should be mentioned here. In *Lambert v. California*, 355 U.S. 255 (1957), the Court held that constitutional due process was denied a defendant who was precluded from introducing evidence that she was unaware of a city ordinance requiring her, as an ex-felon, to register her presence with the city. Some commentators thought that the decision would lead to a series of constitutional challenges to the entire "ignorantia lex" rule, but it has been restricted to cases involving (a) ignorance of (b) a local ordinance (c) imposing a duty to act (in contrast to imposing a prohibition against acting). It has become, as Mr. Justice Frankfurter predicted in his dissent in the case, a "derelict upon the waters of the law." For a broad attempt to resurrect *Lambert*, see the dissenting opinion of Judge Bennett in *United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000).

8. The *Cheek* decision was muddled by the Court's conclusion that, while Congress intended ignorance of tax law to negate liability, it did not intend ignorance or mistake of *constitutional* law to do so. One could easily argue, of course, that constitutional law is even murkier than tax law.

9. See Gur-Arye, Reliance on a Lawyer's Mistaken Advice — Should It Be an Excuse from Criminal Liability?, 29 Am. J. Crim. L. 455 (2002) (recognizing that "reasonably unavoidable mistakes of law" negate culpability in Germany, France, and Israel, among other countries, but arguing that a mistake made in reliance on a lawyer is not "reasonably unavoidable").

10. See, e.g., *Williams v. North Carolina*, 317 U.S. 287 (1942); *Loughran v. Loughran*, 292 U.S. 216 (1934).

11. See generally John T. Parry, Culpability, Mistake, and Official Interpretations of Law, 25 Am. J. Crim. L. 1 (1997).

12. Reasonable reliance is indeed a "defense," which the defendant has to prove by a preponderance of the evidence. See §2.04(4). This stands in stark contrast to most of the rest of the Code, which puts on the prosecution the burden of disproving defensive claims, including all justifications and excuses, once properly raised. See §§1.12 and 1.13. This topic is discussed in Chapter 15. Eighteen states have adopted the MPC provision in whole or in part.

13. See Cremer, The Ironies of Law Reform: A History of Reliance on Officials as a Defense in American Criminal Law, 14 Cal. W. L. Rev. 48 (1978). For example, in *Miller v. Comm.*, 492 S.E.2d 482 (Va. App. 1997), agents of the Federal Bureau of Alcohol, Tobacco and Firearms and

Virginia Department of Game and Inland Fisheries both told defendant that he was not prohibited by state law to possess a firearm based on his conviction of possession of a hunting rifle. Since these persons were not charged by law to define the relevant statute, defendant's reliance was held irrelevant. Fortunately for him, his probation officer, who was charged with defining defendant's permissible conduct (but not directly the firearms statute), also gave him the same advice, and the court held that this advice was legally relevant.

14. The metaphor that mistake of fact (or other relevant claim by the defendant) "negates" mens rea is misleading and can have significant practical importance. The mere wording of the concept suggests that the defendant "had" mens rea (i.e., that her mens *was* "rea") but that somehow the "mistake of fact" (or other claim) "threw the reus part out of her mens." Obviously, this is not true. If the jury believes that the defendant was mistaken, it will conclude that she never harbored a mens rea of any kind. More accurate, though still somewhat tricky, is the explanation that we assume *not* that the defendant *had* mens rea, but that the prosecutor's evidence raises an *inference of mens rea that is negated by the defendant's claim.* The inference of blameworthiness effectively "disappears" when the jury believes the defendant's claim that she was harboring a mistaken view of the world. But even then, the metaphor could lead, and has led, to the conclusion that a defendant can be required to carry the burden of proof on defensive claims because (after all) the mens rea has been shown to be present. See *State v. Smith*, 576 P.2d 1110 (Mont. 1978). We will discuss this issue in Chapters 15-17, but keep it in mind as you read through this and the next chapter.

15. See Richard Singer, The Resurgence of Mens Rea II: Honest But Unreasonable Mistake of Fact in Self-Defense, 28 B.C. L. Rev. 459 (1987).

16. Professor David Luban has distinguished ostriches, who merely do not want to know, and foxes, who contrive deniability. See Luban, Contrived Ignorance, 87 Geo. L.J. 957 (1999).

17. For example, 21 U.S.C. §841(c)(2) makes it a crime to know, or to have reasonable cause to believe, that a substance will be used to manufacture a controlled substance, methamphetamine. Such statutes criminalize negligence and usually impose a lesser sentence; in contrast, a defendant who is found to be willfully blind is treated as "knowingly" acting. Since the legislature has indicated it wants to punish only those who knowingly burn books, the willful blindness doctrine may result in more convictions than the legislature intended.

18. *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976); J.L. Edwards, Mens Rea in Statutory Offenses (1955); Perkins, "Knowledge" as a Mens Rea Requirement, 29 Hastings L.Q. 953 (1978); Williams, The Theory of Excuses, 1982 Crim. L. Rev. 157-159.

19. One commentator has called the category of legal fact "an unfruitful" approach to discussion of mistake. Kenneth W. Simons, Ignorance and Mistake of Criminal law, Noncriminal Law, and Fact, 9 Ohio St. J. Crim. L. 487 (2012).

20. *Ratzlaf v. United States*; *Staples v. United States*; *Cheek v. United States*; and *X-Citement Video v. United States.*

21. Douglas Husak and Richard Singer, Of Innocence and Innocents: the Supreme Court and Mens Rea Since Herbert Packer, 2 Buff. Crim. L. Rev. 859 (1999); Alan Michaels, Constitutional Innocence, 112 Harv. L. Rev. 819 (1999); Susan Pilcher, Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law, 33 Am. Crim. L. Rev. 1 (1995).

CHAPTER 6

Strict Liability

OVERVIEW

Notwithstanding the law's general insistence that the state prove the defendant had a mens rea, in a very few instances, courts interpret statutes that have no mens rea words as allowing criminal liability to be imposed even though the defendant had *no* mens rea *with regard to one or more material elements of the offense* (see Chapter 4 for a discussion of "elements analysis"). A common example is a statute that makes it a crime to sell alcohol to a minor. Most courts would require that the government prove that the defendant knew he was selling liquor; a mistake of fact that the item sold was water would usually exonerate.[1] If there is strict liability in such a statute, it is with respect to the material element of the customer's age.

Suppose that Gregori, a bartender, makes it a practice to "card" every new customer. In walks Herbert. Gregori asks for identification as to age, and Herbert produces a driver's license and a union card, each of which shows him to be 24. Since such documents can be easily forged, reliance on them might not be deemed reasonable by a court or a jury. But *assume* that Herbert, though 17, looks 24, and that Gregori has acted reasonably. Under a strict liability approach Gregori's reasonableness is irrelevant; Gregori is guilty of serving a minor. Now suppose that Gregori, having been stung (not to mention convicted) once, takes "super care" the next time. When Isaiah comes in, Gregori asks for his driver's license, his university or union ID, his birth certificate, and a notarized letter from his parents, whose signature Gregori has obtained in advance, all attesting to Isaiah being over the legal drinking age. If Gregori serves him, and Isaiah is underage, too bad! Gregori is still

liable. Wait — it gets worse. Suppose that in the Isaiah example, the documents were not forged, and that *everyone* (including Isaiah's parents) was wrong about his birth date. Even then, Gregori is liable. When the courts say *no* mens rea — not even tort negligence — is required, they mean it.

One further distinction must be drawn. There are many other areas of the criminal law, felony murder (discussed in Chapter 8) and mistake of law (discussed in Chapter 5) among them, where the common law has, for decades if not centuries, imposed liability without regard to mens rea as to one or more elements of the crime. Yet they are not generally referred to as strict liability "crimes." Perhaps they are better thought of as strict liability "doctrines," because they apply to virtually all underlying crimes, rather than to a specific statutory offense. For example, the "ignorance of law" doctrine applies to virtually *any* crime and imposes liability without regard to the defendant's moral culpability. Similarly, the felony murder doctrine, as discussed in detail in Chapter 8, imposes added liability for a death that occurs during virtually "any" felony.[2]

THE REACH OF STRICT CRIMINAL LIABILITY

Strict criminal liability was only established during the second half of the nineteenth century. Early cases in which some courts upheld strict criminal liability usually involved either sexual acts (e.g., adultery, bigamy, and statutory rape) or the protection of minors (serving or selling alcohol; allowing minors to be present during gambling, billiards, or other such act; or both). Thus, a defendant who remarried, believing that he was divorced or that his first wife was dead, was guilty of bigamy if his belief, no matter how reasonable, turned out to be erroneous. Similarly, if a defendant had intercourse with a female whom he reasonably believed to be over a stated statutory age, he was guilty of rape if his partner turned out to be younger than the statute allowed.[3] Similar results occurred in cases involving the possession of or the serving of liquor.

The courts here relied on two main premises: (1) legislatures were

unrestrained in their ability to proscribe conduct and did not have to require mens rea (a jurisprudential philosophy known as legal positivism); (2) there was a compelling need to protect society, particularly minors, against such evils (sex, liquor, etc.), and it was too hard to prove mens rea.

During the first half of the twentieth century, some courts applied these decisions to newly enacted "regulatory" statutes, such as those prohibiting (1) the sale of oleomargarine; (2) the possession or sale of alcohol generally (during Prohibition); and (3) environmental damage. For example, since requiring a license in order to engage in a home improvement business is for public protection, a defendant's lack of knowledge of this requirement is irrelevant. See, e.g., *People v. Stephens*, 937 N.Y.S.2d 822 (2011). In the last half of the twentieth century, prosecutors argued (not surprisingly, since their burden is eased) that statutes not specifying a mens rea should be construed as establishing strict criminal liability in numerous new settings, such as environmental, endangered species, or traffic cases.

Decisions in the United States Supreme Court have been equivocal. In *United States v. Dotterweich*, 320 U.S. 277 (1943) defendant, and the pharmaceutical company of which he was CEO, were charged with shipping "adulterated" drugs, which in this case involved an innocent misrepresentation on the label of the contents of the item; there was no actual threat to the safety or health of anyone who consumed the drug. Defendant argued that the word "person" under the statute reached only corporations; the narrow holding of the case was simply to reject that interpretation. But Justice Frankfurter's opinion had broad language endorsing, and even encouraging, strict criminal liability:

> Congress has preferred to place [any hardship] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than throw the hazard on the innocent public, who are totally helpless [320 U.S. at 285 (emphasis added)].

Much more recent, and even more ambiguous, is *United States v. Park*, 421 U.S. 658 (1975). Park was the president of a national food chain, one of whose warehouses in Baltimore inadequately protected against rodent infestation, causing some of the food in the warehouse to become "adulterated." Park did not know of the actual contamination before he was notified of it by the Food and Drug Administration; he

then ordered his subordinates to clean up the warehouse. When this was not done, the FDA prosecuted him for possessing adulterated food for sale. The trial judge instructed the jurors that they could convict Park if they found that he was in a position of power to avoid the adulteration even if he was unaware of its existence.

The Court upheld the conviction, finding that the jury instruction was not critically misleading. Both the holding and much of the language in the opinion seem to support strict criminal liability. However, the facts demonstrated that the persons to whom Park delegated the cleanup of the Baltimore warehouse had previously allowed a warehouse in Philadelphia to become similarly contaminated. As the Supreme Court put it, “[Defendant] was on notice that he could not rely on his system of delegation to subordinates to prevent or correct insanitary conditions of [the] warehouses, and . . . he must have been aware of the deficiencies of this system before the Baltimore violations were discovered.” 421 U.S. at 678. This language suggests that Park was willfully blind, reckless, or at least negligent. It emphasizes that Park’s moral culpability lay not in his ignorance of the facts in the Baltimore warehouse, but in his *knowing* reliance on people who he knew had previously been unable to keep his warehouses clean.

DEFINITIONS AND INDICIA OF STRICT LIABILITY

How does a court (or, more to the point, a student) tell whether a statute should be construed as one involving strict liability? The courts have established several guideposts, but they are hard to read and often point in different directions. Good luck!

Public Welfare Offenses

In his classic article discussing strict liability decisions, Professor Francis Bowes Sayre used the term “public welfare offenses” to describe these kinds of crimes. Sayre, Public Welfare Offenses, 33 Colum. L.

Rev. 55 (1933). At first blush, the phrase seems fairly understandable: It appears to refer to instances where the "public" rather than a single individual is endangered.

Dotterweich, which involved the sale of mislabeled drugs, would seem to involve danger to many. It is certainly true that individuals are usually unable to protect themselves against the dangers lurking in a can of soup. But a rock band using pyrotechnics in a crowded nightclub may endanger at least as many lives as a company executive who fails to protect against salmonella in his packaged food. Yet the rock band is seen as perpetrating a "real" crime that requires proof of mens rea, whereas the manufacturer of the food product is not. The number of victims, actual or potential, seems not to be a useful criterion here.

The kinds of cases in which the courts have employed the "public welfare offense" language do not always fit even the "public endangerment" thesis expounded by Justice Frankfurter. Thus, some courts have upheld strict liability for persons who kill migratory birds or endangered species, or remove artifacts from national parks. While these are important interests to protect, it is hard to see how the public is "endangered" or even "affected" by these crimes in a way distinct from the way in which it is affected by other, non-strict liability, crimes (e.g., bribery of an official). The argument that the public is more endangered in "public welfare offenses" than in non-strict liability offenses is, at best, tenuous.

In *Staples v. United States*, 511 U.S. 600 (1994), the United States Supreme Court appeared to limit the reach of strict liability federal crimes to those involving items that were *both* (1) dangerous (such as drugs, grenades, or explosives) *and* (2) highly regulated and, by their nature, would alert the defendant to the possibility of regulation, thus putting her under a duty to inquire about those regulations and ensure her compliance. Whether lower federal courts will follow that lead, however, is uncertain. Moreover, state courts are obviously not required to follow the *Staples* lead, since it was a statutory interpretation case.

Mala in Se ("Real") vs. *Mala Prohibita* ("Unreal"?) Crimes

When lawyers don't understand what they're doing, they often try to make it seem more defensible by clothing it in Latin. (Does "res ipsa loquitur" ring a bell?) In seeking to determine which crimes can be interpreted as allowing strict liability and those that cannot, courts have invented the terms (respectively) of *malum prohibitum* and *malum in se*. The reference is to crimes that are "merely" prohibited by statute and those that are both prohibited by statute and that are "in their nature" bad. Initially, this distinction seems confusing. As we discussed in Chapter 1, the principle of legality requires that *all* crimes now be statutory: In the twenty-first century, actions are criminal only because the legislature has prohibited them by statute. How can we formally distinguish between two statutes, one that punishes burglary and one that punishes a parking violation? On the other hand, the distinction seems to reflect common sense. Parking in violation of a statute or ordinance (malum prohibitum) doesn't "really" seem bad; burglary (malum in se) does.

An everyday example of a malum prohibitum crime that will illustrate this distinction is a statute that requires everyone to drive on the right side of the road. There is nothing inherently wrong with driving on the left side of the road: People in many countries do it all the time, and properly so. Yet this regulation (or an opposite one) is clearly necessary to maintain order and safety, both of which would collapse if people refused to play by a common set of rules. Without such regulations, there would be little reason to pay taxes, get a license before driving, or park in appropriate areas if the law could not penalize failure to do so.[4]

Some courts have expanded on these Latin phrases by explaining that if the offense was punishable under common law, it is a "real crime" (malum in se), while if the offense is a "new" crime, it is not a "real" crime (malum prohibitum).[5] If the latter, the defendant can be convicted without proof of a mens rea with regard to some element of the offense.

Again, there is a surface plausibility to this distinction. Those acts that all societies regard as heinous — rape, homicide, theft — must require a mens rea, or they are not "really" crimes at all. The grain of truth here, however, undermines the central point. If something isn't "really" a crime, then why use criminal sanctions to indicate

displeasure? Moreover, such an approach does little to help us determine whether some “new” crimes, which seem as serious or as evil as the “old” ones, should be strict liability offenses. For example, burying toxic wastes or discharging particulates into the air was not a common law offense. However, today these acts seem both highly obnoxious and at least as life-threatening as burglary. Most federal environmental offenses were misdemeanors when originally enacted, but most are now felonies.[6] Morals and perceptions of dangers change over time. There is a possibility that the “malum in se” notion freezes the criminal law, or at least that part of it requiring mens rea, in the amber of the nineteenth century (or earlier). “[B]oundary cases were so plentiful that even as early as 1822 the malum in se/malum prohibitum distinction was said to have ‘long since exploded.’”[7]

Finally, many would argue that to say that malum prohibitum acts are wrong solely because they are prohibited is not entirely accurate. Most statutory rules[8] seek to prevent some real harm from occurring. Parking by a fire hydrant would normally not be “wrong,” except that it endangers lives by blocking firefighters’ access to water. Carrying or selling cocaine is not “wrong,” except that the legislature has made a judgment that cocaine involves a public danger. Thus, *all* statutory rules appear to prevent some “real” harm and are not merely the whim of a legislature.

In addition to the confusion sometimes generated by “mala in se” and “mala prohibita,” courts sometimes refer to those offenses that may be strict liability as “regulatory” or “police” offenses. Again, the terms are confusing. Perhaps when the only sanctions were fines, this distinction was meaningful. In a governmental system suffused with many regulatory agencies, the phrase seems less limiting.

Innocent Actors

In the *Staples* case, the Court reinvigorated another criterion to the strict criminal liability analysis by declaring that strict criminal liability would be inappropriate if it criminalized ostensibly innocuous conduct.[9] The Court pointed to two cases to demonstrate the difference. In *United*

States v. Liparota, 471 U.S. 429 (1985), the Court had decided against strict liability in a case involving a restaurant owner who had accepted food stamps in a way that, unknown to him, violated federal law. He was, suggested the Court, morally "innocent." On the other hand, the Court had upheld an indictment against a possessor of hand grenades, even though the indictment did not allege that he knew the grenades were unregistered, because "innocent" persons do not possess hand grenades. *United States v. Freed*, 401 U.S. 601 (1971).

This criterion initially seems relatively easy to apply. Most people do not possess what they know to be hand grenades unless they have nefarious schemes, while many people possess food stamps without intending to commit a crime. To impose strict liability with regard to food stamps might expose tens of thousands of morally innocent persons to criminal liability and punishment.

The distinction, however, seems less obvious when applied to other strict liability items. Thousands of persons transport, deliver, trade, or sell canned food every day, yet *Dotterweich* seems to allow legislatures to impose strict liability on all of them if the food in the can is adulterated. But *Staples* suggests that gun owners are not strictly liable, even though (surely) guns are more dangerous than cans of food. And the Court in *X-Citement Video* (see page 83) expressly declared it did not want to hold strictly liable the FedEx carrier who delivered the video containing pornographic child sex. What, then, are "dangerous" items after *Staples*, and who, then, is "innocent" is still unclear, although the trend seems manifest.[10]

The Litmus Test of Available Punishments

Professor Sayre, after reviewing the various attempts to distinguish strict liability offenses from others, concluded that there was only one rational distinction:

> The real distinction depends on the nature of the penalty involved and the character of the offense. If the penalty is a serious one, particularly if it involves imprisonment . . . [strict liability is improper]. But if the maximum penalty consists in no more than a light fine, and if the character of the offense is such that infraction involves wide-spread public injury [strict liability may be proper].[11]

Sayre's suggestion seems straightforward. However, other courts have upheld strict criminal liability where the penalty is very significant, sometimes up to 10 years' imprisonment. See, e.g., *United States v. Freed*, 401 U.S. 601 (1971) (dictum). In *Staples v. United States*, 511 U.S. 600 (1994), however, where the maximum penalty possible was 10 years' imprisonment, the United States Supreme Court explicitly rejected the intensity or duration of punishment as "the" litmus test of strict criminal liability, choosing instead to consider it as but one (albeit a very important one) of a list of factors in making such a determination.[12] The Canadian Supreme Court has actually taken such a step, holding that what we would call "strict liability" would violate the Charter of Human Rights if imprisonment were even possible, *Martineau* [1990] 2 S.C.R. 633.

STRICT VS. VICARIOUS LIABILITY

Strict liability must be distinguished from vicarious liability. In a case involving only vicarious liability, *someone* (usually the person who actually met the conduct element of the offense) has entertained the requisite mens rea; the issue is whether the defendant should be held responsible for that person's acts and mental states. Differently stated, the issue is whether the actus reus element of the crime should be *imputed* from the actual actor to the *putative* actor, our defendant. The answer is easy if the defendant has *told*, or encouraged, the actor to act as he did; we call this accomplice liability, and it is discussed in Chapter 14. Thus, if *A* tells *B* to shoot *C*, *A* is responsible for *B*'s shooting of *C*, even if *A* never held the gun and even if *A* was not present at the shooting. Suppose, however, that the defendant's connection is less direct than that. The classic case involves a bartender who *knowingly* serves a minor: Should the owner be held liable, even though the owner was not present and perhaps even admonished the bartender against such sales? However one resolves that question, there is mens rea present; the bartender knew that the customer was a minor. Though it is true that the employer is morally innocent, and that as to him, the liability is in some sense strict, at least there is someone present who has acted in a morally

blameworthy fashion.[13]

One must distinguish the more difficult case, the one that raises all the policy issues in this area. It involves the bartender who does everything humanly possible to ensure that the customer is over the drinking age (recall the Gregori/Isaiah hypothetical at the outset of this chapter). If his customer now turns out to be one day under that age, should the bartender be held liable? If he is, *strict* liability holds. If the *owner* is held on the basis of the bartender's acts, *strict vicarious* liability operates. Before concluding that a case imposes strict liability, be sure that it is not "only" one of vicarious liability.

ARGUMENTS FOR AND AGAINST STRICT LIABILITY

Proponents of strict liability contend that strict liability is acceptable where (1) the need for deterrence is great and the ability to prove mens rea is difficult (e.g., food adulteration); (2) the penalty is small and the number of cases large (e.g., parking violations); (3) there is no stigma attached to the conviction; and (4) the use of strict liability will lead people to be more careful in carrying out certain types of conduct.[14]

Each of these arguments, taken separately, seems unable to carry the day. Strict liability obviously clashes dramatically with the view that mens rea is a bedrock of criminal liability. If one believes that persons who are not at least criminally negligent are "morally innocent," then strict liability means punishing the morally innocent. Moreover, mens rea is always difficult to prove. Although it is difficult for the prosecution to prove that the defendant knew that the milk was less than 2 percent cream, it is equally difficult to prove that the defendant "purposed" death in a homicide case.

Nor is court backlog a persuasive reason. Having too many cases is always a problem, and there are far too many "real" crimes today on the courts' dockets. Moreover, as we have seen, the Supreme Court has recently opined that the larger the number of potential defendants, the *weaker* the argument for strict liability becomes because of the danger of ensnaring truly innocent parties.

As for the third justification, stigma may well be in the eye of the beholder. As summarized by one panel of dissenting judges:

> We undermine the foundation of criminal law when we . . . vitiate the requirement of a criminal state of knowledge and intention as to make felons of the morally innocent.[15]

Some supporters of strict liability argue that strict liability is necessary to prevent real criminals from fooling juries or escaping conviction because of proof problems, but this concern would exclude all claims that would exonerate a defendant, since juries sometimes do make mistakes.

Finally, although there is some merit to the argument that strict liability will encourage people to be more careful, there may be better means to justify that end. A negligence standard already requires an actor to do everything reasonably within their power to act with care. Demanding any more care than reasonableness may be asking too much from society. Moreover, proponents' argument that strict liability is necessary for the most serious of crimes is undermined by the fact that strict liability is used most commonly for minor offenses.[16]

Proponents of strict liability may also argue that many such crimes involve regulated businesses into which defendants voluntarily enter (e.g., banking, food manufacturing, waste management), and therefore it is not unfair to require them to take the risk of strict liability since the defendants knew of this risk when they undertook the activity. Furthermore, the argument goes, the government regulates this activity because it is potentially harmful to society, and the risks to the public at large that the risks to the public at large outweigh the risk that a truly innocent defendant will be criminalized. [17]

Empirical studies show rather conclusively that regulatory agencies do not enforce these regulations on a strict liability basis, but give the defendants frequent and constant notice of known or suspected violations before bringing criminal charges. Richardson, Strict Liability for Regulatory Crime: The Empirical Record, 1987 Crim. L. Rev. 295.

In addition to this empirical evidence, juries themselves may well nullify strict liability when confronted with actual defendants. Some may argue that the debate over strict criminal liability is a tempest in a very small teapot indeed, but this may not be so. First, juries *do* listen to instructions and follow them (see *Park*, supra). Second, there is surely

something unsettling about a system that must rely on jury nullification or executive discretion in order to achieve justice. Finally, to the extent that strict liability (or any other legal doctrine) fails to comport with the community's moral norms, it may bring the entire system into disrepute.

ALTERNATIVES TO STRICT LIABILITY

The strongest argument against strict liability is that it authorizes the criminalization of the morally innocent. Opponents also point out that no other country embraces strict liability, either rejecting it entirely or adopting one of several options. If compromise were necessary, they posit, the following alternatives could be explored. For example, one could

1. restrict such liability only to fines and preclude loss of freedom as a sanction. If deterrence seems necessary, the legislature could add a crime of "recklessness" and severely increase the penalty;
2. require the state to prove negligence;
3. permit the state to prove its prima facie case on the basis of strict liability, but then allow the defendant to avoid conviction by proving that he was not negligent (usually in a tortious sense). Canada and many other Commonwealth countries have taken this path. *Regina v. City of Sault Ste. Marie*, 85 D.C.R.3d 161 (1978).

"GREATER CRIME" THEORY

If *A* does not know he possesses cocaine at all, throwing him in prison seems unfair. Suppose, however, that *B* knows that he possesses cocaine but is unaware of the quantity involved. If the statute provides for stiffer penalties depending on the amount of cocaine possessed, it does not intuitively seem unfair to impose on *B* the larger penalty. *B*, after all, is not an innocent party to begin with; he knows he is engaging in a crime. Similarly, if *C* purposely punches *D* in the nose, *C* knows he is committing a criminal assault. If it turns out that *D* is a police officer,

and a statute penalizes assaults on police officers more severely, it is arguably acceptable to impose on *C* the higher penalty.[18]

The general approach has been termed the "greater crime" theory. The "greater crime" theory can lead to other, even more expansive, notions. Thus, in the classic case of *Regina v. Prince*, 80 All Eng. L. Rep. 881 (1875), the defendant and his girlfriend, Annie Phillips, ran off to Leeds. When prosecuted for taking a girl under the age of 16 from her parents without their consent, Prince argued that he believed Ms. Phillips was over 16. The jury found this belief to be reasonable. Under normal common law rules, a reasonable mistake of fact would have been a total defense (see Chapter 5). Nevertheless, a majority of the judges subscribed to two theories that went beyond the "greater crime" to uphold Prince's conviction. They would hold the defendant guilty if he knew either (1) that he was committing a possible tort, and therefore should take the risk that he was committing a crime ("greater legal wrong" theory) or (2) that he was committing an immoral (though not necessarily illegal) act, and therefore should take the risk that he was committing a crime ("greater moral wrong" theory).[19] Some would argue that each of these approaches expands the net of criminality far beyond what theories of deterrence or retribution would allow.

In 2009, within one week, the Supreme Court issued two opinions that reflect the tension in the criminal law generated by the greater crime doctrine. In *Dean v. United States*, 556 U.S. 568 (2009), the Court confronted this statute:

> (A) any person who, during and in relation to any crime of violence or drug trafficking crime. . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime —
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Dean robbed a bank, using a gun. As he was collecting the money, the gun discharged, leaving a bullet hole in the partition between two teller stations. He cursed and dashed out of the bank. Witnesses later testified that he seemed surprised that the gun had gone off. For purposes of the appeal, the government conceded that the discharge was

accidental, and, at best (or worst), negligent. Although no one was injured, Dean was sentenced to 10 years for the discharge (in addition to the sentence for his bank robbery). He argued that since subsections (i) and (ii) required some mens rea, subsection (iii), which had a longer additional penalty than either of those two, should be similarly interpreted. Instead, the Court, in an opinion written by Chief Justice Roberts, concluded that defendants who commit "violent offenses" "take the risk" that they will end up with longer sentences than they knew they were risking.

The *Dean* opinion was entirely consistent with the greater crime theory, although Chief Justice Roberts never mentioned that concept by name. Nor did he argue that clause (iii) constituted "merely" a sentencing factor, for which no mens rea was required (see below). One could, therefore, read *Dean* as embracing the greater crime theory.

One week later, however, in *United States v. Flores-Figueroa*, 556 U.S. 646 (2009), the Court totally ignored that same theory. As discussed in Chapter 4, the government in *Flores-Figueroa* argued that while it was required to prove that the defendant knew he was engaged in identify theft, it did not have to prove that he "knew" that the card he used actually belonged to another person in order to obtain a sentence enhancement of two more additional years. This, of course, was the greater crime theory — the *Dean* rationale would have upheld the government's argument. But the Court, in an opinion by Justice Breyer, rejected the government's argument, relying primarily on a reading of the statute that closely resembled "element analysis" (see page 83 for a more detailed examination of this part of the opinion). Nowhere in the opinion did Justice Breyer cite, much less discuss or distinguish, the *Dean* decision, nor was there any reference to the possibility that someone who knew he was involved in identity theft should take the risk that the false identity belonged to a real person.

Dean and *Flores-Figueroa* are reconcilable, of course, on a narrow reading: *Flores-Figueroa* involved a statute that explicitly used the term "knowingly," while the statute in *Dean* did not. Moreover, the *Dean* statute looked more like a "sentencing statute" than did the one involved in *Flores-Figueroa*. And Dean was involved in a violent offense, whereas Flores-Figueroa was not. Still, that *Flores-Figueroa* did not discuss these differences makes the two opinions together clash at least

in approach, if not in actual outcome.[20]

ONE MORE WAY OF IMPOSING STRICT LIABILITY: ELEMENTS, MATERIAL ELEMENTS, AND SENTENCING FACTORS

The courts have sometimes taken another approach to allowing legislatures to impose strict liability. Remember that mens rea only applies if there is a "material element" involved. If the element relates "exclusively" to jurisdiction, not even the Model Penal Code requires the government to prove any mens rea with regard to that fact. (*Caveat*: The government must still prove beyond a reasonable doubt that the element exists, e.g., that the crime occurred within the relevant statute of limitations period or in the relevant city, county, state, etc.)

And if the factor is not even an element, it is even clearer that the government need not prove mens rea. In the past 20 years, the Supreme Court has grappled, in a slightly different context, with statutory facts that appear to relate primarily, if not exclusively, to sentencing. For example, in *Apprendi v. New Jersey*, 430 U.S. 466 (2000), the defendant was convicted of possessing a gun for an illegal purpose, for which the maximum sentence was 10 years in prison. A separate statute provided that if the judge found that the defendant intended to use the gun for a racially motivated crime, the maximum sentence could be doubled. The Court held that the motive had to be proved to the jury beyond a reasonable doubt. But it did not say that the motive was an element, instead it said that since the motive increased the *maximum* sentence, it *acted like* a material element. In the intervening decade, many opinions, and literally hundreds of law review articles, have tried to determine the impact of *Apprendi* and its progeny.[21] For our purposes, however, the question is whether a fact that potentially increases the sentence carries with it a mens rea (which the government would clearly have to prove beyond a reasonable doubt).

CONSTITUTIONALITY

Although the United States Supreme Court has frequently talked about strict liability crimes, a careful reading of the decisions demonstrates that the Court has never actually rendered a holding on whether such offenses are constitutionally permissible. This is due, in large part, to the fact that virtually all of the cases concern federal statutes, and therefore are technically decisions involving statutory construction rather than constitutional limitations. The Court also has frequently indicated its refusal to become enmeshed in deciding the constitutional implications of the mens rea doctrine. Finally, the procedural posture of some of the cases has frequently been such that no "holding" on the issue is necessary. Thus, for example, in each of three of the leading cases, *United States v. Balint*, 258 U.S. 250 (1922); *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558 (1971); and *United States v. Freed*, 401 U.S. 601 (1971), the lower court dismissed an indictment that had not alleged knowledge on the part of the defendant. Each case held that such an allegation is not necessary, but no decision states what should be done when the defendant raises the issue at trial.[22]

Similarly, the *Morrissette* opinion (see page 65), whose language strongly supports a "presumption" that all statutes require mens rea, ultimately avoids the constitutional issue by construing the statute to require mens rea. Even in *Staples*, the Court explicitly acknowledged in dictum in a footnote[23] the possibility of strict criminal liability.

The only United States Supreme Court case *holding* that a conviction dispensing with mens rea is unconstitutional is *Lambert v. California*, 355 U.S. 255 (1957). The Court held that the conviction of an ex-felon for not registering with the police in Los Angeles, as required by a city ordinance, violated the Fifth and Fourteenth Amendments because there was no showing that the defendant knew, or should have known, of a duty to register. That decision, however, has been a "derelict on the waters of the law," precisely as Justice Frankfurter, in dissent, predicted. There may be several reasons for the failure of *Lambert* to start a flood of anti-strict-liability decisions. First, it involved a city ordinance rather than a state statute. It is one thing to require defendants to be familiar with state statutes; it is a burden of a

different order to require them to be familiar with every ordinance of every city in which they happen to find themselves (see Chapter 5). Second, the ordinance imposed a duty to register rather than imposing a duty *not* to do something. The common law has always been wary of imposing duties to act (see Chapter 3).

In short, the United States Supreme Court has given mixed signals on the constitutional significance of mens rea and its counterpart, "strict liability." There has been much eloquent language repeated in several recent decisions about the crucial role that mens rea plays in all criminal charges. However, there is also some language, usually in the earlier decisions, that both supports the concept of strict liability, and in some instances endorses the application of strict liability in particular areas.

THE MODEL PENAL CODE

The Model Penal Code takes what it calls a "frontal attack" on strict criminal liability. Section 2.05 provides expressly that culpability is not required *only* with regard to "[o]ffenses which constitute violations." "Violation" is, under the Code, a term of art meaning an act for which imprisonment, even for a day, is not an available sentence (§1.04(5)). This, of course, follows precisely the line that Professor Sayre proposed in his article some 80 years ago. Even where the defendant is charged with a violation, a court may still interpret a statute to require mens rea if the court determines that requiring the state to prove mens rea is "consistent with effective enforcement of the law defining the offense" (§2.05(1)(a)).

The Code also rejects the "greater crime" theory. Section 2.04(2) provides that mistake is not a defense "if the defendant would be guilty of another offense had the situation been as he supposed." *However*, the next sentence provides that "In such case . . . the . . . mistake . . . shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed."

A RECAP AND A METHODOLOGY

How, after all this, can one begin to assess a statute to decide if it even arguably imposes strict liability? Under the Model Penal Code, the answer is fairly straightforward: If imprisonment is possible, the statute cannot impose strict liability. Under common law:

1. First determine that the statutory word is a "material element" and not a sentencing factor nor a "mere" element of the crime. If it's either of the latter two, STOP.
2. If the statute contains a mens rea word, then it is likely that the mens rea word modifies all material elements of the offense (see *X-Citement Video*, Chapter 4, supra).
3. If the statute does *not* contain any mens rea word, then:
   a. If it prohibits something like a common law crime, it is probably not strict liability (*Morissette*, supra).
   b. If it carries a severe penalty (usually more than one year of imprisonment, but this is very shaky), it is probably not strict liability.
   c. If it involves a complex regulatory scheme, it may be strict liability as long as (a) and (b) are not true, and possibly even if they are. (Boy, was that some help!)
   d. If the defendant would have been guilty of a crime even under the facts as he supposed, many states will impose strict liability on the "greater crime" theory.

Remember that these are only guidelines. If state legislatures declared expressly when an offense is strict liability, most of *these* questions would be answered,[24] and we would be left only with the (easy?) issues of fairness and constitutionality. Good luck in the woods.

Examples

1. Mike, a 25-year-old man, is out at a 21-and-over bar with some friends. He meets and begins talking to a girl named Jenna. At one point in the night, Jenna has her driver's license out and Mike notices they were born in the same year. When he mentions this,

Jenna confirms that she is 25. At the end of the night, Jenna invites Mike back to her apartment, where they engage in consensual sexual acts. Eventually, Mike learns that Jenna is actually a 17-year-old high school student who regularly goes to bars using her fake ID. "Her" apartment is actually her older sister's apartment, which she uses when her sister is out of town. Mike is arrested for statutory rape, which criminalizes an adult engaging in any sexual acts with a minor under the age of 18. Mike argues that he sincerely believed — based on the facts that Jenna was in a bar, had an ID that showed she was 25, and seemed to have her own apartment — that Jenna was an adult. What result?

2. Chris parks his car, puts sufficient money in the meter for one hour, and walks into a meeting. Later, noting that his watch indicates that he has eight minutes left, he leaves the meeting and returns to put more money in the meter, only to find Rita, a meter reader, writing him a parking ticket for overtime parking. The meter reflects a violation. Unknown to him, Chris' watch stopped three times for a period of four minutes each during the hour, although on each occasion the watch began running again. The offense is punishable by a fine of $50. Is Chris guilty of a parking violation?

3. Bjorn is driving his van through a 60 m.p.h. zone. He sets his cruise control at 58 and takes his foot off the pedal. The control malfunctions, and the car's speed slowly rises to 72. It sticks there, and Bjorn carefully darts in and out of traffic, honking his horn as he goes. He finally pulls over and pulls out the ignition key, stripping the gears and causing $6,000 damage to his van. At that point a friendly state trooper points out to Bjorn that haste makes tickets as well as waste. The maximum penalty for speeding is $500. The maximum penalty for reckless driving is 30 days' imprisonment. Is Bjorn guilty of both these offenses? Or of either?

4a. Jack is a cook at Burger Prince; Jill is the cashier. A customer purchases from Jill a burger that was cooked by Jack and becomes ill. It is determined that the meat that Jack used contained bacteria that were not destroyed by the cooking process, although a properly working stove would have killed them. Neither Jack nor Jill is responsible, as a matter of employee functions, for cleaning the

stove. Jack and Jill are prosecuted under a statute that prohibits the "manufacture or selling of dangerous food." The penalty is up to 2 years in jail. What result?

4b. Jack and Jill's supervisor, John Schmidlap, who was not present at the time, is also charged with selling adulterated food. Is John Schmidlap guilty?

5. On a dark and rainy night, Harvey, driving a pickup truck, is unable to stop and runs through a stop sign. His truck hits Matilda, killing her. He is charged with "motor vehicle homicide," which carries a maximum sentence of one year and a substantial fine. At trial, the prosecutor argues that he need not even prove that John was negligent — the crime is one of strict liability. What result?

6. Emily purchases a white powder in a small glassine envelope from a friend. She is told and believes (reasonably) that it is sugar. Guess what? It's not. Is Emily liable for possession of a controlled substance?

7. Striker, a star pitcher for the local baseball team, is also a leading cocaine pusher. He has arranged to meet his latest purchaser near a movie theater in a section of town with which he is not familiar. As the sale goes down, he is arrested and charged with "knowingly selling cocaine within 1,000 feet of a school property." Some 900 feet away, hidden by trees, a railroad trestle, and an interstate highway, is a warehouse owned by the Board of Education and used to store books. The penalty for knowingly selling cocaine (a different statute) is 5 years. The penalty for this statute is 20 years. Striker argues that he did not know, and could not reasonably have known, that he was near school property.

8. Marty wants to surprise his wife, Mary Lou, with a diamond necklace. He steals from a jewelry store a box that contains such a necklace, without knowing that the owner, Diamond Lil, has rigged a bomb inside the box. When Marty gives the "necklace" to Mary Lou, she opens the box, the bomb detonates, and it's so long, Mary Lou. Has Marty committed homicide?

9. Mary, seeking to rent an apartment in a very tight market, falsely

tells the Realtor that she works for the Defense Department. Unknown to her, the Realtor is an FBI agent. Mary is prosecuted for knowingly providing false information to a federal employee. What result?

10. Remember Johnboy from Chapter 5 (on pages 125 and 130)? Is it possible that a court could interpret this statute to impose strict liability as to either his mistake of law or his mistake of fact, however reasonable?

11. Quincy was convicted in state court of child molestation in 1992, and became subject to the state's Sexual Offender Registration Act (SORA). In 2008, as a result of the economic downturn, he lost his job and then his house. For four months he was homeless. He then found another job, and moved into an apartment. Two months later he was arrested and charged with violating SORA, which requires "[w]ithin 48 hours after any change in the offender's permanent or temporary residence . . . the offender shall report in person to a driver's license office." Failure to register is a felony. Quincy requested a jury instruction that the state must show that he knowingly or recklessly did not register, but Bryan, the prosecutor, objected on the ground that this was a public welfare, strict liability statute. The trial judge rejected Quincy's request and Quincy was sentenced to 6.5 years in prison. What result on appeal?

12. Osama purchased, at $4.00 a pack, several packages of Marlboro Lights. He then resold them to Gregory for $6.00 per package. Osama is charged with violating subsection (2) of the following statute: "Whoever

    1. makes a first sale of unstamped cigarettes;
    2. sells, offers for sale, or presents as a prize unstamped cigarettes; or
    3. knowingly consumes, uses, or smokes cigarettes taxed under this chapter without a stamp affixed to each individual package is guilty of a misdemeanor."

    The offense carries a maximum $4000 fine and a jail term of up to 1 year. The indictment does not charge any mens rea. Osama

moved to quash the indictment. What result?

13. Remember Napoleon, who in Chapter 4 shot a rabbit, not knowing that he was even shooting a rabbit? Now assume that the rabbit was a snowshoe rabbit, which is listed as an endangered species under a state endangered species statute, which provides that "[i]t is unlawful to shoot a snowshoe rabbit." (a) He didn't know it was a rabbit he was shooting; (b) he knew it was a rabbit, but not a snowshoe rabbit; (c) he knew it was a snowshoe rabbit, but he had no idea that it was endangered; (d) the rabbit, which is rather large, actually attacked him, and he killed it, fearful for his life.

14. In a series of cases, the federal courts have interpreted the Migratory Bird Treaty Act, 16 U.S.C. §703 as imposing "strict criminal liability" for the death of any migratory bird. On January 15, 2009, U.S. Airways flight 1549 crash-landed in the Hudson River when several birds, including several migratory birds, flew into the jet engines. While all passengers were saved, the birds died. Is Captain Sully Sullenberger, the pilot of Flight 1549, criminally liable for the birds' deaths?

15. Liam buys a Coke at the nearby convenience store. He sees a donation box marked "For the orphans of Sudan." He sees several coins and a $5.00 bill in the box, so he grabs the box and runs. When he shakes the box open, he counts the loot. "Seven dollars! All that effort for seven bucks!" Unhappily for Liam, Chris Columb, the local police officer, hears him and arrests him for larceny, which would normally carry a six-month sentence. Even more unhappily for Liam, it turns out that one of the coins was not merely a nickel, but a "buffalo nickel" worth $50,000. He is charged with grand larceny (anything over $500) and is sentenced to the maximum 10 years. Has Liam been nickled and dimed?

16. Ansel Jefferson, CEO of Green Energy, Inc., is an ardent environmentalist and conservationist. While building his new company headquarters, Ansel became aware that it was on the flight path of robins, which migrated past this spot every year. He sought the advice of the best engineers and environmental groups to assure that the birds would not fly into the building. At a cost of

over $5,000,000, the building was oriented away from the flight path and made as apparent to birds as possible. One dark and stormy night, however, Hurricane Adams blows three robins and a Canadian goose into the windows, and they are all killed. The goose is significantly off-course; the ferocity of the winds had essentially blinded him to his route. Ansel is prosecuted for the violation of the Migratory Bird Treaty Act, 16 U.S.C. §703, which makes it a misdemeanor to "pursue, hunt, take, capture, kill, attempt to take, capture" a protected bird (which a Canadian goose is, but a robin is not). Ansel argues that (1) he has been "super cautious" and that (2) it was totally unforeseeable that a Canadian goose would be injured by his building. Assume that actus reus is established. What result?

Explanations

1. The first thing you would examine in this case is the statutory language of the offense. Statutory rape is "commonly defined as requiring no culpability as to the offender's sexual partner being underage."[25] In other words, it is often designated a strict liability crime by statute. It is unclear what the statute in Mike's jurisdiction says, however, so we must look to other indicia that the crime should or should not be construed as having strict liability.

   The most common and convincing argument would be that statutory rape is a public welfare offense. Undoubtedly, there is strong public policy in favor of protecting youth in society from sexual predators. Making statutory rape a strict liability crime would prevent predators from claiming they were mistaken of their victims' ages. However, such a strong position by nature will make arguably innocent actors culpable of a serious crime. Mike, for example, seemed to have acted in the most prudent way possible; all signs seemed to point to Jenna being of age.

   The Model Penal Code seems to take the middle road on this issue. While most crimes in the MPC are not strict liability crimes, §213.6(1) instructs that, in the context of rape, "[w]henever . . . the criminality of conduct depends on a child's age . . . to be older than 10, it is not defense that the actor did not know the child's age, or

reasonably believed the child to be older than 10." This effectively makes statutory rape of a child under 10 a strict liability crime. Since Jenna was 17, it seems, the crime would not be strict liability in an MPC jurisdiction.

2. This is the prototypical strict liability offense. Whether Chris knew that he was overparked or not, he will be found liable. The penalty is low, and it is at least plausible that there are too many such offenses to allow or require a prosecutor to prove and a court to inquire about the defendant's actual state of mind. It is also unlikely that there is any moral stigma to such an offense. (But in a world where people kill for parking spaces, who knows?) The Model Penal Code would agree, since there is no imprisonment possible.

3. Even assuming that the malfunction of the cruise control occurred for the first time and was a complete surprise, Bjorn is likely to be found strictly liable of speeding, primarily on the flood-of-cases rationale, but also due to the potential harm involved. This will be true even if Bjorn just had had his car, including the cruise control, checked and serviced 10 minutes before the event. Tough luck, Bjorn. Next time, don't be so decadent. Bjorn's best argument is that he was not *driving*, not that he was not speeding (no actus reus). He is not reckless — the chances that the control would stick are not "substantial."

   The Model Penal Code would allow strict liability if the charge is *speeding*. However, Bjorn would not be guilty of the *reckless* driving charge because imprisonment is possible. The state would have to prove recklessness, which under the Code requires a subjective awareness of the risk of committing the crime (in this case speeding).

   Note: This is a real case. *State v. Baker*, 571 P.2d 65 (Kan. App. 1977). However, the court's analysis in *Baker* is not technically based on strict liability. It distinguished two earlier decisions in which drivers involved in accidents because of failing brakes and failing throttles were not held strictly liable on the grounds that those items were "essential" to the operation of a car, whereas a cruise control was not. Perhaps using cruise control is simply too

decadent.

4a. Unless the court reads a mens rea requirement into the statute (see Chapter 4) or they are in an MPC state, Jack and Jill should pack for Statesville now. Food and other health offenses are frequently deemed "public welfare offenses," allowing strict liability even if imprisonment is possible because the public generally is endangered and cannot protect itself. However, the owner of the restaurant, not the employees, may be responsible for this strict liability crime. If the two were charged with "reckless" sale of dangerous food, they might have a good claim because they did not know there was a risk of contamination. They will stay home in an MPC state, which precludes imprisonment without mens rea.

4b. Jack and Jill could have a cellmate, John. Even if John wasn't present in the building, he may be held on a vicarious strict liability basis, even if the punishment is incarceration (except in an MPC state or those states that have held vicarious liability involving imprisonment to be unconstitutional).

5. In *State v. Perina*, 282 Neb. 463 (2011), the Court held that motor vehicle homicide was a public welfare offense not requiring mens rea. The court relied heavily on *Morrissette*'s observation that crimes "derived from" the common law often required mens rea but concluded that because this statute had no common law roots, *Morrissette*'s presumption of mens rea did not apply. Remember, too, that this is the opinion where Justice Jackson spoke so eloquently about the usual need for mens rea (see page 65). The Nebraska court also noted, however, that the crime was a misdemeanor, rather than a felony — which is a significant distinction. Other courts have reached similar conclusions. See, e.g., *State v. Wojahn*, 204 Or. 84 (1955); *Haxforth v. State*, 117 Idaho 189 (1990). Under the Code, it's easy — any jail time requires the state to prove at least (criminal negligence) and recklessness unless negligence is stated.

6. Emily clearly did not have any mens rea as to possession of a controlled substance, so she will only be liable if this is a strict liability crime. There is no clear legislative intent to impose strict

liability, so we must first determine if there is an argument to urge a court to impose strict liability anyway. Emily undoubtedly violated a "material element" when she was in possession of a controlled substance. Moreover, there is no mens rea word (purposefully, knowingly, etc.) that would give us any indication that mens rea is required. Therefore, the prosecutor's best argument will be that strict liability should be imposed because possession of a controlled substance is not a common law crime and the maximum sentence is relatively light. If the court agrees with this argument, then Emily's subjective thoughts do not matter and she is responsible for the crime.

The answer in an MPC jurisdiction would be simple: Since there is a possibility that Emily can be sent to prison, there is no strict liability and Emily is off the hook.

As an aside, the real-world answer to this would depend, incredibly enough, on *when* the event occurred. Prior to 1970 or so, virtually every state — following the Uniform Narcotic Drug Act suggested in 1932 by the Conference of National Commissioners on Uniform State Laws — held that drug crimes, including possession or sale, could be prosecuted on a strict liability basis. The defendant's belief, no matter how reasonable, about the nature of the item was irrelevant. In 1970, the Commissioners revised their view and required mens rea. Within 15 years, every state had followed this lead, either legislatively or judicially. Whether this had to do with possible increased punishments, or a sense that drug deals were now "mala in se" rather than "mala prohibitum," or for some other reason is unclear. So, in reality, Emily stays home, even under the common law.

7. This is an example of the "greater crime" theory. Drug sale, after all, is a crime by itself. Many states, following the example of the federal government, have passed "drug-free school zone" statutes such as the one involved in this example. These statutes vary in form. Some, such as the one here, are "free-standing" crimes. Others, including the federal statute, build on a preexisting statute that bans drug sales, and declare that any sale that occurs near a school yard doubles the maximum penalty. With the latter, the argument that "school property" is not a material element of the

crime, but merely a “sentencing enhancer,” is plausible. Under the statute, as presented in this example, however, it is much more likely that a court should find it to be a “material element” of the crime, thus requiring the state to prove mens rea with regard to the proximity of school property. Some courts, however, have simply ignored this distinction and held that there is no mens rea requirement as to that element. Several states have expressly declared in a statute that lack of knowledge that the event occurred near school property is irrelevant as to guilt. Under the Code, Striker’s term will be much shorter. He can be convicted of selling near a school yard, but his sentence can’t be more than that for “merely” selling. The Code totally rejects the idea of punishment for a “greater crime.” See generally Annot., School-Zone Statutes, 27 A.L.R.5th 593 (1995). It looks like Striker will be pitching for the state prison team for the next few years.

8. This example tests the outer limits of the greater crime theory. To the extent that the issue arises at all, it usually involves a fact that makes the first crime a “higher-level” offense of the same kind. The courts usually are not confronted with, and therefore do not discuss, whether the theory would apply to a different kind of crime (property vs. personal injury; possession of diamonds vs. possession of drugs, etc.). Even more than a century ago, one court expressed great concern over exposing a defendant who knew he was committing larceny to the far more serious crime of arson, when the method by which he committed the larceny resulted in the burning down of a ship. *R v. Faulkner*, 13 Cox C.C. 550 (1877). The court rejected what it called a “very broad” claim by the prosecutor that anyone involved in any crime should be held liable for any greater crime that happened (however accidentally) to ensue. Under the MPC, Marty can be punished only for the larceny, not the death. *But be careful*: When we get to felony murder (Chapter 8), the same question may be answered in a different way.

9. Believe it or not, under both the common law and the MPC, it is likely that Mary will be on her way to prison. This is a variation of *United States v. Bakhtiari*, 913 F.2d 1053 (2d Cir. 1990), which actually has much more bizarre facts than the example. Some

courts would explain that "federal employee" here is not a "material" element, but only a "jurisdictional" element of the offense, and no mens rea is required. If this is a valid argument, the Model Penal Code would agree. Other courts might consider this an example of the "greater moral wrong" theory; while still others might consider a mistake (or ignorance) as to the legal status of the Realtor a legal mistake, and hence governed by ignorantia lex.

10. You guessed it. It's not only possible — it's happened. Courts applying statutes similar to these have held that the statutes are strict liability offenses, immune to both mistake of law and mistake of fact claims. Note that it is virtually impossible to see this statute as a "public welfare offense" in the sense that the public is "endangered" in a way against which it cannot protect itself (the original explanation of that phrase). Here, the only viable explanation is that public policy requires us to sacrifice Johnboy so as to deter real looters from even raising mistake.

11. This sounds like *Lambert* (Chapter 5), right? But Bryan argued that (a) sex offenders were much more likely to repeat than "felons generally," and thus the public welfare (and particularly children's welfare) was more clearly involved; and (b) this was a regulatory provision and thus plausibly strict liability. This sounds like a close question. Even if the state's suggestion that Quincy is "in the business" of offending, he had registered with SORA before and certainly "should" or "might" have been informed of his duty to inform the state of his movements. Moreover, the argument that the state is merely "regulating" this "business" is clever. But the Florida Supreme Court rejected these contentions, pointing out that the penalty for non-registration was severe (particularly in contrast to that in *Lambert*). *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004). Nice try, Bryan.

12. This is a real case. *State v. Abdallah*, 64 S.W.3d 175 (Tex. App.-Fort Worth 2001). The first issue is a matter of statutory construction — does the presence of a specific mens rea in §(3) imply that there is no mens rea required to violate §(2)? Given the presumption that there is always a mens rea, the court in *Abdallah* proceeded to discuss whether this offense could (or should)

otherwise be a strict liability offense, in which case the absence of a mens rea word in §(2) might be persuasive. But the court, in a careful opinion, then examined each aspect of the crime: (a) whether there was a risk of serious harm to the public; (b) the legislative history and the severity of the punishment; (c) defendant's ability to ascertain the facts; and (d) the number of expected prosecutions, and concluded that this statute should not be interpreted as establishing a strict liability offense. There might be some argument here because subsection (1) appears to punish even the first offender, whereas subsection (2) seems to deal with a "second offender," but the court rejected that suggestion. A later decision, *State v. Walker*, 195 S.W.3d 293 (Tex.-Tyler App. 2006) applied *Abdallah* to a charge of filing for record an unapproved plan for real estate development to reject strict liability there, as well.

13. In Chapter 4, we asked how to interpret the statue under "normal" mens rea analysis. By now, however, we have several new questions, and we will discuss them together. The first question is whether this is a strict liability statute. There are now many such statutes, both state and federal, premised on the need to preserve species. The more noted federal laws include the (1) Endangered Species Act, (2) Lacey Act, (3) Marine Mammal Protection Act, (4) Bald Eagle Protection Act, (5) Migratory Bird Treaty Act, and (6) African Elephant Conservation Act.

    In addition, there are a number of federal laws that address the protection of both heritage and habitat, such as the Wild Free-Roaming Horses and Burros Act. If the species is listed by either the EPA or a state agency as "endangered," the liability is usually strict — no matter how careful he was, Nappy would be liable. David P. Gold, Wildlife Protection and Public Welfare Doctrine, 27 Colum. J. Envtl. L. 633 (2002). If there were some mens rea requirement, but he knew it was a horseshoe rabbit, his failure to know that it was "endangered" would not be helpful — it's a mistake of law, or of legal fact (see Chapter 5), and he's liable. For a claim of self-defense (necessity), Nappy's belief might have to be reasonable. If he had shot a charging (protected) Florida panther, for example, it is more likely that he'd be able to claim necessity

than for a charging rabbit, even a snowshoe one. There is, however, still a question of whether one can claim necessity if a crime is one of strict liability. See Chapter 16 for more details.

14. Yes. Although the Justice Department had the good judgment not to attempt a prosecution of Captain Sully, the precedents are clear — so long as the penalty is merely that of a misdemeanor (a maximum sentence of one year in prison), the provision may be applied without requiring a mens rea. See Larry Martin Corcoran, Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human-Caused Bird Deaths, 77 Denv. U. L. Rev. 315 (1999). Under the MPC, of course, the answer is simple — if there is even one day of confinement possible, the statute must be construed as requiring at least negligence, and it is hard to argue that if birds fly into your plane, *you* are the negligent party. Captain Sullenberger might argue that he did not "act" in this regard — that birds flew into his plane, rather than his plane killing them. But the possibility of criminal liability is striking. See Marc R. Greenberg, Captain "Sully" Sullenberger, Charles Dickens, and the Migratory Bird Treaty Act, 25 SPG Crim. Just. 12 (2010).

15. Under the common law, you bet your dollar. This would be the epitome of the "greater crime." A thief never (or rarely) knows the value of what he steals — it could be paste, or it could actually be the Hope Diamond. Liam's going to be flipping coins for a very long time. The issue here is the MPC. It would convict Liam of the crime of which he would be guilty "had the situation been as he supposed." Now Liam can probably make a fairly good case here that he "supposed" the facts to constitute petit, rather than grand, larceny. But if a thief never really knows how much is in the box, wallet, or whatever he takes, what crime does he "suppose" he's committing?

16. First, note that the MBTA provision appears to be *mala prohibitum* — i.e., a regulatory crime — rather than a *mala in se*, or inherently bad, crime. This fact would weigh in favor of an argument for imposing strict liability. Also in favor of strict liability are the facts that Jefferson's crime violated a material element of the law and that the law is a misdemeanor, likely carrying a light sentence or

fine. Moreover, the prosecution will argue that environmental law and the protection of endangered animals involves a highly complex regulatory scheme, which favors imposition of strict liability.

Jefferson's only argument against imposing strict liability is that he was an innocent actor, similar to the *Liparota* case discussed above. Jefferson spent millions of dollars to take every precaution to protect the endangered birds from his building. Arguably, he succeeded, since the only reason the birds flew into his building were because they were thrown off course by unusually high winds. Surely, this makes Jefferson "morally innocent." If Jefferson can successfully make this argument, he will likely be off the hook.

What result in real life? The MBTA has been the subject of much litigation, and even more law review analysis. The misdemeanor provision has been consistently interpreted as imposing strict liability, on the premise that it is an environmental statute which could be easily evaded if the government were required to prove any level of mens rea. See Kalyani Robbins, Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act, 42 Envtl. L. 579 (2012). In strict liability, foreseeability and great care are both irrelevant. The harms are the only issue. But there are two glimmers of hope for Ansel: First, over 30 years ago, the court in *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) actually foresaw (in dictum) the possibility that birds might fly into buildings and suggested that the owners should not be liable for such unforeseeable deaths. But that's only dictum. Second, the court in *United States v. Apollo Energies*, 611 F.3d 679 (10th Cir. 2010), embraced a notion of proximate cause that supplements (or replaces) strict criminal liability. See Alex Arensberg, Are Migratory Birds Extending Environmental Criminal Liability?, 38 Ecology L.Q. 427 (2011). (Wind turbines now kill between 5,000 and 275,000 birds each year.) (at fn. 115). But as the law stands now in most circuits, Ansel's going to pay a fine and possibly go to jail for a year. On the other hand, the MBTA was amended to include a felony offense as well; that provision has been interpreted to require mens rea.

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1. See Richard Singer, The Resurgence of Mens Rea III: The Rise and Fall of Strict Liability, 30 B.C. L. Rev. 337 (1989). Also, some courts, particularly with regard to liquor or drugs, have held that no mistake, however reasonable, as to these two items will exculpate.
2. For a lucid and challenging exploration of these issues, see Douglas Husak, Varieties of Strict Liability, 8 Canadian J.L. & Jurisprudence 189 (1995).
3. This is so-called statutory rape. Note that the defendant must still have mens rea as to the conduct element (intercourse) and the result. His liability is strict only with regard to the age element. See *People v. Hernandez*, 61 Cal. 2d 529 (1964). At least seventeen states now allow a reasonable mistake as to age to avoid liability. See *Garnett v. State*, 632 A.2d 792 (Md. 1993); Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. Rev. 313 (2003).
4. For these examples and more, see Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 8 (New York: Wolters Kluwer, 2017)
5. The United States Supreme Court distinguished between "common law" and "statutory" crimes in determining whether duress could be a relevant claim to the non-common law crimes of "receiving a firearm while under indictment" and "making a false statement to purchase a firearm" and, if so, whether Congress could put upon the defendant the burden of proof. *United States v. Dixon*, 548 U.S. 1 (2006).
6. See Avi Samuel Barbow, The Federal Environmental Crimes Program: The Lorax and Economics 101, 20 Va. Envtl. L.J. 47, 54 (2001); Michael Parker, Categorizing Environmental Crimes: Malum in Se or Malum Prohibitum?, 40 Tex. Envtl. L.J. 93 (2010); David Uhlmann, Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme, 2009 Utah L. Rev. 123 (2009).
7. Daniel Yeager, Kahan on Mistakes, 96 Mich. L. Rev. 2113 (1998) (*Citing Bensley v. Bignold*, 106 Eng. Rep. 1214, 1216 (1822)).
8. Some statutory rules do not have any moral basis. Thus, for example, it is imperative that we all drive on the same side of the road. Whether that is the right- or left-hand side is morally neutral, as long as we all follow the same rule once established.
9. "The government protests that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices." Under this view, it seems that *Liparota*'s concern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous, that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. *Staples*, 511 U.S. at 619-620.
10. The "apparent innocence" language has been challenged as too harsh on the ground that it allows trial courts to exclude a great deal of evidence that would persuade a jury that the defendant was morally innocent. Jeffrey A. Meyer, Authentically Innocent: Juries and Federal Regulatory Crimes, 59 Hastings L.J. 137 (2007). See also Susan L. Pilcher, Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law, 33 Am. Crim. L. Rev. 1 (1995).
11. The Present Significance of *Mens Rea* in Criminal Law, Harvard Legal Essays 399, 408 (1934).
12. "[W]here, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply." 511 U.S. at 624.

13. Most courts would hold the employer strictly (and vicariously) liable in either case, but at least two state courts have held that vicarious liability violates the due process clause of their *state* constitutions. *Davis v. City of Peachtree City*, 251 Ga. 219, (1983); *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986). In each case it was unclear whether the bartender knew the age of the minor, but each court's opinion seems to preclude conviction of the owner unless the owner personally knew the purchaser's age.
14. See generally, Appraising Strict Liability (A.P. Simester ed., 2005); see also Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 147 (New York: Wolters Kluwer, 2017).
15. *United States v. Weitzenhoff*, 35 F.3d 1275, 1299 (9th Cir. 1993).
16. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 149 (New York: Wolters Kluwer, 2017).
17. The argument somewhat begs the question of whether there should be strict liability by assuming that the acquiescence of the defendant answers the question. Suppose the government were to notify every car owner that, by virtue of using the public roads, he "consented" to a search at random of his car or his house. Would that consent be valid?
18. The suggestion was first made in dictum in *Regina v. Prince*, 80 All Eng. Rep. 881 (1875). For current applications, see annotations at 114 A.L.R. Fed. 355; 32 A.L.R. Fed. 2d 371; and 27 A.L.R. Fed. 2d 297. In *United States v. Feola*, 420 U.S. 671 (1975), the Court appeared to hold that a defendant did not need to know his assault victim was a federal officer. However, that issue was not briefed or argued in the Supreme Court, and the decision is therefore on shaky grounds. See Laura Bishop, Whether and at What Cost Section 111 Protects Federal Officers from Assault, 40 Sw. L. Rev. 355 (2010). Many states require such knowledge where there is an additional penalty. See Richard Singer, supra, n. 1.
19. *Prince* and all its progeny now seem to be dead in English law; any belief as to the victim's age, no matter how unreasonable, will be a defense to virtually any sexual crime. See *B (a Minor) v. DPP* (2000) 2 W.L.R. 452 (House of Lords); *R v. K* (2001) 3 W.L.R. 471 (House of Lords); Myerscough, Commentary: The Retreat from *Prince* and *Pointers* to Reform of Age-Based Sexual Offences, 2000 Child & Fam. L.Q. 12.4 (401).
20. The lower federal courts have been slow to apply *Flores-Figueroa*. See *Loenid* (Lenny) Traps, "Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After Flores-Figueroa, 112 Colum. L. Rev. 628 (2012). More generally, see Darryl K. Brown, Federal Mens Rea Interpretation and the Limits of Culpability's Relevance, 75 Law & Contemp. Probs. 109 (2012).
21. See Richard Singer, Examples and Explanations, Criminal Procedure II: From Bail to Jail, Ch. 12 (3d ed. 2012). See also Richard Singer, The Model Penal Code and Three, Two (Possibly Only One) Ways Courts Avoid Mens Rea, 4 Buff. Crim. L. Rev. 139 (2000).
22. There are many other issues that the prosecution need not allege, but upon which the state may have to carry the burden of proof beyond a reasonable doubt once defendants raise them. See Chapter 15.
23. "[I]f Congress thinks it necessary to reduce the Government's burden at trial to ensure proper enforcement of the Act, it remains free to amend §5861(d) by explicitly eliminating a *mens rea* requirement." *Staples*, 511 U.S. at 1802. See also *Bouie v. City of Columbia*, 378 U.S. 347 (1964).
24. In most instances, the absence of a mens rea word, or the failure to specify strict liability, is merely legislative oversight or sloppiness. In Utah, however, the legislature declared that, prior to 1983, a crime was considered strict liability "only when a statute defining the offense clearly indicate[d] a legislative purpose to impose strict liability for the conduct by use of the phrase 'strict liability' or other terms of similar import." Utah Code Ann. §76-2-102 (1982). However, this statute was amended in 1983 to require only that "the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state." Utah Code Ann.

§76-2-102 (1999). Arizona has adopted the contrary statutory interpretation rule: “[i]f a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state.” Ariz. Rev. Stat. §13-202(B) (2001).

25. See Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 147 (New York: Wolters Kluwer, 2017).

CHAPTER 7

Causation

OVERVIEW

Some crimes require the prosecution to prove that the defendant caused a particular result. Proving this fact is usually not difficult. However, challenging issues of causation sometimes occur in the criminal law, most frequently in homicide cases. Homicide requires the prosecutor to prove the defendant caused the death of another human being. (See Chapter 8.)

Causation often can be established by showing that the defendant's action directly brought about the resulting harm. In most cases, causation is simply a question of physical occurrence. Did the defendant initiate physical forces that, according to the laws of nature, led to a particular result?

Establishing that the defendant's conduct caused the proscribed result ordinarily is not difficult. If a professional killer shoots the victim in the head and the victim dies, a pathologist can conduct an autopsy and then testify at trial that the bullet fired by the defendant brought about the victim's death by producing massive injury to the victim's brain. Because the defendant produced the victim's death in exactly the manner he intended, there is no controversy about his criminal responsibility for causing death. Likewise, when a defendant engages in risky conduct that brings about death in exactly the way his conduct made probable, proving that the defendant's conduct caused the prohibited result is not hard. The actor is rightly blamed for the predictable consequences of natural events that he intentionally set in motion.

However, as in all human experience, the unusual or unexpected sometimes happens. What if the defendant did not intend or anticipate

the harm, or the harm occurs in an improbable manner? Is she criminally responsible for that harm? Judges, juries, and especially law students have difficulty determining when the criminal law will conclude the defendant has "caused" the harm and when she did not. In such cases, what started out as a simple inquiry into what caused a physical occurrence often requires a moral judgment, as well.

The analytic tools developed by the criminal law to resolve difficult causation issues are not always clear or easy to apply. This doctrinal difficulty is prompted, in part, by the ongoing debate concerning the relevance of harm in determining and grading criminal responsibility.[1]

Utilitarians are less concerned with the occurrence of harm than some retributivists. Some utilitarians argue that the defendant's *attitude* toward harm — not the *causation* of harm — is critical in determining whether he needs to be punished. They point out that whether harm occurs is often a matter of luck or skill and that the dangerousness of the individual is the same regardless of what harm his conduct actually causes.[2]

Some retributivists, on the other hand, argue that humans intuitively feel that the harm done is an important element in determining criminal responsibility and setting an appropriate punishment.[3] This particular retributive theory requires that individuals be punished only for harm they caused.[4] Otherwise, punishment is disconnected from a moral concept of just deserts.

THE RATIONALE OF CAUSATION

A primary goal of the criminal law is to prevent harm. Individuals may be punished for the harm they cause, provided other necessary elements like mens rea are satisfied. However, there must be a connection between someone's conduct and the resulting harm sufficient to justify the infliction of punishment.

The causation requirement limits criminal responsibility to those individuals whose conduct has been essential in bringing about harm. To ensure freedom from government interference, it must be shown that a prohibited result occurred because the actor's conduct caused that result.

This required relationship between an actor's conduct and the result derives from the notion of causal accountability. A result should only affect an actor's liability if the actor is responsible for it, and responsibility demands some causal connection. In other words, liability should only be established against an actor if the actor is responsible for it.[5]

One approach to determining causation in the criminal law is analogous to how a scientist might examine cause and effect in the physical world. The scientist might examine the natural forces that brought about the harm and determine whether the defendant's act played an essential part in physically causing the harm. Another approach focuses on the defendant's moral culpability; that is, did she act with the intention or contemplation that she might cause harm? If not, *should* she have contemplated the harm?

The former approach stresses the mechanisms by which harm occurs in the real world. The latter approach focuses more on the defendant's attitude and intent toward the occurrence of harm.

Causation is also an important element of tort liability. An individual who commits a tort may be required to pay compensation only for the damage he has caused. However, the goals of tort law are different from criminal law goals. Tort law seeks in part to distribute the risk of harm to those most able to bear the cost as well as to those who benefit from the activity that produced the harm. Moreover, negligent conduct is usually sufficient for the imposition of liability in tort. Thus, the concept of causation in tort is quite broad so that these goals can be more easily accomplished.

Criminal law punishment, on the other hand, is aimed both at deterring and at "paying back" intentional or risky harmful conduct. Thus, the concept of causation in criminal law may be more narrow.

There is an ongoing debate in criminal law on whether tort law concepts of causation should become part and parcel of what criminal law requires or whether criminal law should have a more narrow concept of causation. Needless to say, this debate has not been resolved.

THE ELEMENTS OF CAUSATION

The Common Law

Responsibility for Causing Harm

As in tort, to be held criminally responsible for causing a proscribed harm under the common law, the defendant's conduct must have been both the "cause in fact" and the "proximate cause" of the harm.

Cause in Fact

Cause in fact is "but for" causation. If the harm would *not* have occurred *unless* the defendant had engaged in the conduct, there is "cause in fact." This inquiry is essentially one of fact. Was the defendant's conduct necessary or a substantial factor for the harm to occur? Frequently, the analysis will conclude that the defendant's conduct started a chain of events that eventually resulted in the proscribed harm. Put simply, "but for" defendant's conduct, this chain of events would never have begun and the harm would not have occurred.

Cause in fact ("but for" causation) is required before an individual can be convicted of a crime that requires him to *cause* a result. Without it, the harm that has occurred cannot be linked to the defendant's behavior. After all, the harm may have happened even if the defendant had done nothing. To punish someone in these circumstances is arbitrary and unfair because it is not based on what the defendant did. Thus, "but for" causation must be established whenever causation is necessary for criminal responsibility. However, as we shall soon see, cause in fact is not enough for criminal responsibility under either the common law or the Model Penal Code.

Omission as a Cause

An act requires affirmative conduct while an omission is the failure to act.[6] Though the rule raises interesting philosophical questions, an omission can also satisfy the legal requirement of causation.[7] This is so even though it is difficult to think of "doing nothing" as bringing about a result. In reality, an omission fails to interrupt other forces already at work and, as a consequence of the defendant's not intervening, a harm

that was avoidable occurs.

Concurrent Causation

Concurrent causation is the one situation when the cause in fact requirement does *not* have to be met. It occurs when *two* independent causes in fact occur at the same time, and *either* of them would have caused the result by itself.

If two gang members intentionally shoot a victim *(V)* at the same time with the intent to kill him and each of their bullets inflicts a mortal wound, *each* has been the cause of *V*'s death. This is true even though the victim would have died had either of the defendants not intentionally shot the victim. This is a case of concurrent causation: Each defendant's conduct is considered the "cause in fact" because both acted with the intention of killing the victim and the conduct of either would have been effective in bringing about the proscribed result. The criminal law does not excuse the intentionally harmful conduct of one actor just because another actor also caused the same harm.

People v. Arzon, 92 Misc. 2d 739, 401 N.Y.S.2d 156 (1978), is a close case of concurrent causation. Defendant (*D*) started a fire on the fifth floor of an abandoned building to keep warm. Firefighters responded to fight the fire. Meanwhile, another fire started independently by *B* on the second floor trapped the firefighters. Overcome by smoke from the first and second fires, *V*, a firefighter, sustained injuries from which he died. Has *D* caused the death of *V*? In all likelihood, *V* would not have died had someone else not set the second-story fire. Nonetheless, *D*'s fire satisfied the "but for" requirement. If *D* had not set the chain of events in motion, *V* would not have died. Moreover, the court could point to *D*'s conduct — starting the fire — as one component of the forces that caused the firefighter's death.

In *Quintanilla v. State*, 292 S.W.3d 230 (2009), Defendant (*D*) was driving while intoxicated. The car crashed into a ditch and ejected *D* and his passenger from the vehicle. The passenger was left in a vegetative state and eventually died. The death certificate stated that the immediate cause of death was a "right lung empyema due to a chronic vegetative state that was the result of a closed head injury."[8] *D* was charged and

convicted of intoxication manslaughter. *D* appealed his conviction contending that the evidence was insufficient to sustain a guilty verdict because the prosecution had failed to prove that he had caused the deceased's death. *D* argued that there were concurrent causes of death: a lung infection and the family's decision to discontinue efforts to prolong the decedent's life. The court disagreed, stating that the fatal lung empyema was a sole result of *D*'s conduct. The right lung empyema was the immediate cause of death, however that condition was caused by a chronic vegetative state, which was due to a head injury obtained in the car crash. The court held that the lung empyema and the discontinuance of life support were not concurrent causes of death. But for *D*'s conduct, the lung empyema would not have occurred and the decedent would never have been on life support.

Direct Cause

Direct causation occurs when the defendant's act is the only causal agent in bringing about the harm. Simply stated, there is no other causally connected act that could have caused the harm.

In most criminal law cases, the defendant's conduct *is* the only cause of harm and, therefore, is also the *direct cause* of the harm. No one else even partially helps produce the harm. In the case of our professional killer discussed earlier, the defendant's intentional act of shooting the victim in the head is the only act necessary to bring about death.

Direct causation always satisfies the requirement of proximate cause. The defendant is the sole causal agent, and she brought about the harm in precisely the manner intended or made likely, therefore she is criminally culpable.

Proximate Cause

Is the defendant criminally responsible when another actor or event (called an "intervening cause" since it generally occurs *after* the defendant has engaged in his conduct, but *before* the harm results) plays a causal role in bringing about the harm?

Proximate cause is the doctrine the criminal law generally uses to decide when the defendant *should* be held criminally responsible for

causing harm even though an intervening cause helped bring about the harm. The actor's conduct must be related to the result in a sufficiently strong way in order to be held responsible. Proximate cause is satisfied if the intervening cause was (1) intended or reasonably foreseeable and (2) not too remote or accidental as to fairly hold the defendant responsible. "Foreseeability" does not require that the defendant subjectively knew the intervening cause could bring about the harm. It only requires that she *should* have known. There can be more than one proximate cause of a particular harm. (Note, however, that some jurisdictions require direct causation for criminal responsibility because proximate causation is considered too broad.)

Proximate cause questions cannot be answered solely by the physical sciences; thus, they are not "facts" that can be uncovered by scientifically examining cause and effect in the real world. Instead, their answers will depend to a large extent on public policy and the value judgments made by judges and juries about a defendant's moral culpability and their intuitive sense of justice in a particular case. To hold that an act proximately caused a harm is to say that it seems fair, or just, to hold the actor responsible for that harm. This sense of fairness in imposing accountability cannot be measured scientifically.[9]

Dependent Intervening Cause

A dependent intervening cause is one that was intended or reasonably foreseeable by the defendant, or sufficiently related to his conduct, to impose criminal responsibility for causing the harm. Characterizing the intervening cause as *dependent* results in a finding that the defendant *proximately caused* the harm. In more simple terms, the fact that another causal agent contributed to the result will not relieve the defendant of responsibility.

If a defendant forces a man into a car and states that she is going to kidnap him, and he subsequently leaps out of the moving car and seriously injures himself, his conduct will be considered a dependent intervening cause because human experience shows that victims will take serious risks in trying to escape from their captors. Thus, even though the man chose to leap out of the car, the defendant has proximately caused his injuries.

Independent Intervening Cause

Occasionally, however, another actor or event causes the harm in such an unexpected or unusual manner that the defendant will not be held criminally responsible for causing it. This is true even though the defendant's conduct set in motion the chain of events that produced the harm, thereby satisfying "but for" causation. An additional actor may remove the first actor from the result, weakening the chain of causation.

To find that the intervening cause is *independent,* the fact finder must conclude that (1) the harm was not intended by the defendant or was not reasonably foreseeable, or (2) that it is simply unfair and unjust to hold him responsible for the harm that has occurred. Put more simply, the direct cause of the harm was sufficiently fortuitous or coincidental in its occurrence and unconnected to the defendant's conduct so as to make it unjust to punish him for causing that harm.

A finding of *independent* intervening causation breaks the chain of events that the defendant started and results in a finding of no proximate cause. It thus prevents his being convicted of any crime that requires the prosecution to prove the defendant *caused* the harm. (Note: Some courts and commentators as well as the Restatement of Torts call this *superseding causation.*)

Consider a case in which the defendant inflicts a minor wound on a victim, and afterwards the victim is driven by a friend to a doctor's office for some stitches. While sitting in a waiting room, a disgruntled patient enters the doctor's office and opens fire with a gun, killing the victim. The defendant's initial assault satisfies the "cause in fact" requirement. But for his conduct, the victim would not have been at the doctor's office at that particular moment. However, the killing by the former patient is really a coincidence; it is just bad luck that the assault victim became a murder victim. Even though the defendant initiated the sequence of events that eventually resulted in the homicide, the death was not foreseeable nor made more likely by the defendant's act. Thus, the disgruntled patient who fired the fatal shots would be considered an *independent intervening cause*, and the defendant would not be considered the "proximate cause" of death.

For a visual summary of proximate causation, see Table 7.1.

Judicial Rules of Thumb for Finding Dependent Intervening Causation

As noted at the outset, the definitions of proximate cause and intervening cause do not provide much help in analysis because they require both a factual inquiry and a moral judgment. As a result, courts often use rules of thumb to justify their conclusion that the defendant *should* be held liable in a particular case. There are some generalizations from the case law that may be useful.

Harm Intended or Risked Versus the Manner in Which It Occurs. If a defendant intended a particular harm or created a risk that a particular harm would occur but it occurs in a manner different than intended or expected, courts generally will find the intervening cause to be dependent, provided the specific causal mechanism was not entirely unexpected or coincidental. In such cases, when the court finds the interning cause to be dependent, the defendant will be held liable.

This principle is illustrated in *People v. Kibbe*, 35 N.Y.2d 407, 321 N.E.2d 773 (1974). Late in the evening, two defendants robbed a nearsighted and very intoxicated victim on a cold winter night in upstate New York where heavy snow had fallen. They left him without his glasses near the side of a road surrounded by steep snowbanks. The victim, unable to see clearly and somewhat immobile, sat down in the middle of the roadway. Soon a truck driver, who was speeding, struck and killed the victim. The defendants argued that they did not cause the victim's death. They claimed that either the victim — by putting himself in such obvious peril of being hit by a vehicle — or the truck driver — who could not brake in time because he was speeding — was an *independent* supervening cause.

7.1 Proximate Causation

Proximate Cause		→	*Causation of Result*
↓	↓		
"But for" *D*'s act or omission +	"Foreseeability" of social harm occurring		

Dependent Intervening Cause

Proximate Cause		+ ***Dependent*** *Intervening Cause*	→	*Caused Result*
↓		↓		
"But for" *D*'s act or omission +	"Foreseeability" of social harm occurring	Does **not** break causal chain because act foreseeable or reasonably related to *D*'s conduct		

Independent Intervening Cause

Proximate Cause		+ ***Independent*** *Intervening Cause*	→	*Did Not Cause Result*
↓	↓	↓		
"But for" *D*'s act or omission +	"Foreseeability" of social harm occurring	Breaks causal chain because act **not** foreseeable or reasonably related to *D*'s conduct		

The New York Court of Appeals disagreed with the defendants. It concluded that the defendants, in committing armed robbery and leaving their intoxicated victim in these harsh and perilous conditions, could anticipate that he would seek help by moving onto the road, especially because he had trouble seeing and walking. Nor was it unusual for drivers to be driving over the speed limit at that hour.

In this case, defendants surely knew they created a strong possibility that the victim might die from exposure to the cold. They might even

have anticipated his being struck by a vehicle while walking alongside the road. However, it is unlikely they anticipated, or should have anticipated, the particular manner in which the defendant was killed because most people, even if drunk and unable to see or walk well, do not sit in the middle of a highway. Though conceding that it was somewhat unusual for someone to sit down in the middle of the road, the court concluded that the victim's *death* was foreseeable, even though the *particular manner* in which it occurred may not have been. Only if the victim had died in a manner that was not related to what the defendants did — perhaps by having a meteor fall on him because *that* would be a matter of pure chance — would the court probably find an independent intervening cause.

Preexisting Conditions and Negligent Medical Treatment. Most jurisdictions will consider the victim's preexisting medical condition as a *dependent* intervening cause. Thus, in *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), the court found the defendant had proximately caused the victim's death during the commission of an armed robbery when the 60-year-old victim, who was extremely overweight and had a history of heart disease, died during the robbery.[10]

Likewise, subsequent negligent medical treatment is usually considered a dependent intervening cause even though it contributes to the victim's death.[11] We expect medical care to be furnished to individuals who have been assaulted. Because medical aid is so likely and because the possibility of negligent medical aid is a fact of life, the criminal law considers this intervening cause *dependent*. It is foreseeable and sufficiently related to what the defendant did. Consequently, negligent medical care usually does not break the causal chain of events set in motion by the defendant, and proximate causation will be found.[12]

In *United States v. Rodriguez*, 754 F.3d 1122 (9th Cir. 2014), three defendants were charged with "knowingly and willfully conspir[ing] and agree[ing] with each other to murder" a fellow inmate.[13] The defendants stabbed an inmate, and the inmate was hospitalized. At the hospital, the medical staff allegedly removed the victim's breathing tube, but this evidence was omitted from trial. The defendants claimed that the improper removal of decedent's breathing tube during his

hospitalization may have been the proximate cause of his death, not the stabbing. Therefore, it was inappropriate to omit the evidence. The court determined that medical treatment was a foreseeable response to defendants' conduct of stabbing the decedent; any error by the district court in excluding the evidence was harmless. Furthermore, the court explained that the defendants failed to show that there was medical negligence and that the removal of the breathing tube was "so extraordinary that it would be unfair to hold [defendants] responsible."[14]

Foreseeable Human Action. Action taken in response to the danger created by the defendant is also considered foreseeable. Thus, persons in danger will try to escape and others will try to rescue them. The police will also try to apprehend criminals.

Defendants who create peril to human life should realize that their conduct elicits precisely this kind of human response. They should not be surprised if harm occurs as a result of what they did. Consequently, an actor will be held responsible even if another person, including the victim, a would-be rescuer, or a police officer, actually brings about the harm. Increasingly, courts are holding fleeing criminals responsible for the death of police officers giving chase even when the conduct of the pursuing police officer is itself extremely reckless and, therefore, arguably unexpected.[15]

Contributing Cause. Occasionally, a defendant will hasten the death of a victim who is already suffering from a mortal wound inflicted by another. Or the victim himself, suffering from a mortal wound, will hasten his own death by inflicting another mortal wound.[16] Most courts do not allow the individual who inflicted the initial mortal injury to avoid responsibility by claiming that the subsequent voluntary act of another human being was an intervening independent cause. They conclude instead that *both* acts (i.e., those of the initial actor and of the subsequent actor) caused the harm. This situation is often called a case of contributing causation because both acts are effective in bringing about the harm. It can also be considered a case of "concurrent causation." (See pages 167-168.)

Judicial Rules of Thumb for Finding Independent Intervening Causation

Not surprisingly, courts also use judicial rules of thumb to support their conclusion that the defendant *should not* be held responsible in a particular case.

Grossly Negligent or Reckless Medical Treatment. If a physician provides grossly negligent or reckless medical treatment, a finding of *independent* intervening causation is likely (but not inevitable),[17] cutting off the defendant's responsibility for causing death.[18] The logic in such cases is that the defendant's conduct set in motion a chain of events that would normally not result in the victim's death. Death was actually caused by extremely poor medical treatment, which is a very unusual event. Consequently, the grossly negligent treatment, rather than the defendant's initial conduct, will be considered the cause of death.

Irresponsible Human Agent. As we will see in the discussion of accomplice liability in Chapter 14, the criminal law generally does not look beyond the last human actor for a causal explanation of events. Because every human being is presumed to have free will, the last actor is considered capable of deciding whether to engage in conduct intended to cause harm. Thus, in *People v. Kevorkian*[19], the Michigan Supreme Court concluded that Dr. Kevorkian, who gave the deceased his (in)famous "suicide machine" (a device that, when hooked up to a person, and activated by that person, released a lethal dose of chemicals into the individual's bloodstream), did not cause his death. Kevorkian simply furnished the means for causing death, but the deceased, as a responsible agent, then had to choose to commit the final, overt act that directly killed him. (Dr. Kevorkian was later convicted of other crimes.)

Suppose, however, that a defendant engages in conduct, such as continuous rape and other assaultive behavior, that renders another human being so distraught that she cannot make rational decisions; if she were to intentionally take poison that contributes to her death, the defendant may be held responsible for causing her death.[20] (This approach is very similar to how the law attributes the act of an innocent agent to the principal. See Chapter 14.)

In *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932), the defendant held the victim prisoner against her will for several days and committed various sexual assaults on her. The victim consumed a poisonous substance in an attempt to commit suicide. Subsequently, she died from several causes, including the self-administered poison. The court held the defendant responsible for the victim's death, rejecting his argument that, in taking poison, the victim was an intervening independent cause. It concluded that the victim's becoming irresponsible was a "natural and probable result" of defendant's conduct.

Unforeseeable Human Action. Courts will generally find intervening causation to be *independent* when a person subsequently acts in a very unusual or unlikely manner. A defendant who swindles retired people out of their life savings will probably not be found guilty of homicide if one of the victims, distraught by his financial losses, commits suicide. Based on human experience, the law will generally assume that most fraud victims, even though suffering severe financial and psychological harm, would not take their lives as a consequence of being so victimized.

Identifying the Specific Causal Mechanism. Some cases hold that the defendant cannot be held responsible for causing a harm if the specific causal mechanism cannot be identified. Thus, in *People v. Warner-Lambert*, 51 N.Y.2d 295, 414 N.E.2d 660 (1980), the defendant knowingly used two explosive ingredients in its manufacturing process and had been warned that high concentrations of these chemicals were creating dangerous conditions in its factory. Several employees were killed after an explosion occurred in the factory. The corporation and several of its officers and employees were convicted of second-degree manslaughter. The prosecution could prove that defendant had knowingly created the dangerous conditions. It could not establish the specific mechanism that triggered the explosion.

The court of appeals concluded that cause in fact ("but for" causation) was insufficient to hold the defendants responsible. Though this case seems wrongly decided, one can argue that, without knowledge of what exactly triggered the explosion, it is impossible to know if the manner in which the harm came about should have been within the

defendant's contemplation. Thus, it is possible (though highly unlikely) that a burglar entered the factory late at night and deliberately sparked the explosion. Of course, it is more likely that the explosion occurred in precisely the way the defendants knew it might. The probability that one set of circumstances is more likely or probable is not enough to hold the defendants responsible.

The cases go both ways on this question. However, the prosecution's case is stronger if it can show the precise manner in which the harm occurred. This will then enable the fact finders to conclude that the defendant should have foreseen that this particular causal mechanism could occur.

Contributory Negligence and Proximate Causation

Conduct by a victim that would be considered contributory negligence in a tort case does not prevent a finding that the defendant was the proximate cause of the victim's death. Thus, if *A* engages in a high-speed drag race with *B*, who dies in a car crash during the race, *A* can be prosecuted for proximately causing *B*'s death even though *B*'s survivors could not successfully sue *A* in tort because *B*'s own act of driving was contributory negligence.

The Model Penal Code

Responsibility for Causing Harm

The Model Penal Code dramatically revises the role of causation in assessing criminal responsibility. In effect, the MPC transforms much of the analysis of causation into an inquiry about the defendant's culpability.

"But For" Causation

To be held criminally responsible for causing a proscribed harm, the MPC requires the prosecution to establish "but for" causation (cause in fact under the common law approach) and any other specific causal

requirement “imposed by the Code or the law defining the offense.”[21]

Causation is established under the MPC if “but for” the actor’s conduct, the result in question would not have occurred. Additional analysis, is required only when the result that occurs is different from the result intended or contemplated. Consequently, in most cases it is very easy for the prosecution to establish the causation necessary for criminal responsibility under the MPC.

The “but for” inquiry is essentially a hypothetical question asking what the result would have been had the actor not done the act. If the result would not have occurred, then the actor’s conduct was necessary to the result and “but for” causation would apply. If the result would have occurred regardless of the actor’s conduct, then the result would not be a “but for” cause.[22]

Other Causation, Concurrent Causation, and Transferred Intent

The MPC allows legislatures to impose traditional causal elements in a statute if they wish,[23] but it does not directly address “concurrent causation.” Common law cases of “transferred intent” are treated by the MPC as cases of causation, requiring causation analysis; that is, did the defendant *cause* the result? This question arises only if the result that occurs is *not* within the purpose or contemplation of the actor.

Culpability as to Result

The MPC focuses on the defendant’s culpability toward the result.[24] It compares what *actually* happened with what the defendant *thought* or *should have thought* would happen. When results different from what the defendant intended, contemplated, or should have contemplated occur, subsections (2)(a) and (2)(b) (purposefully or knowingly) or (3)(a) or (3)(b) (recklessly or negligently) are applied, depending on the culpability required for conviction.

Section 2(a), Purposefully and Knowingly

If the actual result differs from what the actor purposed or knew would occur, then he is *not* responsible for the actual result unless (i) a *different person* or *property* was harmed, or (ii) the defendant actually caused a *lesser* harm than contemplated.[25] In either of these two situations, the defendant *is* responsible for the actual harm he causes.

The MPC approach in holding the defendant responsible for injuring a different person or property than he intended or contemplated is just like the common law's use of "transferred intent." If *D* shoots at *A* and hits *B*, then the MPC treats *D* as having caused *B*'s injury. Likewise, if *D* sets out to burn down *A*'s house by use of an incendiary device and instead only produces some charring of *B*'s house, then *D* has caused the harm to *B*'s house. (Note that the defendant must cause a harm equal to, or less than, the harm he intended or contemplated.)

Section 2(b)

Under this section, even though the same kind of injury occurred as the actor intended or contemplated, he will not be held responsible if unusual and unexpected causal mechanisms actually caused the harm. Thus, the jury must decide whether the actual causal agent is "not too remote or accidental in its occurrence to have a just bearing" on the actor's liability or the severity of the offense.

The approach in subsection (b) lets the fact finder conclude that the mechanism that caused the harm is simply too coincidental or unexpected to impose liability. It is a very open-ended approach, inviting subjective judgments about moral culpability, chance, desert, and whatever else the fact finder considers relevant. Thus, if the victim in the *Kibbe* case discussed above was killed in a random drive-by shooting, a jury might conclude that the defendants should not be held responsible for causing the harm.

Recklessly or Negligently

Section 2.03(3) of the MPC uses the same approach here for these culpability requirements as described above for purposefully and knowingly in §2.03(2).

Again, the MPC compares the harm that actually occurred with the

harm risked by the actor and asks the same questions. A person is responsible for the harm that actually occurs if the harm simply involves injury to a different person or property or was less serious than the harm risked. Likewise, if the harm that occurs is the same kind as the harm risked, the actor is responsible unless it is "too remote or accidental in its occurrence" to fairly blame the actor.

Strict Liability

Section 2.03(4) sets forth how causation is analyzed in a strict liability offense that contains a result element. The actual result must be a "probable consequence of the actor's conduct."

Examples

1. Sam, a drug dealer, uses a pharmaceutical drug to produce Drug X. Two teenagers purchase and consume Drug X. Both teenagers overdose on the drug and suffer from permanent brain damage. The parents of both teens sue the Manufacturing Company of the pharmaceutical drug claiming negligence. The plaintiffs argue that the Manufacturing Company should have foreseen that the pharmaceutical drug would be used by drug dealers to produce Drug X. The Manufacturing Company filed a Motion to Dismiss asserting that the plaintiffs cannot show that the Manufacturing Company's actions were the proximate cause of the injuries sustained by the teens. How would the court rule?

2a. Adrian, a mechanic, accidently spills gasoline on the shop floor and forgets to clean it up. Jaden, a customer, is walking by and throws his cigarette butt and it lands on the spilled gasoline. The gasoline catches fire causing burns to Jaden. Is the cigarette butt a dependent intervening cause or an independent intervening cause?

2b. Jaden is so frightened by the fire that he suffers a heart attack. Is the cigarette butt a dependent intervening cause or an independent intervening cause?

3. Roberta, angry at Raoul and wanting to kill him, pointed a loaded pistol at his head while Raoul was asleep and pulled the trigger.

The gun discharged, killing Raoul. Did Roberta cause Raoul's death?

4. Charlie enters a hotel room to steal valuables left behind by the guests. Unfortunately, Edna is still in the room and sees Charlie. Charlie hits her over the head with a heavy object, intending to kill her because she could potentially identify him to police. Charlie leaves Edna lying in a pool of blood. A maid discovers Edna, who is then rushed to the hospital. Edna, still unconscious, is diagnosed as having suffered serious brain damage. Did Charlie cause Edna's death in the following examples?

4a. Dr. Able skillfully performs complicated and risky brain surgery, reasonably concluding that otherwise Edna will surely die within a few days. Despite the surgery, Edna dies from excessive bleeding resulting from the surgery.

4b. Edna would have survived if Dr. Inept had not provided negligent medical treatment.

4c. Edna would have survived if Dr. Hopeless had not provided grossly negligent medical treatment.

5. While driving along the highway with Tara in the passenger seat, Jennifer spotted Bob, her fiancé, several car lengths ahead of her. She sped up to wave at him. Bob, recognizing Jennifer in the car behind him, waited until she almost caught up to him and then sped away. Jennifer then increased her speed so she could catch up to Bob once more. Again, Bob, laughing, waited until Jennifer almost caught up and then increased his speed even more. This game of "cat and mouse" continued until suddenly Jennifer, traveling well above the speed limit, lost control and hit a tree. Tara died instantly. Jennifer and Bob are both charged with homicide. Did Bob cause Tara's death?

6. Jason and Keefer agree to race their cars on a winding public street. Jason drives a BMW, which is extremely fast. Keefer drives a Honda, which has more agility but is slower. Without Jason's knowledge, Keefer adds a nitrous oxide system ("NOS," in professional racing circles) to his engine to boost its power and

speed if necessary. (NOS allows the driver to inject gases into his engine that alter combustion and dramatically increase power and speed.) During the race, Keefer, aware that he is losing, decides to use his NOS and presses the activating button. Unfortunately, the NOS explodes, killing Keefer. Moreover, shrapnel from his car flies through the air and kills Ashley, who is walking on a nearby sidewalk. Did Jason cause the death of either Keefer or Ashley?

7. The U.S. Army charged eight soldiers, including a platoon leader, with manslaughter and involuntary manslaughter after Daniel, a 19-year-old soldier of Chinese descent, killed himself while on solitary guard duty in Afghanistan.[26] The soldiers had bullied Daniel mercilessly, including — among other abusive acts — dragging him across a floor while pelting him with rocks, forcing him to hang upside down with water in his mouth, and taunting him with ethnic slurs. Can the soldiers be convicted of homicide?

8. Luke, drunk as a skunk, crossed over into the oncoming traffic lane, slamming his macho SUV into a car driven by Rebecca, who suffered devastating injuries, including a spinal column fracture that caused paralysis from the chest down, broken ribs and hip, brain damage, and recurring infections. Unable to breathe on her own, Rebecca was placed on life-support systems in a hospital for several weeks. Before the accident, Rebecca had made it clear that she did not want to live on life support, and during lucid moments after the accident, she made it apparent that she did not want to live in this condition. Rebecca requested that she be removed from life support. Her request was honored and she died shortly thereafter. Did Luke cause Rebecca's death?

9. Finally ending a series of random sniper killings, the police arrested Allen and Boyd and charged them both with capital murder for the "willful, deliberate, and premeditated killing of a person by the use of a firearm." The police seized a .22 caliber Bushmaster rifle and scope from their car. Ballistics matched the gun to the bullets recovered from the first victim, Calvin. Fingerprints from both Allen and Boyd were found on the trigger. The prosecutor is unable to prove which of the two suspects actually pulled the trigger and killed Calvin. Only the *shooter* can be sentenced to death under the

statute. Can the prosecutor obtain a death sentence for Allen and Boyd?

10. Martin was desperate for money. One night he deliberately set fire to a large, abandoned warehouse he owned in order to collect the fire insurance. The fire department responded and started to fight the fire.

    Sven, a firefighter, wearing a breathing apparatus with a 30-minute tank of oxygen, entered the burning building without a buddy. When the alarm signaled that Sven had only five minutes of oxygen left in his tank, Sven disregarded it and stayed to fight the fire. Almost five minutes later, Sven died from suffocation. Fighting a fire "solo" (without a buddy) and failing to immediately leave a fire when the warning signal sounds on the oxygen tank are both serious violations of department regulations. Should the judge instruct the jury that Martin could not have caused Sven's death?

11. Nyguen walked into the bank, pulled a gun, and told the teller to put money in a bank bag. Betty did this while triggering a silent alarm. Seeing a police car pull up in front of the bank, Nyguen grabbed Betty by the arm, pointed his gun at her head, and used her as a shield while leaving the bank from a rear exit. A police sharpshooter, stationed in the alley, saw Nyguen leaving the bank with Betty in front of him and his gun pointed at her head. Taking very careful aim at Nyguen, the sharpshooter waited for a clear shot and fired. Unfortunately, Nyguen turned at the same moment. The bullet struck and killed Betty instantly. Is there a viable theory that the prosecutor can use to hold Nyguen responsible for Betty's death?

12a. Hal, tired of living, jumped off the top of a 15-story office building. Just as Hal was passing by the twelfth floor, Julia, angry that her boyfriend, Chet, was leaving her, fired a pistol at him intending to kill Chet. Fortunately, Chet moved and the bullet missed him. Unfortunately, it went through the window of the twelfth-floor apartment, killing Hal instantly in mid-flight. The prosecutor has filed a murder charge against Julia. Is she guilty?

12b. What if Cindy had pushed Hal off the building, intending to kill

him, after he told her their relationship was over? Who killed Hal? Cindy? Julia?

13. Kyra, a high-ranking police detective, arrests Wayne, a gang member, in his neighborhood where a fatal armed robbery recently occurred in a grocery store and brings him to the police station. She grants him immunity from the use of any confession. Wayne then admits to needlessly killing two beloved members of the neighborhood who owned the store during the robbery. He also identified two other gang members who participated in the robbery. Kyra cannot use his statement as evidence against Wayne. But, knowing that word of his confession implicating other gang members has spread in his neighborhood, she drives Wayne in her marked police car to the corner where the killing took place, and, over his strenuous objection that his life is in danger, tells him to get out. Thirty minutes later, Wayne is killed by his fellow gang members.

    Can Kyra be charged with homicide?

14. Ian was jealous of his coworker Craig, who had been promoted over Ian by Otto, their boss. Otto was obsessively possessive and jealous of his wife, Mona. Ian knew that Otto had a reputation for violent outbreaks when he suspected his wife of cheating. He also knew that Otto had been convicted several times for beating Mona for alleged flirting and for assaulting the men he erroneously believed were involved with Mona. Hoping that Otto would kill Craig, Ian sent an anonymous e-mail message to Otto telling him that Mona was having an affair with Craig. Ian made up scandalous details to make Otto furious. Otto flew into a rage and wanted revenge.[27]

    a. Otto went straight to Craig's office and shot him dead.
    b. When Otto got home, he shot and killed Mona in a rage of jealousy before she could deny the accusations.
    c. When Otto found out that Mona in fact had not had an affair with Craig, Otto was devastated and killed himself.

15. Vic was diagnosed with lung cancer at age 50. He underwent chemotherapy treatment, and his cancer went into remission. Two

years later, his oncologist discovered that the cancer was back. Vic began the same chemotherapy, taking daily intravenous doses of the drug, Taxol. Vic died four months later from this cancer, which never remitted. Vic's oncologist was stunned because he was very confident that Taxol would cause Vic's cancer to remit again. He filed a report with the FDA expressing suspicion about the drug's potency. The FDA investigated Vic's pharmacist, Richard Courtney, and discovered that he had drastically diluted Vic's Taxol. An expert oncologist concluded that (a) Taxol was prescribed to Vic at a high potency and should have checked his cancer; (b) Vic's chance of remission was moderate without chemotherapy and increased significantly with the use of Taxol at the prescribed dosage; and (c) had Vic been injecting the prescribed dosage of Taxol, he probably would have lived at least several more years.

Courtney admitted that he understood the dosage of Taxol prescribed and intentionally had significantly diluted every dosage of Vic's Taxol. Can Courtney be charged with murder?

16. Joe Camel, president of Federated Tobacco, recently testified before a congressional committee that cigarette smoking is not addictive and that there is no evidence scientifically establishing that smoking causes cancer.

    Rusty Lunchpail, a lifelong smoker of cigarettes made by Federated, died recently of lung cancer. On his deathbed Rusty swore in a videotaped deposition that he knew cigarette smoking was harmful to his health, but that he could not break the habit.

    Billy Jackson, a crusading prosecutor from Mississippi, has indicted Federated and Joe Camel, as its president, for murder in connection with the death of Rusty Lunchpail. Billy can prove that the United States Surgeon General has publicly warned that smoking cigarettes is harmful to human health and that nicotine, a primary ingredient in cigarette tobacco, does create a physiological craving for its continued consumption. He also has a witness who will testify that Federated carefully monitored the amount of nicotine in its cigarettes and always blended in sufficient amounts of nicotine-rich tobacco to ensure that its cigarettes contained at

least a specified amount of nicotine. Finally, he can prove that Joe Camel knew nicotine was addictive.

17a. Justin unlawfully sold Erica a new prescription drug patch containing fentanyl, a pain-killing drug more powerful than morphine. The patch releases the drug over a three-day period and was intended for use only by cancer patients and others with serious chronic pain. Justin showed Erica how she could bite down on the patch and release the entire drug dosage instantly. Erica took the patch home, bit down on it, and died. Did Justin cause Erica's death?

17b. Justin unlawfully sold Aaron, who he knew was addicted to painkilling drugs, the same patch and also showed him how to release the entire dosage with one bite. Aaron took the patch home, bit down on it, and died. Did Justin cause Aaron's death?

18. Roberta, angry at Raoul and wanting to kill him, pointed a loaded pistol at his head while Raoul was asleep and pulled the trigger. The gun jams and does not fire. Raoul wakes up and grabs the gun from Roberta before she can pull the trigger again. What would be the result?

Explanations

1. The court would likely grant the Motion to Dismiss. The parents are not able to show that the Manufacturing Company's actions were the proximate cause of the plaintiffs' injuries. The sole or supervening cause of the injuries to the teens was a criminal act committed by the drug dealer. The Manufacturing Company had no duty to anticipate or prevent the criminal actions.

2a. Adrian may argue that the lit cigarette was the intervening cause that broke the chain of events between Adrian spilling the gasoline and Jaden's burns. However, Jaden may argue that it would be foreseeable that such a flammable liquid would catch on fire in a mechanic shop, and he received no warning, and therefore the cigarette butt is not an independent intervening cause.

2b. Adrian may be held liable for Jaden suffering a heart attack. Most

jurisdictions consider the victim's preexisting medical conditions as a dependent intervening cause therefore holding the defendant liable for any resulting injuries. However, the lit cigarette could be seen as an independent intervening cause because Adrian could not have foreseen that the spilled gasoline would result in someone having a heart attack.

3. In firing a loaded pistol at the head of another human being, Roberta intended to cause a particular result, Raoul's death. In a homicide prosecution the prosecutor should easily establish causation as required by the law. Roberta's conduct was the cause in fact and direct cause of Raoul's death. The very same harm she intended to bring about occurred in exactly the manner Roberta intended.

4a. Under the common law, Charlie's conduct satisfies both cause in fact and proximate cause. Hitting Edna with a heavy object satisfies cause in fact; but for this conduct, Edna would be alive. It was also foreseeable that Edna's death was a natural and probable result of Charlie's conduct.

True, Edna died as a direct result of Dr. Able's skillful and high-risk surgery. However, only such surgery might interrupt the fatal causal forces that Charlie had previously set in motion. Thus, such invasive medical treatment was a likely and natural result of the chain of events put in motion by Charlie. The surgery will therefore be considered a dependent intervening cause, and Charlie will be held responsible for proximately causing Edna's death.

The MPC would also find Charlie responsible. The actual result, Edna's death, is the same as that intended or contemplated. Although the operation was the immediate and direct cause of Edna's death, it is highly likely that medical professionals will undertake high-risk surgery to avoid the harm Charlie's actions will otherwise cause. Thus, the surgery is not too remote or accidental to have a just bearing on Charlie's guilt.

4b. Charlie's conduct satisfies "but for" causation. Edna's injury and subsequent medical treatment would not have occurred unless Charlie had struck her. However, there is an intervening cause — the negligent treatment provided by Dr. Inept.

In most jurisdictions negligent medical treatment is considered foreseeable and the natural and probable result of the actor's harmful conduct. Thus, it is a *dependent* intervening cause that does *not* defeat a finding of proximate cause. Charlie would be found to have caused Edna's death in most jurisdictions and could be convicted of a homicide charge.

The outcome under the MPC is not clear. Charlie's conduct satisfies its "but for" causation requirement. The jury would then have to decide whether the actual mechanism of death, Dr. Inept's negligent medical care, was "too remote or accidental" to convict Charlie.

4c. The initial analysis here is the same as in Example 4b. *Grossly negligent* medical treatment is generally not considered foreseeable or the natural and probable result of the defendant's conduct. Such a deviation from the standard of medical competency is unusual as a matter of human experience. Thus, it is an *independent* intervening cause that precludes a finding of proximate causation for Charlie.

Under the MPC, there is a strong case for concluding that the grossly negligent medical treatment provided by Dr. Hopeless is too remote or accidental to fairly hold Charlie responsible. This will be a value judgment that the fact finder will have to make.

5. At common law, Jennifer is both the cause in fact and the proximate cause of Tara's death. Jennifer can easily be convicted of vehicular homicide.

The MPC would reach the same conclusion. Jennifer's driving is the "but for" cause of Tara's death. The analysis then turns to the culpability required under the relevant statute. Most vehicular homicide statutes require recklessness. The prosecutor should be able to prove that, while driving the car, Jennifer acted with conscious disregard toward a substantial and unjustifiable risk of a fatal car accident. Moreover, the victim was the very same person whom she put at risk and the actual result, Tara's death, was the very same risk that she contemplated.

Bob, by initiating and continuing to play car tag, satisfies the common law's cause in fact requirement. He might argue that

Jennifer’s driving is the only cause in fact; had she not driven recklessly, the accident would not have happened. Nonetheless, his conduct will probably be found also to have been a proximate cause of Tara’s death. (Remember that there can be more than one proximate cause.) Thus, *both* Jennifer and Bob have legally caused Tara’s death.

Jennifer’s response to Bob’s game of car tag is foreseeable because Bob knew she would continue to speed to catch him. Thus, it was foreseeable that either he or Jennifer might lose control of their respective vehicles and cause someone’s death. Note that the foreseeability analysis here does not depend on what Bob subjectively expected or contemplated. Rather, it depends on what human experience indicates can happen. At common law, proximate causation is not dependent on the actor’s subjective awareness of risk or probable consequences.

Under the MPC, Bob’s driving satisfies the “but for” requirement of §2.03(1)(a). The analysis then focuses on the culpability required in the relevant statute. The prosecutor could establish that Bob acted with conscious disregard toward a substantial and unjustifiable risk that either he or Jennifer might lose control of their respective cars, resulting in a fatal accident. The actual outcome is the same as the contemplated outcome, and the result is not “too remote or accidental” as to justly blame Bob.

6. If the jurisdiction requires *direct* causation, then Jason clearly did not cause Keefer to install the NOS nor to use it; thus he was not the direct cause of either Keefer’s or Ashley’s death. Keefer’s installation and use of the NOS was a but for cause (or “cause in fact”) of both deaths, and the resulting explosion was the “direct” cause. Only Keefer’s conduct brought about these results.

   If the jurisdiction requires only *proximate* causation, the prosecutor must prove that the defendant’s conduct was a “but for” cause and that the harm was “foreseeable.” Had Jason refused to compete, Keefer and Ashley would still be alive. His conduct probably satisfies “but for” causation. Were their deaths foreseeable?

   The prosecutor would argue that death during a drag race is known to happen, including deaths caused by unusual mechanisms.

Moreover, installation of a volatile NOS is not uncommon in racing circles. Thus, he would maintain that its installation and explosion were foreseeable.

The defense might agree that drag racing contestants are generally held responsible for actions of their competitors that *typically* occur during such heated and risky competitions, such as speeding, and passing in prohibited zones. However, it would claim that there was no reason to expect that a competitor's secretly installing a volatile NOS system is typical or even remotely expected in these already dangerous activities. Consequently, both Keefer's and Ashley's deaths occurred in a very unusual manner and through a bizarre causal mechanism and were not foreseeable.

Ultimately, this is a jury question. Again, note that "foreseeability" does not require Jason to be aware of the NOS; rather, the question is whether there is some reasonable possibility that competitors might use this type of system.

Under the MPC, Jason is a "but for" cause of these deaths. His conduct was necessary for these deaths to have occurred. Although the same kind of injury occurred as the actor contemplated (death of a competitor and a bystander), the causal mechanism may be "too remote or accidental" to "have a just bearing" on Jason's liability. If so, then Jason has not caused these deaths. The jury must decide this question. Would you convict Jason?

7. A significant issue is whether the defendants *caused* Daniel's death. The prosecutor may have at least two theories available to prove causation. She would concede that Daniel, by discharging a loaded weapon into his head, was the direct cause (cause in fact) of his own death. However, she would argue that, if direct causation is required, the defendants' conduct had done so much physical and psychological harm to Daniel that he had become an "irresponsible" human agent, no longer rational and able to see a way out of his unbearable situation. Thus, defendants are the last responsible actors in this sad case and become the direct cause of Daniel's death by rendering him incapable of free will, including rational decisionmaking.

   If she must prove proximate causation, the prosecutor would probably have a somewhat easier road to conviction. She would

argue that suicide was a reasonably foreseeable outcome of such intensive bullying over an extended period of time, especially when it occurs in a war zone and breaks the bond of brotherhood crucial to soldiers' survival on the battlefield. Even his platoon leader did nothing to prevent this hazing. No wonder Daniel concluded that going through the chain of command would not end his ordeal. Thus, Daniel's self-destructive act cannot be considered an independent intervening cause because his death in this manner was foreseeable. Note that the prosecutor does not have to prove that the defendants *actually* foresaw this outcome; she must only persuade the jury they *should* have. This issue is a mixed judgment of fact and values for the military jury based on their assessment of the defendants' moral culpability and their intuitive sense of justice in this case.

Under the MPC, the prosecutor would only have to establish "but for" causation; this terrible death would not have occurred if the defendants had not engaged in such brazen and terrible acts of human degradation. Can she prove this? Soldiers in combat have been known to commit suicide. Can the prosecutor persuasively claim that Daniel would not have killed himself if the defendants had not bullied him? On the other hand, this type of violence against fellow soldiers is very unusual. If she can establish "but for" causation, the issue for the jury then becomes one of culpability. In this case, were the defendants either reckless or negligent as to the result of death? The prosecution would argue that though the defendants did not intend Daniel to kill himself, they surely were aware he might, or at the very least, should have been aware he might. Thus, Daniel's taking his own life was not too remote or accidental to have a just bearing on the defendants' liability. Again, this would be a judgment call for the jury. (See pages 209 and 214 in Chapter 8.)

The defense will argue that Daniel took his own life and all responsibility for homicide stops with the last responsible human agent. Though defendants' conduct is reprehensible and worthy of punishment for less serious crimes like assault, Daniel had free will and could have — and should have — taken less extreme measures to stop the bullying. He could have reported the hazing to officers

higher up the chain of command than platoon leader, spoken with the chaplain, or taken other steps that virtually every other soldier would take. Thus, the prosecutor cannot prove direct causation in this case, and homicide of any degree cannot be established. Neither can the prosecution establish proximate causation here. The defense would argue that neither the defendants nor other soldiers would expect a combat soldier would kill himself simply because he was subjected to harsh hazing or racial slurs. Hazing occurs with some frequency on the battlefield and victims do not take their own lives. This proves that the result here — the unfortunate death of a soldier — was too remote or accidental to be reasonably related to their behavior. Thus, under either common law or the MPC, the defendants cannot be convicted of homicide.

If you were the prosecutor, would you charge the defendants with homicide? Would you vote to convict as a juror?

8. Luke is clearly the "but for" cause of Rebecca's death. Had he not driven while intoxicated and recklessly crossed into her lane, she would not have been severely injured and required life support. Thus, his conduct started a chain of causality that resulted in Rebecca's death. But should her removal from life support be characterized as a *dependent* or *independent* intervening cause of her death?

   Under the common law, the defense will argue that removing life support caused Rebecca's death and that removal was so unexpected and out of the ordinary in relation to Luke's conduct that it was an independent intervening cause. Moreover, the defense will point out that Rebecca was a competent and responsible decision maker who, in effect, ended her own life. In a MPC jurisdiction, the defense will claim that Rebecca's death was too dependent on another's volitional act, that is, Rebecca's own decision to discontinue life support, to have a "just bearing" on Luke's liability.

   The prosecutor will respond that this jurisdiction recognizes an individual's right to refuse medical treatment and, consequently, Rebecca's decision cannot be considered unexpected or extraordinary. Physicians had no duty or right to continue life support in this case. Thus, stopping life support was clearly

foreseeable. Moreover, Luke's conduct generated the need for life support in the first place, so its removal is not the cause of Rebecca's death. It simply allowed fatal forces already at work to continue. The prosecutor will argue that removing Rebecca from life support was a dependent intervening cause that does not break the causal chain or responsibility.

These are difficult value judgments for juries to make. How would you vote?

9. To obtain a death sentence under this statute, the prosecutor must prove that the defendant *personally* and *directly* caused Calvin's death. It should be easy to prove that the shooter caused Calvin's death and that either Allen or Boyd was the shooter. Calvin died from gunshot wounds. The bullets taken from his wounds were fired from the rifle found in the possession of Allen and Boyd. Fingerprints from both Allen and Boyd were on the rifle and its trigger. Either Allen or Boyd shot Calvin, and therefore one of them is guilty of capital murder.

   But can the prosecution prove beyond a reasonable doubt that either Allen or Boyd was the shooter? Though theoretically both could have pulled the trigger at the same time, this is highly unlikely given the need to aim and fire carefully. Since Allen's fingerprints are on the trigger, there is reasonable doubt that Boyd shot Calvin. Likewise, since Boyd's fingerprints are also on the trigger, there is reasonable doubt that Allen shot him. Without other evidence, like a confession or an eyewitness, establishing who actually fired the shot that killed Calvin, it is unlikely that the prosecutor can prove who killed him. Both Allen and Boyd can be convicted of murder as accomplices or as co-conspirators, but neither will be sentenced to death.

10. In charging Martin with felony murder (see Chapter 8), the prosecutor will argue that an arsonist creates a risk that a firefighter may die fighting the fire. Thus, this particular harm is, or should be, within Martin's contemplation and occurred during the course of the victim doing his job. Martin's setting the fire was the proximate cause of Sven's death.

    Martin will respond that he did not proximately cause Sven's

death. Sven should be considered an independent intervening cause of his own death because Sven would not have died if he had complied with the department's regulations. By disregarding two separate regulations, Sven acted negligently, or even with gross negligence, and such negligence by a professional firefighter is simply not foreseeable.

The court will probably conclude that an arsonist has no right to expect that a fire will be fought carefully, and that any negligence by a firefighter that contributes to his death does not preclude a finding of proximate causation.

Under the MPC, Martin's conduct satisfies cause in fact. Though the MPC does not provide for felony murder, in analyzing causation the Code asks whether the causal agency for this harm is "too remote or accidental" in its occurrence to have a "just bearing" on Martin's responsibility. A jury could go either way in this case. It might find no causation here if it concluded that Sven acted in a very unprofessional and reckless manner. Or, angered by the death of a public servant in the course of his duties, the jury might want to blame Martin and, in order to achieve this goal, find that Martin did cause Sven's death and thus convict him of some form of homicide. Ultimately, causation in this case is a value judgment to be determined by the fact finder.

11. Nyguen would not be liable under a felony murder theory in most jurisdictions because neither he nor another co-felon killed an innocent person during the commission of a felony. (See Chapter 8.) Causation theory, however, would allow a conviction of Nyguen for proximately causing the death of Betty even though she was killed by a police officer trying to rescue her.

    By using Betty as a human shield, Nyguen satisfies cause in fact; but for his act, she would not have been killed. Moreover, by using her as a shield, Nyguen placed Betty in harm's way. It was foreseeable that a police officer would try to rescue her from this dangerous situation by using deadly force against Nyguen. By keeping Betty so close to him while threatening her with imminent death, Nyguen started a chain of events, the natural and probable consequence of which was her accidental death.

    This example demonstrates how conduct that manifests extreme

indifference to the value of human life that proximately causes the death of either a felon or an innocent person can generate responsibility for homicide. For a good example of this approach, see *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131 (1970).

Under MPC §210.2(1)(b), the prosecutor could argue that, in using Betty as a shield, Nyguen committed murder "recklessly under circumstances manifesting extreme indifference to the value of human life." To satisfy causation, she would prove that Nyguen's act was the "but for" cause of Betty's death and that, because the police often use deadly force to rescue hostages, the result was contemplated by Nyguen. Note that the MPC requires the prosecutor to prove culpability with respect to result in this example.

12a. Hal would have died in a few seconds, and he certainly would have been the direct cause of his own death in that event. Nonetheless, Julia has *directly* caused Hal's death because it was her shot that actually ended his life. Thus, under the common law, her intent to kill Chet is "transferred" to Hal (see Chapter 4) and she can be convicted of intentional homicide. Even though the chance of Julia's shot hitting anyone else (let alone *killing* anyone else) other than Chet was a million in one, her actions satisfy the common law's causation requirement.

Under the MPC, a jury could conclude that Julia has caused Hal's death because her errant shot caused the death of a "different" person than she intended. Because Julia has brought about a harm *equal to* the one she intended (the death of a human being), conviction and punishment would not be disproportionate to the harm she intended to cause. However, the MPC would also allow the jury to conclude that she did not cause Hal's death. The jury might decide that the causal mechanism of his death (Julia's shooting at Chet and killing Hal) was "too remote or accidental" to have a "just bearing" on her liability. What are the odds of anyone dying in this manner? And yet, Julia surely intended to kill someone. Should attitude or harm be more important? How would you vote as a juror?

12b. Cindy would argue that Julia is the "direct" cause of Hal's death.

Furthermore, she would argue that the manner in which Hal died was absolutely unforeseeable and accidental. Thus, Julia was the *independent* intervening cause and Cindy can only be convicted of attempted murder.

The prosecutor would argue that this is a case of *concurrent* causation and that both Cindy and Julia caused Hal's death. He will argue that either Cindy's or Julia's conduct would have caused Hal's death and that Julia's conduct merely hastened an inevitable result set in motion by Cindy. Thus, this must be a case of two *independent* causal agents who must bear joint responsibility for causing Hal's death. The prosecutor probably has the better argument. Cindy intended to cause Hal's death. She should not escape responsibility simply because the particular harm she intended came about in such a bizarre and unexpected manner. But, it is a close call!

Under the MPC, Cindy is a "but-for" cause of Hal's death; Hal would not have been in Julia's line of fire had Cindy not pushed him off the building. But was Julia's errant shot "too remote or accidental in its occurrence to have a just bearing" on Cindy's responsibility? One suspects that a jury would not let Cindy, the primary actor who set out to kill Hal, off the hook just because Julia was trying to kill someone else and did the job for her.

13. Clearly, Kyra did not directly kill Wayne — gang members did. Thus, she cannot be convicted of homicide unless proximately causing his death is sufficient in this jurisdiction and the prosecutor can establish it. The prosecutor has at least two theories of responsibility. She would first argue that Kyra proximately caused Wayne's death by deliberately putting him "in harm's way," thereby satisfying the requirement of "but for" causation. Kyra knew that word of his confession had already spread in this neighborhood and that gang members would try to silence Wayne. In addition, Wayne had pleaded with her not to release him publicly in his neighborhood precisely because he knew his life was in danger. Thus, Kyra was subjectively aware that this particular harm, Wayne's death, was very likely to occur and she knew how it would most likely occur — gang members would shoot him. Moreover, as a police officer, Kyra had a duty to

prevent Wayne's death and failed to take reasonable steps to prevent this terrible harm. At the very least, she should have released him in a safer location and, even better, given him police protection. Her omission or failure to act together with her duty to prevent this harm is an independent ground for finding proximate causation here.

Defense counsel would claim that Kyra acted professionally in obtaining useful information implicating other gang members from Wayne. Kyra only knew that information about her grant of immunity to Wayne and his subsequent confession implicating other gang members had reached some members of Wayne's community. She could not know or expect, nor should she have known or realized, that other gang members would actually kill Wayne. And even if she did, counsel would argue that Kyra was not a "but for" cause of Wayne's death. Wayne's killers might well have shot and killed him regardless of what Kyra did or didn't do. Thus, his death cannot be linked to Kyra's conduct, which is neither a necessary nor sufficient condition for the occurrence of this particular harm. Moreover, Kyra was only obligated to return Wayne back to where she initially arrested him. The police department would be available to protect Wayne on the same basis as it protects everyone living in this neighborhood. Wayne is not entitled to special protection. Thus, the prosecutor's alternative theory — omission and duty — though clever, does not apply because Kyra satisfied any duty applicable to police officers. And even if she did not, her omission was not a "but for" cause of Wayne's death.

Under the MPC, the prosecutor would have to prove "but for" causation and then proceed to establish the culpability required by the homicide statute. As noted above, it may be difficult for the prosecution to establish that Kyra's conduct was required before Wayne could be killed. If she is successful in establishing "but for" causation, however, it might be easier to establish criminal culpability (rather than foreseeability) with respect to result here. After all, Kyra knew or should have known that she was risking Wayne's life by returning him to his neighborhood under these circumstances.

On balance, it will be very difficult for the prosecution to prove "but for" causation, which is required in establishing criminal causation. Thus, Kyra would probably be acquitted even though she may well have expected this result. The prosecutor might use an alternative theory — accomplice liability — if she could prove that Kyra acted with the *purpose* of aiding and abetting Wayne's unknown killers. (See Chapter 14 and *State ex rel Attorney General v. Tally*, at page 435.)

This is a real brain teaser. In all likelihood, Kyra knew that she was creating a greater risk and probability that Wayne would die, but her conduct was not essential for the harm to occur. Should this relieve her of criminal responsibility?

14a. *The Death of Craig.* Ian acted with premeditated intent to cause Craig's death. This satisfies the mens rea requirement for first-degree homicide. But did Ian *cause* Craig's death? Otto — not Ian — shot and killed Craig. Under the common law, Otto is the "cause in fact" (direct cause) of Craig's death. Should the law look beyond the last human actor and moral agent to establish causation?

The prosecution will argue in the affirmative, claiming that Ian proximately caused Craig's death. Ian's conduct satisfies both requirements of proximate cause: but for causation and foreseeability. Otto would not have killed Craig unless Ian had sent the e-mail that incited Otto's predictable rage and violence. The prosecutor will insist that Otto's killing of Craig was the "natural and probable consequence" of Ian's conduct. Because Otto's jealous rage and violence were foreseeable, his shooting Craig does not break the chain of causal connection between Ian's e-mail and the subsequent harm. Thus, Otto's conduct was a dependent intervening factor because it was expected and integral to bringing about Craig's death. Ian preyed on Otto's insecurity, jealousy, and fury with the actual purpose of causing Otto to kill Craig; logically, he should not now claim that Otto's actions were unforeseeable.

The defense will claim that jealousy and anger do not preclude moral choice and intentional conduct. Thus, the law cannot look beyond Otto as the legally relevant cause of Craig's death. Thus, Otto is an independent intervening cause of Craig's death.

Under MPC analysis, Ian may also have caused Craig's death.

Under §2.03, Ian satisfies the "but for" requirement of §2.03(1)(a). Under §2.03(2)(a), the result that occurred is precisely the same result as that purposed by Ian. Thus, Ian has caused the result — Craig's death.

If Ian is found to have proximately caused Craig's death, the defense might argue that Otto acted in the heat of passion and can be convicted only of manslaughter. Ian would then claim that accomplice liability limits his responsibility to the same crime committed by Otto, his principal. Depending on the law of complicity in this jurisdiction, this argument might succeed.[28] As a matter of causation, however, the question is simply whether Otto's intervening act was foreseeable; if it was, then it is a dependent intervening cause that does not preclude Ian's being held responsible.

14b. *The Death of Mona.* Ian's responsibility for the killing of Mona is harder to establish. Ian did not intend to cause Mona's death. But if Ian had not sent the e-mail, Otto would not have been incited to kill Mona. Because Ian knew that Otto was extremely jealous and violent when Mona's fidelity was questioned, a strong argument can be made that Ian acted *recklessly* (with gross and callous disregard of the risk that Otto might also kill Mona) or *negligently* (he should have known of the substantial and unjustifiable risk that Otto might kill Mona). These mental states satisfy the respective mens rea requirements of manslaughter.

But has Ian *caused* Mona's death? The pivotal question now is whether it was *foreseeable* that Otto would kill Mona. The prosecutor would argue that, because Ian knew that Otto's prior violent outbreaks were sometimes directed at Mona, it was even more foreseeable that Otto might harm Mona rather than Craig, her alleged lover. Thus, the jury could find that Otto's homicidal act was a *dependent* intervening cause, which will not defeat a finding of proximate causation. Note that foreseeability is an objective test; it does not depend on what Ian actually did anticipate would happen. Instead, it depends on what a jury determines about Ian's moral culpability and its sense of justice in this case. Clearly, Ian did not expect that Mona would die as a result of his actions, but a jury could find that, nonetheless, her death was foreseeable. It

could also find that Ian acted with recklessness or negligence with respect to that result. That determination would reduce the severity of the crime to manslaughter rather than murder.

Under the MPC, this is a more difficult problem. Ian did not intend or contemplate Mona's death. But did a *different* harm occur than that intended? Not really; Mona was killed rather than Craig. Thus, Mona's death is not a case of "transferred intent," and §2.03(2)(a) probably does not apply. More likely, §2.03(2)(b) applies. Mona's death is the same kind of harm as that intended by Ian, and because Ian knew of Otto's past jealous violence against Mona, Otto's killing her (instead of Craig) is not "too remote or accidental in its occurrence to have a just bearing" on Ian's liability.

14c. *The Death of Otto.* Although moral theory might hold Ian responsible for Otto's suicide, legally he is not culpable. The suicide will probably be considered as an *independent* intervening causation that breaks the causal chain of events from Ian's e-mail to Otto's death. Ian never intended Otto's death, nor did anything in Otto's history suggest that he might turn his jealous rage into violence against himself. Thus, Ian will argue this risk was not foreseeable.

Under the MPC, the analysis is the same as for Mona's death in (14b) above. However, because Ian had no reason to anticipate that Otto might take his own life, a jury would probably conclude that this harm is "too remote or accidental in its occurrence" to hold Ian responsible. This is essentially a value judgment for the jury to make.

15. The prosecution has the burden of providing beyond a reasonable doubt that the defendant proximately caused Vic's death. Here causation is complicated because the direct cause of Vic's death was his cancer. Courtney's attorney would claim that the cancer would have killed Vic anyway.

However, the prosecution can readily prove that Taxol had been effective in treating Vic's cancer before; Courtney knew that this type of cancer is usually fatal without treatment; and highly diluted Taxol would be ineffective in arresting Vic's cancer. Thus,

Courtney could readily predict that, at the very least, Vic's death from the cancer would be accelerated because he was not receiving a treatment proven to be effective. In all probability, Courtney's conduct hastened Vic's death. A jury could find that Vic would not have died when he did if Courtney had not diluted the Taxol. It could also determine that his conduct was readily foreseeable as a contributing cause of Vic's (early) death because the untreated cancer did not go into remission as before, but spread. Thus, the jury could conclude that Courtney's conduct was a *concurrent* cause (together with the cancer) of Vic's death. Remember that shortening the life of a human being for even a few moments is legally sufficient to "cause" death.

16. Billy Jackson will argue that selling cigarettes to Rusty was the cause in fact and the proximate cause of his death. Billy will claim that Joe Camel knew cigarettes are dangerous to human health and that many smokers cannot break their "habit."

Joe will respond that the available evidence does not establish that lung cancer is a foreseeable result of smoking cigarettes. Moreover, Joe will maintain that Rusty was forewarned about any possible health risk and that, consequently, Rusty's decision to smoke and to continue smoking broke any causal chain that Federated may have put in motion by selling cigarettes.

This is a hard case. If the jury finds that lung cancer is a natural and probable result of smoking cigarettes and that nicotine is physically addictive, making it difficult for individuals to discontinue smoking, it might find that Federated and its president caused Rusty's death and return a homicide verdict.

In *Commonwealth v. Feinberg*, 433 Pa. 558, 253 A.2d 636 (1969), the defendant, who stocked and sold regular-strength Sterno (which contains methanol) to alcoholics on skid row, was convicted of 32 counts of manslaughter after selling industrial-strength Sterno, which contains a much higher percentage of methanol, to customers who then drank the product. The Pennsylvania Supreme Court held that the voluntary acts of the victims, though considered contributory negligence in a tort action, were not independent supervening causes in the criminal case.

17a. The prosecutor would argue that Justin was the proximate cause of Erica's death. A reasonable person would anticipate that Erica would release the entire dosage by chomping down on the patch just as Justin had showed her. He or she would also understand that consuming such a large amount of this powerful drug could well be fatal. In illegally selling her such a powerful drug *and* showing her how to consume three days' dosage at once, Justin surely foresaw (perhaps even intended) that Erica would engage in very risky behavior that could well result in her death. Though Erica was the direct cause of her own death, Justin was the proximate cause by setting into motion the very chain of events that he expected or should have expected.

Justin would argue that Erica was the direct and only cause of her own death. She was a responsible human agent who chose to consume the entire drug at once; thus, she, not Justin, caused her death. He is not criminally responsible for her independent decision.

The prosecutor has the better argument here. Justin provided Erica with the illegal drug and showed her how to short-circuit the time-release mechanism so she could get high. Thus, Erica's risk-taking behavior, which directly caused her death, was reasonably foreseeable (and probably intended) by Justin. Thus, it was not accidental or remote in the least, and the jury would likely decide that she was a *dependent* intervening cause and hold Justin responsible.

Justin would probably be found guilty under the MPC, as well. By making the powerful drug available and showing her how to misuse it, he is the "but for" cause of Erica's death. And since the result here is the same result as Justin expected (or should have expected), he has caused her death. The only serious issue is what level of culpability the jury would find.

17b. The prosecutor has a stronger argument here. Justin knew that Aaron was addicted to pain-killing drugs. He illegally sold Aaron the "loaded" patch and showed him how to ingest the entire drug in one swallow. It is much harder for Justin to argue that he did not intend or foresee that Aaron would do exactly what Justin enabled him and showed him how to do. Justin also knew that Aaron was

not a fully responsible human agent since his control over his risk-taking use of drugs was substantially impaired.

The MPC analysis is the same here as for Erica's death, with the same outcome: Justin caused Aaron's death.

18. Roberta has acted with the same mens rea as in Example 3, yet she has not caused Raoul's death. Roberta could be convicted of attempted murder, probably in the first degree. However, why should she be punished less severely than in Example 3? She acted with the same state of mind and took the last step she could to bring about the result. The fact that she did not actually kill Raoul was fortuitous. Only luck saved her from causing his death.

    Some would argue that causing harm should not be an important consideration in determining the severity of punishment. Rather, the defendant's attitude toward causing harm and her conduct designed to bring it about should be the primary considerations. Others argue that the public is rightly angered by the fact that harm has occurred and that more severe punishment should be imposed in such cases.

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1. The moral debate over the relevance of harm to criminal responsibility also occurs in attempt. See Chapter 12.

2. Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. Pa. L. Rev. 1497, 1514-1516 (1974); Alexander, Crime and Culpability, 5 J. Contemp. Legal Issues 1 (1994).

3. M. Dan-Cohen, Causation, 1 Encyclopedia of Crime and Justice 165-166 (S. Kadish ed., 1983); Crocker, A Retributive Theory of Criminal Causation, 5 J. Contemp. Legal Issues 65 (1994). But see H.L.A. Hart & A.M. Honore, Causation in the Law 395 (2d ed. 1985).

4. Michael S. Moore, Causation and Responsibility, 16 Soc. Philos. & Policy 1 (1999).

5. P. H. Robinson, S. Baradaran Baughman, & M. T. Cahill, Criminal Law: Case Studies and Controversies 302 (4th ed. 2017).

6. David A. Fischer, Causation in Fact in Omission Cases, 1992 Utah L. Rev. 1335, 1339.

7. See Leavens, A Causation Approach to Criminal Omissions, 76 Cal. L. Rev. 547 (1988).

8. *Quintanilla v. State*, 292 S.W.3d 230, 233 (Tex. App. 2009).

9. P. H. Robinson, S. Baradaran Baughman, & M. T. Cahill, Criminal Law: Case Studies and Controversies 304 (4th ed. 2017).

10. See also *State v. McKeiver*, 89 N.J. Super. 52, 213 A.2d 320 (1965); *Komlodi v. Picciano*, 217 N.J. 387, 89 A.3d 1234 (2014).

11. See, e.g., *Hall v. State*, 199 Ind. 592, 159 N.E. 420 (1928).

12. *United States v. Rodriguez*, 754 F.3d 1122 (9th Cir. 2014).

13. Id.

14. *United States v. Rodriguez*, 754 F.3d 1122, 1133 (9th Cir. 2014) (citing *United States v. Pineda-Doval*, 614 F.3d 1019, 1034 (9th Cir. 2010).

15. See, e.g., *People v. Acosta*, 284 Cal. Rptr. 117 (1991).

16. See, e.g., *People v. Lewis*, 124 Cal. 551, 57 P. 470 (1889).
17. See, e.g., *State v. Shabazz*, 719 A.2d 40 (1998) (holding subsequent gross negligence of hospital treatment precludes criminal liability for actor who inflicted wounds that would have caused death in the absence of medical treatment only when it was the *sole* cause of death; otherwise, the hospital's gross negligence is a contributing factor).
18. See, e.g., *Regina v. Cheshire*, 3 All E.R. 670 (1991).
19. *People v. Kevorkian*, 447 Mich. 436, 527 N.W.2d 714 (1994).
20. See, e.g., *People v. Roberts*, 2 Cal. 4th 271, 826 P.2d 274 (1992).
21. MPC §2.03(1)(a) and (b). Section 1(a) and (b) provides:

> (1) Conduct is the cause of a result when: (a) it is an antecedent but for which the result in question would not have occurred; and (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the defense.

22. P. H. Robinson, S. Baradaran Baughman, & M. T. Cahill, Criminal Law: Case Studies and Controversies 304 (4th ed. 2017).
23. MPC §2.03(1)(b). In most jurisdictions the "law defining the offense" will require "proximate causation."
24. To refresh your memory on culpability, see Chapter 4.
25. Section 2.03(2)(a) of the MPC is difficult to read. It provides in part that the actual harm or injury is not within the purpose or contemplation of the actor unless the "injury or harm designed or contemplated would have been *more serious* or *more extensive* than that caused." The effect of this language is to make the actor responsible for an injury or harm that he causes, provided it is *not* as serious or extensive as that he designed or contemplated. Put another way, the actor is not held responsible for causing a more serious injury than the one he intended or contemplated. To punish in such a situation would impose disproportionately more punishment than his culpability deserved.
26. N.Y. Times, Dec. 22, 2011 at A-6.
27. The Riverside Shakespeare, *The Tragedy of Othello, the Moor of Venice 1198-1248* (G. Blakemore Evans ed., 1974).
28. For complicity, see Chapter 14.

CHAPTER 8

Homicide

OVERVIEW

Homicide is defined by the common law as the unjustified and unexcused killing of a human being. Most American jurisdictions in the nineteenth century divided homicide into two major categories, *murder* or *manslaughter*, and then subdivided these categories to reflect differences in available punishments. Murder was divided into *first degree* (for which a defendant could be executed) and *second degree* (which did not carry the death penalty). Manslaughter was viewed as a less serious killing and was not initially divided into degrees. However, over the years many states divided manslaughter into *voluntary* (or first degree) and *involuntary* (or second degree) manslaughter.

The Model Penal Code abolishes the "degrees" of murder, and makes all murders subject to the death penalty. The availability of the death penalty is a major, though unseen, factor in the development of homicide law. It is, indeed, the gorilla in the closet.

HUMAN BEING

The definition of homicide includes the killing of a "human being." This term was once self-evident, but current medical technology now raises questions about both the beginning and end points of life's temporal spectrum.

When Does Life Begin?

Death comes to fetuses just as it does to full-born persons. Most courts have held that a viable fetus, even if the obvious target of a purposefully homicidal act, is not a "human being" within the meaning of the homicide statute. In *Keeler v. Superior Court*, 2 Cal. 3d 619 (1970), the defendant purposely kicked his former wife, whom he knew was pregnant, in the abdomen, threatening to "stomp it out of you." The fetus died. Reluctantly, but on the theory of narrow interpretation of criminal statutes (see Chapter 1), the court held that the fetus was not a "human being." But see *Commonwealth v. Cass*, 392 Mass. 700 (1984). A rarer question is whether a fetus, even at the moment of birth, qualifies as a "human being." Thus, in *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947), Defendant (*D*) delivered her baby into a toilet bowl where it drowned. *D* testified that the baby did not cry, and that she did not tie its umbilical cord. The court held that the fetus became a "human being" after the child passed through the birth canal and took a breath; it was irrelevant that the baby may have been dead by the time the process was finished.[1]

These cases, though rare, raise serious questions about the degree to which the criminal law should broaden its net to capture persons who seem as evil and malevolent as persons already captured by the "normal rules." Against this goal is the general belief that criminal statutes should be construed narrowly, in order to avoid judicial expansion of legislative determinations of the proper scope of the criminal law. Legislatures, reacting to these decisions, have either broadened the definition of "person" to include fetuses or created a separate offense, called feticide, as did California after *Keeler*. Cal. Penal Code §187.

When Does Life End?

At the other end of life's path is the question of whether the victim of an unlawful act was "dead" (and hence no longer a "human being") before the defendant acted. In past centuries, death was assessed practically. The majority rule was that a "human being" ceases to exist once the heart stops functioning. The majority of states today, however, now define death as "brain death," although there are various definitions of

this event.

Cause and Death

A related question arises as to whether a defendant's act "causes" death, particularly if the actual cessation of breathing (or brain death) is due to the intervention of a third party. Most of these causation issues were discussed in Chapter 7, but one aspect must be addressed here. In earlier days, when victims tended to die soon after an assault, the common law established a rule that any death that did not occur within a "year and a day" of the assault was not "caused" by the assault. If the victim could survive for more than a year, it was at least arguable that something else (extraneous disease, incompetent medical assistance) had in fact caused the death. In such ambiguous circumstances, the better rule is to favor the defendant and find that the defendant's act did not cause the death. Modern medical technology, however, has again created problems. We can now extend, sometimes by years or decades, the "life" of a person who, in other times, clearly would have "died" at an earlier date. Courts and legislatures confronted with cases of this kind have abolished the year-and-a-day rule as inconsistent with modern technology.

MURDER

"Original" Murder: Killing with "Malice Aforethought"

The common law and statutes of fourteenth-century England originally defined "murder" as a killing with "malice prepense (aforethought)." There were no "degrees" of murder under the common law. The words meant precisely what they suggested in ordinary English: an intentional, preplanned, deliberate killing, motivated by ill will (malice) toward the victim.[2] Over a period of several centuries, however, judges redefined the term "malice aforethought" to encompass not only these calculated killings (often labeled "express" malice), but also those that resulted

from extremely reckless or wanton conduct (often labeled "implied," "universal," or "constructive" malice). In this way, the courts substantially broadened the legislature's net for "murderers." By the mid-nineteenth century, the term "malice aforethought" had come to mean in England any killing with

> (a) intention to cause the death of, or grievous bodily harm to, any person. . . .
> (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person . . . although such knowledge is accompanied by indifference or by a wish that it may not be caused. . . .[3]

As Stephen shows, "malice" no longer required an intent to kill; the term "malice aforethought" acquired a much broader meaning. It was no longer limited to ill will toward the victim or preplanned killings, as Parliament originally intended; it had been broadly "reinterpreted" by the courts to have little, if anything, to do with either malice or aforethought.

Part (a) of the definition above seems obvious as to why such persons might be labeled as serious offenders. People who *intend* to kill are arguably the "worst" killers. Part (b) of the definition is less evident; not everyone who sets out to hurt someone severely by, for example, stabbing them in the arm, intends death. Perhaps, in past centuries, when serious bodily harm often led to death because of inadequate medical treatment, an intent to kill could be inferred from any intent to inflict serious harm. That inference is less sound today.

The common law developed a set of romantic terms to describe the second kind of killings done with "malice aforethought," sometimes called *implied malice.* Persons who, though not intending to kill, nevertheless acted in a way that they knew created a very high risk of death, and not caring whether death occurred or not, were said to act with a "depraved heart" or one "disregarding social duty" or having an "abandoned heart." Such, for example, was the case of a defendant who, for no apparent reason, fired a rifle into a train, killing (by mere fortuity) a trainman. Under this approach someone who knowingly creates a great risk of death generally, and actually kills someone, can be found to have acted with "malice aforethought" toward the victim.

In sum, both those who *wanted* to kill and those who engaged in very dangerous conduct that they actually foresaw almost surely would (and did) result in death could be convicted of murder with "malice

aforethought.”

If this all sounds confusing, don’t be too alarmed. The definition of “malice aforethought” continues to perplex courts. In 2007, more than six centuries after it was first used, the California courts stumbled as they tried to define the term. In *People v. Knoller*, 41 Cal. 4th 139, the trial court concluded that the term, as used in California, meant conduct “that involved a high *probability* of resulting in the *death of* another.” The California appellate court disagreed, concluding that the term meant “a defendant’s conscious disregard of the *risk of serious bodily injury* to another.” The California Supreme Court determined that BOTH courts were wrong — the term meant “an act, which is *dangerous to life*, deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” Thankfully, at least the seven California Supreme Court justices were unanimous. But if the trial court, and the three judges on the appellate division, can err on such a fundamental point, you have every right to be uncertain of the precise meaning of the term.

Is the “substantiality” of the risk, or the recklessness of an act quantifiable? Consider *Comm. v. Malone*, 354 Pa. 180 (1946). Defendant, a juvenile, put one bullet in a five-chamber gun. According to his testimony, he did not expect the bullet to discharge until the fifth pull of the trigger. He then “pretended” to play Russian roulette with Billie, his 13-year-old friend. There was no evidence that he spun the chamber. On the third pull of the trigger the gun fired, killing Billie. The court, ignoring the defendant’s testimony that he did not anticipate any risk at all, sustained a conviction of “depraved heart” murder, concluding that the risk of death was 60 percent (three pulls of a five-chamber gun). As every law professor in the country points out in class, however, that is incorrect — the actual chance of the gun firing on the third pull was 33 percent, since there were only three chambers left (assuming no spinning of the chamber after each pull of the trigger), the chances were one in three that this chamber held the bullet. Despite the court’s bad math, however, if the defendant’s testimony is ignored, the fact that the chances of firing were less than 50 percent is irrelevant — indeed, as the hypothetical with Peter Pumpkin in the room of guns (page 74) shows, even a .0001 percent chance of death may indicate a “depraved heart” when there is “no reason” for generating the risk at

all.[4] (On the other hand, if the defendant's testimony is credited, he did not "consciously disregard" any risk that the gun would fire, unless one takes the position that anyone who "plays" with a gun, even what he believes to be an "empty" gun, is consciously disregarding a risk that he is wrong.)

These common law labels reflect a deeper, ethical assessment of the defendant's conduct. No one's heart (or mind) can be "depraved." The latter word connotes a judgment that the defendant's *conduct* (not his heart, or liver, or brain) is unacceptable on a moral level. While a doctor might be able to tell us whether a heart (or mind) is "malignant," whether it is "depraved" is not a medical question. And how a heart could be "abandoned," and still beat within the defendant's body is unclear. The words are merely metaphors to convey what, in the twenty-first century, we might call (in an obviously legal phrase) a "scumbag."

Presumed Malice

Prior to the end of the nineteenth century, criminal defendants were not allowed to testify in court (even if they wanted to), and current constitutional prohibitions preclude the prosecutor from compelling the defendant to testify. The common law therefore established several "presumptions" with regard to malice. Of these, two are of interest here. The first was that a person is "presumed" to intend the "natural and probable consequences of his act." The other was that a killing committed with a deadly weapon (defined as a weapon calculated to or likely to produce death or great bodily injury) was presumed to have been committed with malice. Although some courts today continue to rely on these doctrines, the better view is that these are not "presumptions" at all but merely permissive inferences, which the jury may use or disregard at its discretion. See *Bantum v. State*, 85 A.2d 741 (Del. 1952). See also Chapter 15.

Gradations of Murder

"First-Degree" Murder

After the American Revolution, many state legislatures — aware that English courts had expanded the meaning of "malice aforethought" to include those who, while not intending death, created a great risk of death — responded by dividing "murder" into two "degrees." These statutes provided the death penalty only for "first-degree" murders — that is, only those "murders"[5] that were "premeditated, willful and deliberate."[6] In so doing, state legislatures clearly intended to recapture the original meaning of "malice aforethought," that is, killings committed by individuals who (1) thought about killing their victim (premeditated), (2) brooded over it for some significant period of time (deliberated), and (3) then killed willfully. The openness of the phrase has split courts on whether it is overly vague (*State v. Thompson*, 34 P.3d 382 (Ariz. App. Div. 2001)), or, on the other hand, whether it needs to be defined at all (*State v. Patton*, 102 P.3d 1195 (Kan. App. 2004)). Neither a "depraved heart," nor even intent, were sufficient to constitute "premeditation, deliberation and willfulness." The legislature had redefined those eligible for the death penalty by focusing on the "coldbloodedness" of their killings.

As in England, however, many American courts quickly thwarted this ameliorative legislation by construing the term "premeditation" to encompass even split-second decisionmaking. Thus, in *State v. Arata*, 56 Wash. 185, 105 P. 227 (1909), the court declared that

> the law knows no specific time; if a man reflects upon the act a moment antecedent to the act, it is sufficient; the time for deliberation and premeditation need not be long. . . . [Emphasis added.][7]

Although it is possible to argue — and some courts have tried — that the three words do indeed connote different levels of mental state, by the early twentieth century, the term was a "term of art," without reflecting much difference among the words (much less "malice aforethought," really). As a consequence, the death-eligible group of killers was once again judicially broadened. In recent years, an increasing number of courts, rejecting this expansion, have required a "reasonable period of time" to find premeditation or deliberation. In the well-known case of *People v. Anderson*, 447 P.2d 942 (Cal. 1968), the court listed three elements tending to show the requisite premeditation and deliberation — (1) planning activity, (2) motive, and (3) manner of

killing — which would combine to establish that the defendant acted with a preconceived design. This is very close to the fourteenth-century view of what "malice prepense" meant.

This struggle between the judiciary and the legislature over which killers should be death-eligible is neither surprising nor difficult to explain. While the legislature must define general categories of offenders eligible for the death penalty, courts encounter specific instances where the defendant, though perhaps not fitting within the precise words of the legislation, falls within its spirit. As the court said about the defendant described above who, for no apparent reason, and with no apparent intent to injure, much less kill, shot into a passing train:

> That man who can coolly shoot into a moving train . . . in which are persons guiltless of any wrongdoing toward him . . . is, if possible, worse than the man who . . . waylays and kills his personal enemy.[8]

Confronted with persons they considered "as morally bad" (or as dangerous) as the killers clearly falling within the legislatively defined group, courts frequently construed the statute's words to meet their views. Because they could not expressly *say* they were "adding" to the category of death-eligible killers a new category, they merely "redefined" the terms to encompass killers they saw as equally blameworthy (and dangerous).

"Second-Degree" Murder

The statutory division of murder into two "degrees" meant that second-degree murder became the "default" ("catch-all") position. If a killing was murder (committed within the broadened notion of "malice aforethought") and was not premeditated, it was second degree. These killings were not capitally punishable, although they might result in a sentence of life imprisonment.

To determine under a statute dividing murder into two degrees whether a murder was first or second degree requires three steps:

1. Was the killing a "murder" (was it done with malice aforethought)?
2. If so, was it "premeditated, deliberate and willful"?

3. If yes, it was first-degree murder; if not, second-degree.

The Model Penal Code Approach

The Model Penal Code essentially agrees with the policy views of the nineteenth-century courts that no single set of general words describing an actor's state of mind can adequately encompass all the factors that should go into deciding whether to execute a particular killer.[9] Section 210 of the Code abolishes both the term "malice" and the distinction between first-and second-degree murder. Instead, it characterizes as "death eligible" all killers who cause the death of another human being

1. purposely;
2. knowingly; or
3. recklessly under circumstances manifesting extreme indifference to the value of human life.

These words closely parallel the notions enunciated in pre-Code law. Any "premeditated and deliberate" homicide would fit within the Code's definition of "purpose" or "knowing." The Code's third category can encompass those killers said to have a "depraved heart." Thus, a person who acts "recklessly" neither "purposes" death, nor does he know that death is "practically certain." Instead, he simply "consciously disregards" a "substantial and unjustifiable risk" that his actions (like shooting into a passing train) might result in death. On the other hand, the Code does not explicitly include the "intent to inflict serious bodily injury" category of murder (unless such intent can be said to imply recklessness under "extreme circumstances"). It is critical to remember that the Code's definition of "reckless" would require that the defendant *subjectively recognize* the risk of death. Even if the defendant is reckless, the death must *also* occur under "circumstances manifesting extreme indifference." If the defendant is "merely" reckless or negligent, the death is manslaughter, not murder. (See below.)

Some Further Thoughts

The common law's preoccupation with mens rea as "the" dividing line in grading homicides is not the only approach that could have been chosen. One might, for example, distinguish, even among premeditators, depending on (a) the victim,[10] (b) the method of killing, (c) whether it was done for hire, and (d) whether there were multiple possible victims. Thus, a torturer of a two-year-old child or a premeditated killer of a police officer might well be seen as "worse" than a poisoner of a 50-year-old man even though all three killings are premeditated murder. Similarly, one could conclude that a reckless killer of an infant is more culpable or dangerous than one who poisons an adult who happens to be his worst enemy. The Code allows some of these factors to be considered in sentencing.

Although historically the availability of the death penalty was thought to require gradations among offenders, even some countries that have abolished the penalty have consciously decided to retain the label "murderer" because of its association with the "worst" kind of killer.[11] The argument is that criminal law does and should make moral distinctions among offenders, and that simply calling all criminal killings "homicide" would weaken the law's moral status.

Examples

1. Karen learns that her worst enemy, Rick, is coming to town in two days. She buys a gun and decides to kill Rick as he steps off the train. Two days later, she takes the gun with her to the station, loads it there, and walks up to Rick and shoots him at point-blank range in the head five times, killing him instantly. What level of homicide?

2. Karen has watched her brother, Rick, die slowly and painfully from cancer over the last six months. Totally distraught, she buys a gun and decides to kill Rick. Two days later, she walks into the hospital room, deceives a nurse into leaving the room, and then shoots Rick at point-blank range in the head five times, killing him instantly. What level of homicide?

3. Geraldo is waiting for a bus one day when he sees a four-year-old boy nearby, walking on the sidewalk. He instantly pushes the boy off the sidewalk into the path of an oncoming car (which Geraldo saw), killing him. Is this murder? What level?

4a. Tom is in love with Mary, but Mary doesn't return his affection. She is, however, in love with Romero. Tom, hoping to scare or injure his rival, puts a nonpoisonous snake in Romero's mailbox. Unknown to Tom, Romero has always been afraid of snakes. He looks into the mailbox and has a coronary. Is Tom guilty of murder?

4b. Suppose, instead, that the snake is a cobra, but that even before it can bite Romero, he has that same coronary. Murder this time?

5. Laurie and Michael are the last two contestants for a major job opportunity. Laurie, wearing a ski mask, kidnaps Michael and puts him in a locked room. She has provided two weeks' worth of food in a refrigerator and freezer. The room is escape proof. She tells Michael that he will be released in seven days. She has also pre-timed a set of videotapes, so that Michael will see one each day, assuring him he would be released. On the fourth day, Laurie gets the job in part because Michael is not able to make the final interview.

   a. After landing the job, Laurie writes an anonymous and nontraceable e-mail to the police, telling them where to find Michael. Unfortunately, just as she is about to press "Send," she is struck by a car and goes into a coma; her computer is totally destroyed. She awakens two weeks later, and immediately shouts, "Find Michael!" and gives the location. Michael is dead when the police arrive.

   b. The videotape for the seventh day told Michael that the key to the room was in ice cubes in the freezer, so that he could escape on that day. Unfortunately, Michael became so despondent over the situation, believing it to be hopeless, that he killed himself on the fifth day. Is Laurie a murderer in either, both, or neither of these scenarios?

6. John and Evelyn have a heated dispute over John's excessive golfing, an issue that has divided their marriage for years. After five hours, John, more in frustration than anything, reaches into his golf bag and pulls out a five iron. After 10 seconds, he swings it once at Evelyn and hits her in the head, killing her instantly. Is this murder?

7. Widgets Inc. manufactures widgets. A by-product of the process is "gooey," which is extremely toxic and has been declared by the state Environmental Protection Agency to be a hazardous waste. Daniel, vice president of Widgets, knows of gooey's characteristics but, needing money, decides to dispose of the gooey by dumping it into a nearby river and pocket the money that is otherwise earmarked for disposal processes. Six months later, Billy, age 5, dies from swimming in the river. An expert will testify that gooey, still present in the river, caused Billy's death. Dan is charged with Billy's death. What result?

8. Reba, aware that she is "drunk," nevertheless attempts to drive home. She weaves across a median and collides with another car head on, killing two occupants. Of what level of murder, if any, is she guilty?

9. Jack is a telephone operator for 911 Emergency Services. He agrees with Fast and Speedy Ambulance Service that he will divert at least 20 calls a day to them, for $50 a call. This arrangement continues for two months, with no ill effects. One day, Jack receives a call from Joseph Johnson, who screams over the phone: "My wife is having trouble breathing. Please get down here soon!" Jack obtains basic information, and concludes that the situation is not as bad as Johnson believes. Rather than calling the nearest ambulance, Jack diverts the call to Fast and Speedy, who this time isn't. Johnson's wife dies. Assuming that the prosecutor can establish causation, of what level of homicide is Jack guilty, if any?

10. Bob and Marjorie own two, 120-pound dogs. Sometimes Bob walks them, sometimes Marjorie; on rare occasions, both do. On several walks, the dogs have lunged at passersby, but no person has ever been injured. On at least one occasion, the dogs pulled Marjorie for

several hundred feet. One day, while Marjorie is walking both dogs alone, the dogs attack and kill a neighbor. The dogs were not muzzled. Marjorie tried, but was unable to stop them. At trial, Marjorie and Bob present evidence that although other dogs have killed strangers, (a) none of this breed has ever been involved in a lethal attack, and (b) no lethal attack, involving any breed, has occurred while the dogs were being walked. Is either Marjorie or Bob guilty of murder, and if so, what degree?

11. Michael is told by his doctor that he has AIDS. He continues to have sex with various partners without telling them of his condition. Two of his partners die. Is he guilty of murder? If so, what degree?

12. Lamont, a trial judge who had desperately and unsuccessfully sought to be promoted to the appellate bench, becomes so despondent that he decides to take his own life. He turns on all the burners in his gas oven, seals the windows and doors, takes six sleeping pills, and lies down to die. A spark from his refrigerator ignites the gas. An explosion kills four neighbors, but Lamont survives. Is he guilty of any level of homicide?

13. Albert, a 36-year-old software developer, bicycles to work every day in San Francisco. On several occasions, he has just missed hitting pedestrians. On the fateful day, he was not so lucky. While biking downhill, and being clocked by various monitors at a speed of over 35 miles per hour, Albert sees a yellow light ahead of him but claims, "I was too committed to stop." The light turns red, and he collides with two pedestrians, one of whom is killed. (a) Of what level of homicide, if any, is Albert guilty? (b) May the prosecutor introduce evidence that four pedestrians have been killed in the city in the past year?

14. Janet and her husband, Bob, often get into heated arguments; sometimes Janet even turns violent. Janet has been known to strike or kick Bob in the middle of arguments, or even throw objects at him. However, Janet has never seriously injured Bob. One day, Janet and Bob are in the middle of one of their biggest arguments to date and Janet, in the heat of the moment, grabs a nearby pocket

knife and stabs Bob in the leg. Shocked at what she had done, she called 911, but it was too late by the time they arrived. Janet had hit an artery in Bob's leg and he bled out in minutes. When the police arrived, Janet insisted that she did not intend to kill Bob, only hurt him a little; she never imagined a thin, 2-inch knife to the leg could actually kill someone. Assume Janet is of sound mind. For what level of homicide, if any, is Janet culpable?

Explanations

1. Karen intended to kill, and thus, under the common law, has "malice aforethought" and a "depraved mind" (not to mention heart). She is thus guilty of at least second-degree murder. The jury may readily find that she premeditated the event, deliberated and mulled it over, and then willfully killed. She is thus guilty not merely of murder but of first-degree murder. Under the Model Penal Code, Karen has acted "purposely" and is therefore guilty of murder.

2. This case is intended to be almost precisely the same as that in Example 1 to illustrate a point: The "premeditation" formula sometimes is *over*-inclusive as well as *under*-inclusive in assessing moral blame. *This* Karen thought for a long period of time, about taking life before acting, and thus, like the first Karen, "premeditated." Under the common law, she, too, would be found guilty of first-degree murder and of murder under the Model Penal Code. But Karen's premeditation does not indicate that she is a "wicked" or "depraved" person. On the contrary, she has tried to do the right thing (as she saw it) and has, arguably, acted from the best of motives. (See Chapter 4.) There is something jarring about treating her as equally "culpable" or equally "bad" as Karen in Example 1, no matter how one feels about euthanasia as a general matter. We will explore and explain this tension at various points in the book, especially in the materials on "new excuses" (Chapter 17). However, as the law now stands, Karen is a first-degree murderer — or, under the MPC, simply a murderer — and may be executed. Of course, it is not certain the prosecutor will charge Karen with any homicide, nor that the grand jury will indict, nor

that the petit jury will convict. Often, at some level of discretion, the decision is made not to move forward. But that is discretion, not law.

3. There is little argument that Geraldo's actions would not satisfy at least second-degree murder under the common law. He purposely pushed the boy into the path of the car that he clearly saw coming, demonstrating malice aforethought. Also recall that the common law presumes that Geraldo intended the "natural and probable consequences of his act." So, the bulk of our concern will be whether there was the requisite premeditation to elevate Geraldo's charges to first-degree murder.

   It is unlikely that the legislature intended such a killing to fall within the term "premeditated." But it is precisely because this term fails to capture such killers that nineteenth-century American courts often declared that juries could conclude that a person premeditated "in an instant." See, e.g., *People v. Waters*, 118 Mich. App. 176 (1982), in which the defendant, a youth armed with a gun, became annoyed with the victim's husband. He fired his gun into the victim's car once and then, within five seconds, but with both hands on the pistol, fired the gun a second time, killing the victim. The trial court found premeditation, which was upheld on appeal.

   Caveat. Merely because the jury *could* find premeditation does not mean it must. And mere time alone, in the absence of other factors, may not be sufficient even to allow a jury finding of premeditation. Thus, in *State v. Bingham*, 105 Wash. 2d 820 (1986), the defendant spent five minutes strangling his victim. The (very divided) court, however, said that there was no other evidence of premeditation, and that "time alone," without more, would not support such a finding.

   As already noted, the Model Penal Code eliminates the concept of "premeditation" precisely because of these ambiguities. The Code's formulation is significantly more helpful here. A jury could easily find "purpose" or "recklessness under circumstances manifesting extreme indifference to the value of human life." Whether the death penalty would then be imposed would depend on a series of factors rather than merely one.

4a. Tom is clearly a rapscallion. But it is hard to argue that his conduct, however scandalous and outrageous, evinced a "depraved heart" under the common law, or a "conscious disregard of a substantial and unjustifiable risk" that Romero would have a heart attack upon seeing the snake. Without evidence of these mental states, it would be difficult, if not impossible to prove malice aforethought, which is necessary to find Tom guilty of murder under the common law.

    Moreover, it would be equally difficult to prove negligence or recklessness, let alone the lowest necessary mental state for a murder charge under the MPC: recklessness *under circumstances manifesting extreme indifference to the value of human life*. Even assuming the prosecutor could find evidence that Tom was aware of Romero's fear of snakes, that would be clear evidence of Tom's intent to scare Romero, not to kill him. Tom's behavior demonstrates a disregard for common decency at most.

4b. Much more likely this time. Tom clearly had a "person-endangering state of mind," and a "malignant heart," which would support at least a second degree murder charge under the common law. And Romero's death was clearly caused by Tom's action, even if the result didn't come about quite the way Tom had envisioned (see Chapter 7 on causation).

    Under the MPC, Tom's behavior would likely constitute murder for the same reason. His actions show at least an extreme indifference to the value of human life, given the immense risk of mortal injury from a cobra bite.

5a. Even though she didn't intend Michael's death, Laurie is clearly a "but for" cause of Michael's death. But was her heart "malignant and abandoned"? Kidnapping someone is no laughing matter. But her steps suggest that she did not disregard a substantial risk that Michael would die. On the other hand, there are a million ways in which Laurie could become unable to inform the police of Michael's location. A jury might well infer a bad heart (or mind) or a "conscious disregard" of the risk that Michael would die, sufficient to satisfy either a charge of first-degree murder under the common law or murder under the MPC. This is a jury question, but it is very likely that a jury would convict Laurie.

5b. This is a version of the *Stephenson* case, discussed in Chapter 7 on causation. In that case, and similar ones, the defendant was found liable when the victim committed suicide. But in those cases, the defendant did "more" than kidnap — rape or other personal injury was involved. Here, again, even if Laurie is found to be the "proximate cause" of Michael's death, the question of the level of her liability (manslaughter or murder) will depend on whether the jury finds that she had the relevant mens rea. In the rape-suicide cases above, it is easy to envision that a victim might seek any form of escape. But here, Laurie has given Michael food for two weeks, and promised release in a week (which she intended to observe). Probably not murder. Whether she was "reckless" (voluntary manslaughter) or "criminally negligent" (involuntary manslaughter) or guilty of felony murder is another matter — see the discussion infra pages 236-241; 244-246.

6. This is a difficult case. Under the common law, a jury could find that John intended to kill or seriously injure Evelyn, or that he "thought about the risks involved and went ahead anyway," thereby demonstrating a "depraved heart." He therefore has "malice aforethought" and is guilty of common law murder. But did he premeditate so as to be guilty of "first-degree murder" under American statutes? As in Example 3, John's 10 seconds is probably sufficient time to allow a jury to find not merely intent, but premeditation. In a similar case, a court found the defendant guilty of first-degree murder and sentenced him to life in prison. *Commonwealth v. Carroll,* 412 Pa. 525 (1963).

   Under the Model Penal Code, "premeditation" is not the key. The jury could easily find "purpose" and thus render the defendant eligible for the death penalty. And they could even more readily find that John was "reckless under circumstances manifesting extreme indifference to the value of human life." Who said golf was not a dangerous sport?

7. Clearly, Daniel is not guilty of first-degree murder under the common law. He did not intend, much less premeditate, the death of anyone. Whether he had a "depraved heart" is less clear. He knew of "some" risk, perhaps even a substantial risk, that someone

might be injured. However, that might not qualify as actually foreseeing that death might "probably" result.

Under the MPC, the result is likely to be the same. Even assuming that there was a "substantial risk" of death, it is not obvious that Daniel foresaw the risk as substantial and therefore "consciously disregarded" it. However, if this part of the Code's test were met, since Daniel was aware that the substance was potentially dangerous to human life, he could be found to have acted under circumstances "manifesting extreme indifference to human life" as required by §210 of the Code.

Alternatively, under the common law "felony murder" doctrine, Daniel might be found guilty of murder if his failure to follow EPA disposal methods qualified as a felony. See the next section.

8. There is no evidence that Reba had the intent to kill anyone when she began driving, let alone that she premeditated the victim's death, so she would not be guilty of first-degree murder under the common law. This would almost certainly not have qualified as "depraved heart" murder under earlier views. However, an increasing number of courts, outraged by the number of highway fatalities caused by drunk drivers, have allowed second-degree murder charges to go to the jury, at least where it can be shown that the defendant was "excessively" drunk and had been warned and cautioned about his driving. *Jeffries v. State*, 169 P.3d 913 (Alaska 2007); *People v. Murray*, 225 Cal. App. 3d 734 (1990). Given the increasingly widespread knowledge of the risks associated with driving drunk, this comports with the second definition of "malice aforethought," requiring knowledge that the act will probably cause the death of, or grievous bodily harm to, some person.

   Reba's culpability under the MPC would likely be dependent on her criminal history. If Reba has an extensive history of DUIs, there may be an argument that her behavior was reckless *and* manifesting extreme indifference to human life, amounting to murder. However, the strongest argument would be that her behavior was reckless, or at least negligent, calling for a manslaughter charge.

9. Is this common law murder? Does Jack have "malice aforethought"

— a mind "disregardful of social duty"? Under the Model Penal Code terms, is the risk "substantial" enough to warrant imposition of liability for murder? Remember — even under the common law, and clearly under the Model Penal Code, the prosecutor must show not merely that the RPP "would have" recognized this risk as substantial — he must show that *Jack saw* the risk as substantial. This is surely a jury question, and a jury could conclude that Jack must have considered the fact that he is involved in a business that literally involves life and death decisions, and must have considered the risk that something like this would happen.

10. This, is the infamous "dog maul" case, discussed supra, page 210. This example contains some of the key facts. In the actual prosecution, the jury convicted Marjorie of second-degree murder, apparently finding that her refusal to muzzle the dogs, combined with her knowledge of the breed's general reputation for violence and prior incidents with passersby, constituted a "depraved heart." The jury also convicted Robert of involuntary manslaughter. The trial judge overturned Marjorie's murder conviction, however, holding that under California law (1) there had to be a high probability of death on any given occasion, and (2) the defendant had to *know* that there was a high probability of death. After declaring that Ms. Knoller had lied continually on the stand, the trial judge concluded that she had told the truth when she said that she did not know that death was a highly probable result. The California Appellate Division reversed the trial judge. The appellate opinion held that the jury could have found that the prosecution proved that there was a "base, antisocial motive and wanton disregard for human life or [knowledge] that one's conduct endangers the life of another and consciously disregards that risk." The murder verdict was reinstated. *People v. Noel*, 28 Cal. Rptr. 3d 369 (Cal. App. 1 Dist. 2005).

    As noted in the text, the California Supreme Court reversed, finding that both the trial judge and appellate courts had used erroneous definitions of "malice aforethought." Instead, said the court, the prosecutor need prove only that the act was "dangerous to life" and that the defendant was "consciously aware" of that risk. On remand, a new judge found Ms. Knoller guilty of second-degree

murder and reinstated the original jury verdict.

A number of state legislatures have considered, or enacted, legislation imposing criminal liability on dog owners when the owner knew or should have known that a dog was potentially dangerous. See ABA Journal 26 (Jan. 2003).

11. A number of cases reported in newspapers have involved persons charged with "attempted" murder in similar situations; that issue is discussed in Chapter 12 infra. Many states have made, the knowing or reckless transmission of AIDS a crime by itself. See State Criminal Statutes on HIV Transmission, https://www.aclu.org/other/state-criminal-statutes-hiv-transmission (last visited Jan. 25, 2018). If death were to occur, as in the example here, a jury could easily find the defendant had a "depraved mind" with regard to *all* of the possible victims. But if (as in the *Malone* case) we consider the victims one by one, it is a more difficult question. The chances of infecting "someone" may be significant, but the odds of infecting any one victim are relatively insignificant. Still, on the "traditional" notion of "morally bad behavior" as the premise of mens rea, Michael seems to qualify. It is also possible, if the state has made sexual contact without disclosure a felony, that Michael could qualify for second degree felony murder (see the next section). Failing that, Michael is surely "grossly negligent" for not having informed his partners of his condition and is therefore guilty of involuntary manslaughter (see pages 244-246 infra). Under the MPC, the analysis is really the same — does the "unjustifiable" risk for recklessness have to be "quantifiably" substantial or only "qualitatively" substantial (i.e., disproportionate to the gain). Another consideration is that an AIDS transmission is no longer the death sentence it used to be, as many are able to live a long and productive life with the disease.

12. People bent on suicide often kill others and not themselves. Jumping off buildings, ingesting poison while pregnant, and driving into another car are just some of the myriad methods that can lead to this bizarre result. The prosecutor would argue that the defendant actually has a desire that (his) death will occur (though not that of others), and that he is therefore guilty of purposeful

murder. Moreover, since the defendant premeditated his own death, the prosecution could contend that this was first degree. What about the doctrine of transferred intent (see Chapter 4)? Defense counsel, on the other hand, would contend that suicide is no longer a crime. Since the defendant did not intend any other person's death, there was no transferred intent because there was no *criminal* intent to begin with. In addition, it is hard to see how the defendant, who wished to kill only himself, demonstrated a common law "depraved heart" or MPC "extreme recklessness." It is also possible that the defense counsel may argue some form of mental instability or incapacity; see Chapter 17.

In the case on which this example is based (in which, fortunately, no one died), the court found the judge guilty of reckless endangerment. *People v. Feingold*, 852 N.E.2d 1163 (N.Y. 2006).

13a. This incident occurred in San Francisco on March 29, 2012, and the cyclist was subsequently charged with felony vehicular manslaughter based upon reckless diving of a vehicle (yes, a bicycle is a vehicle for these purposes). See www.articles.latimes.com/2012/jun/16/local/la-me-sf-bikes-20120616. Whether Albert is reckless or not, of course, will depend on the facts as they develop. But if he has had several "near hits" on prior occasions, he's going to find it hard to convince a jury that he didn't "consciously disregard" a significant risk that he could hit a pedestrian. And going down those streets on Nob Hill at those speeds is certainly likely to result in serious injury or death. There is — as always — another side to some of these issues. It appears that bicyclists have been injured so often by cars (and sometimes pedestrians) that some are now wearing video cameras to provide evidence of how a collision occurred. See Nick Wingfield, A "Black Box" on a Biker, N.Y. Times, July 21, 2012, p. B1.

13b. Since the charge involves recklessness, the prosecution will have to show that there was serious risk of serious bodily harm or death. This evidence will therefore be admissible. Two questions, however, will remain: (1) does this level of injury per year, in a city of several million people, amount to a "substantial" risk of death of

serious bodily injury? and (2) would it be prejudicial to introduce this evidence unless the prosecutor can also show that Albert was aware of this statistical danger? As the text suggests, "substantial risk" is really more a normative than an empirical judgment, and the evidence would be probative on at least the first issue.

14. Under the common law, Janet will likely be charged with second-degree murder. There is a legitimate question as to whether Janet acted with "malice aforethought." There is no evidence that Janet truly wanted to kill her husband; arguably, the fact that she stabbed him in the leg — as opposed to the chest or stomach — corroborates her story that she only intended to harm him. However, recall that the common law presumes that an actor acts with malice when killing with a deadly weapon. Here, such an inference may be a reasonable one. Moreover, without any evidence that Janet premediated the murder, a prosecutor would likely not charge her with first degree felony. Another possibility under the common law is manslaughter, since Janet did not have the intent to establish a first or second degree murder and this likely qualifies as an "accidental" killing.

    Under the MPC, Janet would likely be charged with some type of homicide; but the question of which type is a close one. Janet did not deliberately kill her husband, so she did not act purposely or knowingly. However, stabbing someone with a knife is arguably reckless under circumstances manifesting indifference to the value of human life. This would be the prosecutor's best argument to support a charge of murder. Recall, however, that the Code's definition of "reckless" requires that the actor *subjectively* recognize the risk of death. If Janet can successfully show that she honestly believed there was no risk of death in stabbing someone in the leg with a small pocket knife, then she may escape liability for murder. However, the prosecutor may have an argument that Janet was criminally negligent, and so, liable for manslaughter (or negligent homicide under the MPC). This will likely come down to whether the jury finds that a reasonable person should have recognized the potential threat to life in stabbing someone as Janet did (see below for further discussion on the "reasonable person" standard in this context).

FELONY MURDER

Introduction

Although murder in the common law generally required "malice aforethought," two kinds of slaying were labeled murder even without such a mens rea. One, the killing of an officer in resisting arrest, will not be discussed in these materials. The other is an infamous rule called the "felony murder" rule. Of dubious origin, the felony murder rule, as usually stated in its broadest possible form, declares:

Any death occurring during the course of a felony is murder.

The broad language of this rule traditionally has two components. First, "it imposes murder liability for any death caused, even if entirely accidentally, in the course of the attempt, commission, or flight from a felony."[12] Second, the rule "holds accomplices in the felony to be accomplices in the murder, whether or not they aided the killing specifically, and even if the killing was performed by a nonfelon (such as the felony's victim, or a responding police officer).[13] These components may be subject to several exceptions that will be discussed below.

The rule in this broad form has been called "a monstrous doctrine," 3 J. Stephen, History of the Criminal Law of England 75 (1883), and Thomas Jefferson, while Governor of Virginia during the Revolution, proposed the abolition of the doctrine (however, the bill did not pass because the British seized Richmond). It is "difficult to find a jurisdiction outside the United States — even in the English-speaking world — that still applies the rule." Fletcher, The Nature and Function of Criminal Theory, 88 Cal. L. Rev. 687, 694 (2000). The doctrine imposes liability (and perhaps capital punishment) for murder whether a felon kills intentionally, recklessly, negligently, or even non-negligently. It is in fact a form of strict liability.

One explanation for this harsh rule is the notion of "transferred intent" — the defendant's intent to engage in the felony is "transferred" to the death. This use of the transferred intent doctrine, however, is problematic at best, since it usually refers to transferring an established

intent from one victim to another (*A* intends to kill *B*, but the bullet misses and kills *C*, *A*'s closest friend). Perhaps when all felonies were capitally punishable, transferring one's intent to commit one capital felony to another capital felony might have made some sense. This explanation, however, is no longer applicable, since the penalty for all nonhomicidal felonies is less than death.[14] This is NOT a version of the "greater crime" theory we saw in Chapter 6 — there, the defendant was usually guilty of a higher degree of the *same crime* — e.g., grand larceny rather than petty larceny. Here, the intent to commit crime A is sufficient to find the defendant guilty not only of crime A, but of the entirely different crime B (murder).

The primary philosophical explanation given for the rule is that it will deter felonies. However, even Justice Holmes, a prime believer in deterrence, declared that threatening to hang at random one chicken thief out of every thousand would carry more deterrence and be just as sensible. O.W.Holmes, The Common Law 58 (1881). Moreover, it is difficult to understand how such a rule "deters" negligent homicides which, by definition, the defendant is not contemplating.

The only effect of the felony murder doctrine is to relieve the prosecutor of proving mens rea ("malice aforethought") with regard to death. Even if a defendant cannot be convicted of felony murder, there is still the possibility of a "straight" murder conviction.

Restrictions on the Doctrine: "Cause" Questions

Most courts have shared the view that the doctrine is too broad and have found ways to limit its application.

As originally understood, the felony murder doctrine applied to "any" death that "occurred" during the felony. This obviously clashed with notions of causation (discussed in detail in Chapter 7). The difficult cases arise where, while *D* is committing a felony (e.g., a robbery), the actual victim is killed by someone other than the *D* or his accomplice. Thus, in the classic cases, *D* and *C* attempt to hold up a grocery store and

1. *V* (the intended robbery victim) or *P* (a police officer responding

to the crime) kills *D*'s accomplice, *C*;
2. *V* or *P* kills an innocent bystander (*IB*);
3. *D* grabs *IB* and uses her as a "shield," during which *V* or *P* kills *IB*.

Obviously, *D* is "a" cause of the death: "But for" the attempted robbery, *C* or *IB* would be alive. However, not even tort law rests liability on mere but-for causation. There is always the issue of proximate cause. In the context of felony murder, the courts have used different approaches, although ultimately the results are similar. In most states, *D* is liable only in Case 3, and possibly not even then.

The "Proximate Cause" Theory

As indicated in Chapter 7, courts have wrestled with whether criminal liability should *ever* be predicated on tort causation concepts. Although some courts attempted to apply the tort notion of "proximate cause" to the situations discussed here, that effort has proven largely frustrating and unfruitful. First, the elusive quality of "foreseeability" raises serious questions itself. Second, the use of an objective standard in assessing criminal *guilt* seems undesirable. In a famous series of decisions,[15] the Pennsylvania Supreme Court first adopted and then rejected the "proximate cause" approach, although it is still used in some jurisdictions.

The "In Furtherance" ("Agency") and "Provocative Act" Theories

Courts alternatively have required that the killing be "in furtherance" of the felony. See, e.g., *People v. Washington*, 402 P.2d 130 (Cal. 1965). This obviously eliminates Case 1, where *D*'s accomplice is killed, thus making it more difficult to accomplish the felony. A similar notion is the "agency theory," which draws its theoretical base from accomplice doctrine (discussed in Chapter 14). A person is responsible only for his own actions or those who are acting with him in the felony and who are, therefore, his "agents." If *C* had killed *IB*, *D* would be liable because *C* is *D*'s agent. But neither *V* nor *P* is *D*'s agent. Although these two

approaches usually come to the same conclusion, there is some possibility of a conflict in strange situations. Thus, if *IB* or *V* shoots an officer who is about to thwart the robbery, the killing may in fact further the criminal purpose, although *IB* is obviously not *D*'s and or *C*'s agent. The most obvious way around this tension is to say that while *IB*'s acts *did* further the crime, they were not *intended* to be "in furtherance thereof."

In other states, the result may depend on who fired the first shot. This may be a rational result on the basis of cause. After all, one who starts a gun battle may anticipate the likelihood that others will return fire and misaim. However, that explanation would also hold if *V* fires first: Store owners may reasonably react without waiting to see if they will be killed. A few courts have crystallized this latter idea by adopting a so-called "provocative act" notion of felony murder — if the defendant's crime "provoked" the killing or "created an atmosphere of malice," the defendant is guilty of felony murder even if *V* fired first.

Justified vs. Excused Killings

Still other courts have argued that *D* should not be liable for C's death because the policeman or the robbery victim was justified in killing *C*. *D* is liable, however, for the death of *IB* or *V* because that death is not justifiable but excusable (see Chapter 15). Thus, since C's death is *desirable, D* should not be held liable for it. But the death of *IB* or *V* is *not desirable,* and *D* should be held accountable.

This is a misunderstanding of the distinction between excuse and justification approaches. An act is justified depending not on its results but on the circumstances under which it occurred. Thus, when *V* shoots at *D* but hits *IB*, it is *V*'s *act* of shooting, not the result, that is either justified or excused, not the result. Whether the bullet hits *IB, C, D,* or *X* should be irrelevant.

The Shield Cases: Exception to an Exception to an Exception

However the courts decide these cases, they all seem to agree that in the "shield" case (Case 3 above), *D* is liable. Thus, in *State v. Canola,* 73 N.J. 206 (1977), the court, while holding that *D* could not be liable for

the death of a co-felon by the intended victim of a robbery, declared in dictum that the result would be different if the deceased were used as a shield. This result can be easily explained on a "risk-generating" theory of mens rea.

Other Restrictions

In addition to resolving the issues of causation, American courts by the middle of the twentieth century had established other restrictions on the felony murder doctrine as well:

1. The killing must be done "during" the felony.
2. Neither person-endangering felonies nor "nondangerous" felonies can be the basis of a felony murder charge.

Duration of the Felony: Time Matters

The felony murder rule applies while a defendant is attempting a crime or escaping from the scene. Though courts have differed as to how long an "escape" may take, it is clear that a death occurring days after the felony takes place is not covered by the felony murder rule. Courts have often spoken of the felony "coming to rest" or the defendant having obtained "temporary respite" or having found a "safe haven."

Thus, if *A* robs a store and, while exiting the store, pushes *V1*, who dies from the fall, the death is said to occur "during" the felony. If, however, *A* returns to his house, sits an hour, and then, hearing the police come to the front door, runs through the back door, pushing *V2*, who dies from the fall, the death does not occur "during" the felony, and the homicide is not felony murder.[16]

Limitations on the Predicate Felony

Two limitations are placed upon which felonies can be the basis of the doctrine.

(1) "Merger" (or "Independent Felonious Purpose") Doctrine

This doctrine states that the *predicate felony must not be one involving personal injury* but have a purpose other than inflicting harm. The explanation for this limitation is easier to understand than to apply. If, for example, manslaughter could be used as a basis for the felony murder rule, there would be no more manslaughter convictions, since every such death would become a felony murder. Thus, in *People v. Smith*, 678 P.2d 886 (Cal. 1984), the court held that a mother who intentionally beat her child could not be held for the resulting unintended death *under the felony murder doctrine*.[17] The application of this doctrine becomes more difficult when the underlying felonies are less clearly life-threatening. Most courts agree that if the underlying felony is assault or mayhem, the merger occurs. In more difficult cases, the courts have been divided. For example, "burglary" was defined under the common law as the breaking and entering of a dwelling at night with intent to commit a felony therein. Usually, that felony is theft. But if the intended felony is a life-threatening one which would merge if the assault occurred on the street (*D* enters with the intent to assault *V*), some courts hold that the burglary merges and there is no felony murder charge. *People v. Sears*, 2 Cal. 3d 180 (1970). Only a few jurisdictions refuse to acknowledge the limitation at all. The merger doctrine has thwarted prosecutions based upon a felony murder theory for deaths resulting from child abuse,[18] but state legislatures have responded by passing specific statutes covering homicidal child abuse. See, e.g., Utah Crim. Code §76-56-208.

(2) "Inherently Dangerous Felony" Rule

By far, the most important limitation is the "inherently dangerous felony" rule, which states that the felony can only be used as the basis of a conviction if the defendant was engaged in a felony that created serious risk of death. American courts almost uniformly limited the reach of the felony murder doctrine to felonies involving violence, dangerousness, or both. Guyora Binder, The Origins of American Felony Murder Rules, 57 Stan. L. Rev. 59 (2004). Professor Binder has written extensively on the subject.[19] This limitation has two variations:

1. “dangerous” as defined *in the abstract* by the statute;
2. “dangerous” *as perpetrated.*

The first of these approaches looks only at how the felony in question is perpetrated “in most cases.” If, most of the time, the felony is not dangerous to human life, then it is not considered dangerous “in the abstract,” even if, on occasion, a defendant does commit it so as to endanger life. An infamous case is *People v. Phillips,* 64 Cal. 574 (1966), in which a chiropractor, knowing that his eight-year-old patient was dying of cancer of the eye, continued to deceive her parents that he could cure her. Upon her death, he was charged with (1) grand larceny and (2) felony murder. The Supreme Court of California held that only felonies “inherently dangerous in the abstract” could be used for this doctrine and that grand larceny “in the abstract” is not a dangerous felony. It could therefore not be the basis of a charge of felony murder.

This approach has several problems. First, since there is no evidence at trial to determine how a felony is perpetrated “normally,” judges or juries may guess at the way in which “this crime” is usually perpetrated. Second, it can create major difficulties when the legislature combines multiple offenses in one statute. Thus, for example, in *People v. Patterson,* 49 Cal. 3d 15 (1984), the defendant furnished cocaine to a friend, who died of an overdose. Defendant’s act violated a statute that prohibited “selling, transporting, administering or furnishing” nearly one hundred different dangerous controlled substances, including marijuana, heroin, and cocaine. The court had to decide what “the felony” was: (1) all 400 (or so) of these acts; (2) each specific kind of conduct with respect to all the listed drugs; (3) all acts with respect to a specific drug; (4) each act with regard to each drug. The court chose the last approach and asked whether *furnishing cocaine* was an inherently dangerous felony in the abstract.

The court then had to face the further problem of deciding what test should be used in deciding this question. The court rejected a standard that would have found furnishing cocaine “inherently dangerous” if there were a “substantial likelihood” of death. Instead, it selected a test requiring a “high probability” of death. The dissent argued (almost surely correctly) that if the majority’s test is to be based on statistical probabilities, it essentially nullified the doctrine, since *no* felony carries

with it the “high probability” of death as a side result.[20]

It may be difficult to determine whether even a “dangerous-sounding” crime can be a predicate. For example, is driving while intoxicated (DUI) a “dangerous” act? Statistically, the answer is no; although a substantial percentage of car deaths are caused by DUI drivers, of all DUI drivers, few actually cause death or even serious bodily harm; most actually make it home without an accident.

The alternative approach asks whether the felony was dangerous “as perpetrated.” Thus, in *Phillips,* supra, the defendant clearly perpetrated the felony of grand larceny in a way to endanger the life of his patient, even if grand larceny usually does not endanger life. This approach makes the felony murder doctrine virtually superfluous. If the jurors find that the defendant perpetrated the felony in question in a dangerous way, they can surely find that he was aware of this risk and acted recklessly and with a depraved heart. Such a finding establishes mens rea by itself and makes the felony murder rule unnecessary. Indeed, in *Phillips,* the defendant was reconvicted on retrial solely on the basis of depraved heart murder.

These two limitations together, or separately, narrowly restrict (some would say essentially abolish) the felony murder doctrine. When a defendant engages in a felony that is “dangerous in the abstract” (such as armed robbery, or rape, or burglary), a jury could easily find that he was reckless (or had a malignant heart) with regard to the risk of death. *People v. Wilson,* 1 Cal. 3d 431 (1969). And even if the felony is not one “dangerous in the abstract” but only “as perpetrated,” the jury may well find the requisite mens rea for murder, as it did in the retrial of *Phillips.* See also *People v. Washington,* 62 Cal. 2d 777 (1965).

In a similar fashion, the combination of the “inherently dangerous” and “merger” rules severely restrict the ability of the prosecutor to use the felony murder approach. The former rule says that only person-endangering felonies can be used as a predicate, while the latter rule says that at least *some* person-endangering felonies may not be used as a predicate. See Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763 (1999).

Summary

In sum, the courts have generally been critical of the doctrine, and many limit its application to cases where the mens rea for murder could be found in any event. Only in the truly rare cases involving inherently dangerous felonies carried out in a nondangerous way is the full impact of the doctrine likely to be put to the test.

Despite the virtually unanimous criticism by legal scholars, and the willingness of courts to invent limitations upon its reach, however, the felony murder rule is still viable in all but a few states. A few legislatures have repealed it by statute, and one court[21] has judicially abandoned it. Even the Model Penal Code version (see below) has been adopted by only a few jurisdictions. The tenacity of the doctrine probably has several explanations. First, there *is* an intuition that persons engaged in felonies, particularly very risky felonies, should be held responsible if they commit a greater harm than they anticipated (see the discussion of the "greater crimes" theory in Chapter 6). Second, we are willing to place on the prosecution the burden of proving mens rea with regard to death when the defendant has not shown himself to be "criminal" or "evil" in some other way. We recognize that an erroneous conclusion would imprison a totally innocent person. However, when the defendant has already demonstrated a mens rea of ignoring mores and laws, we are less willing to cede that benefit of the doubt. See generally Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law, 31 Wash. & Lee L. Rev. 1429 (1994).

Another way of looking at this question is to try to define the constitutional limits on a state legislature's ability to define crimes. Could a state legislature, for example, declare that any death occurring during jaywalking would be capitally punished? If not, then perhaps there is a constitutional limit to the crimes that can serve as predicates for a felony murder charge. And, most likely, these would be "inherently dangerous" felonies (however that term is defined). In recent years, numerous attacks have been leveled at the doctrine on the ground that the felony murder doctrine generally, and most specifically with regard to the statutory version, establishes an irrebuttable "presumption" of mens rea, which at least arguably violates the due process clause (see Chapter 15). Were the legislature expressly to apply the doctrine to an unquestionably non-inherently dangerous, non-person-endangering

felony without the other limiting doctrines as well, the courts might confront a different, and more testing, constitutional problem.

Statutory Felony Murder: The Interplay of Courts and Legislatures

The picture is even more complex. In the United States, where murders are divided into "degrees," legislatures have typically listed a number of felonies that can serve as the predicate for "first-degree" murder. These usually include rape, kidnapping, robbery, arson, and burglary. Individual state statutes may include others as well. But what of "other" felony murders? Under the common law (and by inference therefore in most states), these are "murders." By default, since they are not included in the statutory provision, they are "second-degree" murders.

The Model Penal Code Approach

In accord with most judicial and academic criticism, §210.2 of the Model Penal Code severely limits the doctrine, allowing its application only in cases involving robbery, rape, arson, burglary, kidnapping, or felonious escape. Even then, the Code raises only a (rebuttable) *presumption* that the defendant was murderously reckless with regard to the possibility of death. Under the Code, once a defendant produces sufficient evidence to raise an issue on which there is a presumption, the prosecution must then prove the presumed fact (mens rea) beyond a reasonable doubt. It is fair to say that the Code effectively abolishes the doctrine in the vast majority of cases. Most legislatures that have otherwise adopted the MPC have rejected its view here.

England, the originator of the rule, statutorily abolished it in 1957. Eng. Homicide Act, 1957, 5 & 6 Eliz. 2, c.11, §11. A few states, while not following the Code on this question, have limited the doctrine in other ways. See, e.g., N.Y. Penal Law §125.25(3), which has been adopted by several states.[22]

Examples

1a. Ashley walks into Mom-and-Pop's grocery with a gun and says "Give me your money." Pop refuses, and she shoots him six times at pointblank range. She is charged with murder. Is it?

1b. On her way to the grocery store, but several blocks before she gets there, Ashley trips and falls, the gun discharging and killing a pedestrian. Is this murder?

1c. Ashley attempts the hold-up, but Pop shoots first, killing Zuzu, a customer in the store. Murder?

1d. Pop shoots at Ashley and misses, whereupon Ashley takes Zuzu hostage, using her as a shield. Thereafter, (a) Pop or (b) a police officer responding to the call shoots at Ashley, killing Zuzu instead. Murder by Ashley? By Pop or the officer?

2. Russ, a bank teller, decides one day to embezzle $50,000 from the bank. As he walks unarmed out of the bank with the money in his briefcase, he non-negligently slips on a bank pen left on the floor by some customer and falls into Jezebel, the bank guard, whose gun discharges, killing her. Is Russ guilty of any level of homicide?

3. Go back to Chapter 4, page 96, Example 10. Is this now felony murder?

4. Zeke, a cocaine dealer, sells Gonzo, one of his regular purchasers, enough cocaine for six days. Gonzo takes the cocaine home and, in a fit of depression or pique, consumes all six days' supply in one hit and dies. Will Zeke be guilty of murder?

5. Bernard Madoff perpetrates a massive securities fraud on thousands of people, inducing them to invest millions of dollars in areas he knows are speculative at best and fraudulent at worst. Two of these investors, having lost their life savings in this scam, commit suicide. Is Madoff a murderer?

6a. Larry burns down his house for the insurance money. Hortense, a firefighter called to the scene, is killed while fighting the fire. Has Larry murdered Hortense?

6b. Same facts, except that Hortense dies because she is negligent in fighting the fire.

7. Reconsider Chapter 6, page 152, Example 8. Is Marty guilty of felony murder?

8. At 12:40 a.m., Keith is in a rural area driving a Chevrolet Tahoe (an SUV) with no rear license plate. He is pulled over by a state trooper, but when the officer exits his cruiser, Keith takes off at speeds up to 90 mph, turning off his car's headlights, running two stop signs and a red light, and driving on the wrong side of the road. As the vehicles enter an urban area, the trooper stops the pursuit, fearing that the chase might cause an accident. One minute later, Keith runs another red light and collides with a car, killing the driver. A state statute (which we'll call §101) provides that it is a felony "(a) if a person flees or attempts to elude a pursuing peace officer . . . and the pursued vehicle is driven in willful or wanton disregard for the safety of persons or property. . . . (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time three or more violations that are assigned a traffic violation point count . . . occur." By another statute, among the violations that are assigned points (in addition to reckless and dangerous driving) are (1) driving an unregistered vehicle owned by the driver, (2) driving with a suspended license, (3) driving on a highway at any speed more than 55 miles per hour when a higher speed limit has not been posted, (4) failing to come to a complete stop at a stop sign, and (5) making a right turn without signaling for 100 feet before turning. Did Keith commit felony murder?

9. Dave sees an SUV sitting outside a convenience store, with the motor running. He jumps in and throws the car into reverse. At that moment, a woman runs out screaming: "You can have the car, just let me have my son." Dave then notices, for the first time, that there is a five-year-old in a car seat in the back. The woman tries to take the child, but the child becomes entangled in the seat belt. Dave hits the gas, and the car speeds forward, the child hanging halfway out of the car, and the woman running alongside yelling. When the car finally stops, and Dave runs out, the child is dead. Has Dave committed murder?

10. John and Henry conspire to embezzle money from the corporation for which they work by taking monies that should be used to pay for proper disposal of hazardous wastes, instead dumping the wastes into a river. Allyson is killed by the wastes. Assuming that the dumping is not a felony, are John and Henry murderers?

11. Mehta and Saul burglarized Sarah's house, but Sarah walked in on them and called the police. They leaped in their car and took off. As Mehta drove, Saul took several shots at a pursuing police car but injured no one. The police then stopped the car, and Mehta surrendered. The police handcuffed him and threw him into the police cruiser. As they were handcuffing Saul, however, he broke free, ran back to the car, and sped off. Five minutes later, he fired one shot at the pursuing car of Police Officer Joshua Aleman. The shot killed Aleman. The state wishes to try Mehta for Aleman's death, using a felony murder charge. What result?

12. Arabella, an executive vice president of CityBanc, is in desperate need of money. She decides to go to the bank on a quiet Sunday afternoon and take a few hundred thousand dollars in cash from the bank vault. She brings a large, wheeled suitcase and stuffs it with cash, as well as with jewels from safety deposit boxes in the bank. As she is leaving, George Guard comes around the corner, pulls his revolver, and says, "Freeze." Arabella, panicked, rolls the suitcase toward George and runs through the fire exit before he can shoot. The suitcase hits George, who is standing at the top of a steep flight of stairs, and pushes him down. He dies from the fall. Charged with his homicide, Arabella wishes to plead self-defense. Can she?

13. Brenda commutes 30 minutes to work every day. For the past year, the only freeway leading to her destination has been under construction, to her great dismay. Large signs notifying drivers of the construction — and the accompanying 45-mile speed limit — are displayed miles in advance. One morning, Brenda is running very late for work. She grabs her morning thermos of coffee, dashes into her car, and speeds off. As she approaches the construction on the freeway, the roads are relatively clear. Staring at the clock, she speeds through the construction zone at 90 miles an hour. Suddenly, Brenda spills steaming hot coffee on her legs

and subsequently loses control of the wheel. She barrels into the construction zone, injuring several construction workers and killing one. Brenda later learns that in her jurisdiction, driving 40 miles or more over than the speed limit is a felony. Is Brenda liable for felony murder?

Explanations

1a. This is the most obvious use of the felony murder doctrine. Ashley is clearly involved in an inherently dangerous felony, the killing is "in furtherance" of the felony, and it occurs during its perpetration. It is also causally linked to the felony. In most jurisdictions this will be a first-degree murder because it is a felony listed in the first-degree murder provision. But we don't need the felony murder doctrine here. Ashley has killed with premeditation (common law) and purposely (MPC).

1b. Ashley may be liable because she killed a pedestrian as she was on her way to commit a robbery. This, however, stretches the limits of the duration doctrine, since the danger here comes simply from Ashley's carrying a weapon; the robbery has not yet "begun" in that sense. That is, suppose that Ashley were not intending to rob the store, but merely carrying an illegal gun, and killed a pedestrian in the same way, because of tripping. Is carrying the gun in a public place sufficiently dangerous to warrant *murder* liability when the gun unexpectedly discharges? Moreover, Ashley's accidental discharge of the weapon was clearly not in furtherance of the robbery. If her jurisdiction has this agency requirement, she will likely escape liability for felony murder.

1c. The difficult question here is that someone *other than the felon* killed someone else. As to this type of scenario, the courts are mixed. Ashley's culpability for murder will depend on what factors courts in her jurisdiction examine to determine whether Ashley "caused" the customer's death. The shooting here is not in furtherance of the felony, and it is justified (a term which means it was not a crime for Pop, or the officer, to shoot at Ashley; see Chapter 16). However, Pop would not have fired his weapon —

and in turn, the customer would not have been killed — had Ashley not been in the midst of robbing the store. The possibility that someone would be shot during the robbery is arguably foreseeable, so under a proximate cause approach, this may be enough to show causation.

1d. Recall our earlier discussion regarding felonious actors using third parties as shields from harm. Under this scenario, virtually all the courts, either in holdings or dicta, are in agreement that Ashley may be held responsible. The Model Penal Code would address the problem as one of cause, not of felony murder (see Chapter 7).

2. This is intended to demonstrate the clearly contrasting case to Example 1a. The typical kind of horrible hypothetical raised by opponents, it employs the broadest statement of the felony murder doctrine to demonstrate its irrationality. The death has occurred "during" the perpetration of "a" felony. The felony is causally related to the death. If the doctrine were not limited in some way, opponents argue, Russ would be guilty not only of embezzlement but of murder. Thus, "the inherently dangerous" requirement is imposed, and embezzlement is not inherently dangerous. Without this requirement, Russ might be liable for murder even though he was totally non-negligent with regard to any risk that death would occur. Despite the fact that critics have used such "horribles" in attacking the doctrine, they have not pointed to a single appellate reported opinion in which the courts have applied the doctrine to such a situation. Under the MPC, felony murder doctrine, Russ is not liable for the death. Only a few felonies will even serve as a possible predicate for felony murder, and embezzlement is not among them.

3. In Chapter 4, we concluded that Helen had no mens rea with regard to Harry's death. Now, however, we add the doctrine of felony murder. Helen has arguably committed felony murder. Burglary is one of those felonies that most courts have held to be "inherently dangerous" *in the abstract*. Thus, even though she is unarmed and has been extraordinarily careful not to endanger life in committing burglary *as perpetrated*, Helen may be found guilty of felony murder. It is possible to argue that the death here was not "in

furtherance" of the felony, and therefore the application of the felony murder rule is inapt. Under the MPC, there is a presumption in any burglary that the defendant acted with reckless indifference to the value of human life. But the presumption is rebuttable, and Helen would have no difficulty here rebutting that presumption.

4. Zeke may be liable for felony murder in some jurisdictions, which have declared drug transactions (or sales of specific drugs) "inherently dangerous" in the abstract. This is a difficult result to accept, since hundreds of thousands of sales are consummated every day with relatively few deaths. Courts have reached differing conclusions. Most find that drug transactions are not, per se, inherently dangerous. Some find no causal relation between the sale and the overdose unless the seller (a) helps administer the fix or (b) watches while the victim administers the fix. But in those situations, the act is not "really" the sale, but the administering or encouraging the administration of the drug. Moreover, this seems to be applying the "as perpetrated" approach rather than the "in the abstract" approach, and may not need the felony murder doctrine at all to convict. Again, if Zeke knows that Gonzo has overdosed before, Zeke's transfer of so much cocaine at one time might be found by a jury to reflect "a conscious disregard of a risk . . . etc." under the Model Penal Code or the common law, qualifying Zeke for either manslaughter or murder but not "felony murder."

5. Madoff is probably not guilty of felony murder and probably not even of murder. The felony is not "inherently dangerous," either in the abstract or as perpetrated. *Even if* a suicide were "foreseeable," the risk is not so great that Madoff should be held criminally responsible (civil liability might be another question). And even if all these limitations were somehow avoided, it is hard to see how the deaths are "in furtherance of" the felony. Finally, unless the suicide occurred immediately after the victims lost their money, it is possible that the "duration" requirement of the doctrine might not be met. Madoff may be a scoundrel but he is not a murderer, at least under the felony murder doctrine.

6a The first problem here is defining what the underlying felony might be. Is it "arson" (almost surely an inherently dangerous felony and

a statutorily enunciated basis for first degree felony murder in most states) or is it “insurance fraud” (almost certainly not inherently dangerous in the abstract)? If arson, then under the common law, Larry may be guilty of murder and possibly first-degree murder. Larry’s best argument is that the felony has ended, but if the felony is still continuing, he is responsible for the causally related death. Under the MPC, if the predicate crime is arson, a presumption of recklessness would be established, but Larry could probably rebut that easily unless he knew that the fire would be more dangerous than anyone might expect. See Chapter 7 for a discussion of the causation questions here. Another consideration is whether the death was “in furtherance” of the crime. Under these facts, it would be difficult to argue that it was.

6b. In common law and under the MPC, the victim’s negligence is relatively unimportant in any crime and particularly in a felony murder. The only opportunity for Larry here is to argue lack of causation (see Chapter 7).

7. No, not unless the state applies the harshest possible version of the felony murder rule. First, larceny or theft is not inherently dangerous. Even as carried out here, the theft itself was not dangerous to anyone. Second, the theft itself is over. Marty is “home” and “safe.” Mary Lou’s death is a tragedy, but it’s not felony murder.

8. Surprise! (Or not. You know the answer must be bizarre; we wouldn’t include it here if it were the obvious one.) The California Supreme Court, in *People v. Howard*, 34 Cal. 4th 1129, (2005), held that this could not be felony murder. California uses the “inherently dangerous in the abstract” test to determine whether a crime can be the predicate for felony murder. The court held that although Keith’s driving was clearly inherently dangerous, he *could* have violated §101 by nonviolent means (the ones listed at the end of the example). Therefore, since not all ways of violating §101 are “inherently dangerous in the abstract,” §101 could not be the predicate for a felony murder count. The court combined the number of ways in which §101 could be violated, concluded that some of them were nondangerous, and therefore held that the

statute *could* be violated "in the abstract" in a nondangerous way. This methodology seems to be in direct conflict with the one used by the same court in *Patterson*, discussed on page 224.

In view of these results, it would be hard to argue with a layman's conclusion that this is an absurd result. After all, how could killing someone with *that* vehicle after *that* kind of car chase, at *that* speed, not be murder? But consider that (1) the prosecutor could easily have charged Keith with "depraved heart" murder and almost assuredly convicted (after all, the officer recognized that the chase was dangerous); and (2) many courts are generally hostile to the felony murder rule, preferring that the prosecutor prove mens rea as to the deaths.

9. This tragic scene actually occurred in Missouri several years ago. First — is Dave guilty of "straight" murder? He certainly did not "premeditate" the death of the child, and therefore would probably not be guilty of first-degree murder in most states. Moreover, he probably did not have "universal malice," or a "depraved mind" (under the common law) or "recklessness under circumstances manifesting extreme indifference" (under the MPC) unless he recognized a real risk to the child. This could be argued either way, but it is at least possible that the entire situation was so confusing at that point that Dave's actions would fall short of this standard.

   Can he then be guilty of felony murder? What felony has Dave committed? Perhaps kidnapping, but many states require that the taking be for ransom, which is not the case here. Perhaps robbery: It could be the taking of property by force or threat of force. That is surely an "inherently dangerous" felony and many states statutorily list it as a predicate for first degree murder. Carjacking is an even more likely predicate. Legislatures enacted carjacking statutes when the penalty for robbery was seen as too lenient. So it may be an "inherently dangerous" felony. However, many of these same legislatures, while creating this new felony, did not list it as a predicate for first degree murder. So if the prosecutor uses that statute, it may only be second-degree murder. Let's consider that — a felony which has a harsher sentence than robbery can't be the basis of a first degree murder charge while robbery, with a "lighter" sentence, could be. Is this any way to run a criminal code?[23]

10. This question raises, again, defining "the" felony involved. Is the "predicate felony" (a) embezzlement? (b) conspiracy to embezzle? (c) dumping wastes? The first two are almost surely not "inherently dangerous." But the last one might be, depending on the precise wording of the statute. (For example, if the statutory violation is "dumping hazardous wastes without a permit," it would not be inherently dangerous, for one could safely dump, but still not have a permit. If the statute prohibited "dangerous dumping of hazardous wastes" or "dumping of hazardous materials into aquifers or other sources of drinking water," however, it might be a predicate felony.) Since none of these felonies is specifically articulated in §210.2 of the MPC, the prosecutor will not be able to rely on the felony murder doctrine at all in an MPC jurisdiction.

11. The issue, of course, is whether Mehta's arrest and custody means that the felony has "come to a rest." Clearly it has for him, but not for Saul. The courts are actually divided three ways on this. Some say arrest terminates liability for the arrestee, whatever his cohorts do. See, e.g., *State v. Milam*, 108 Ohio App. 254 (1959). A second group says the felony continues until everyone is arrested (or comes to rest in some other way). E.g., *State v. Hitchcock*, 350 P.2d 681 (Ariz. 1960). A third group emphasizes the particular facts of capture, surrender, or arrest. *Auman v. People*, 109 P.3d 647 (Colo. 2005). Many of these decisions rely on statutory wording (although none of the statutes is explicit on this point). On the one hand, a rule requiring the arrest of all co-felons emphasizes the potential danger that any felon generates when working with others. On the other hand, accomplice liability generally requires that the risk of death be "reasonably foreseeable" by the defendant, and many states require that the defendant actually foresee the risk of death, or possibly intend that death occur (see Chapter 14). In the example as given, Mehta knows that Saul is armed — maybe he should have warned the police (perhaps the police in the first cruiser didn't warn Aleman). As a general matter, whether the felony has "come to rest" is an issue of fact for the jury. *State v. Lee*, 969 S.W.2d 414 (Tenn. Crim. App. 1997).

12. The general rule is that a participant in a felony cannot claim self-

defense if he committed the homicidal act during the course of the felony. *Street v. Warden*, 423 F. Supp. 611, 613-614 (D. Md. 1976); *State v. Celaya*, 135 Ariz. 248 (1983). But in most of the cases so stated, the defendant was involved in a violent felony (usually robbery) and used deadly force. Here, neither of those predicates is true — larceny is not an "inherently dangerous felony" in the abstract nor as committed here, and Arabella did not use deadly force. (If the Example had said that she picked up a nearby pistol and shot George, that might raise a different question entirely.)

13. Brenda's actions fall within the standard common-law definition of felony murder (i.e., a death occurred during the course of a felony). However, we then must examine whether any exceptions to the rule may give Brenda relief from liability. Brenda's strongest argument would be that the death certainly was not "in furtherance" of the felony. If Brenda's jurisdiction places this restriction on felony murder, then Brenda will likely escape liability.

    Brenda may also argue that the felony of speeding is not "inherently dangerous," and so cannot be the basis of a felony murder charge. The strength of this argument will undoubtedly rely on the way the court defines "dangerous" — in the abstract or as perpetrated. The circumstances of Brenda's crime — specifically, speeding at such a high rate through a construction zone, where it is known that construction workers will be vulnerable — would likely be deemed inherently dangerous. Therefore, Brenda's best hope is if the court examines dangerousness in the abstract. She will argue that people speed on a regular basis and that, statistically, few incidents of speeding actually result in a crash or death. The prosecutor will counter that the court should not examine the dangerousness of speeding generally, but specifically speeding at rates over 40 miles per hour over the speed limit. Certainly, such reckless driving is inherently dangerous even in the abstract.

    The answer to this question is simple under the MPC. Since the predicate felony of speeding is not under the category of robbery, rape, arson, burglary, kidnapping, or felonious escape, Brenda would not be liable for felony murder.

MANSLAUGHTER

Manslaughter is usually defined as “an unlawful homicide without malice aforethought.” This is then subdivided between “voluntary” and “involuntary” manslaughter:

1. Voluntary manslaughter is a killing done “on a sudden” in the “heat of passion” after “adequate provocation.”
2. Involuntary manslaughter is either “merely” reckless (but not the result of a “depraved mind”) or “criminally negligent” killing.

Voluntary Manslaughter

The Rules of Voluntary Manslaughter

By the middle of the nineteenth century, most American courts had come to the conclusion that *only* a killing

1. engendered by an act recognized as “legally adequate provocation” and
2. actually done suddenly, in the heat of passion

would be reduced to a category of homicide called “voluntary manslaughter,” for which the punishment was significantly less than murder.

Unfortunately, the courts were unclear as to why these killings were “reduced.” As Justice Holmes said, “the life of the law has not been logic; it has been experience.” The Common Law 1 (1881). Manslaughter was a category of homicide created by the judiciary as a way of limiting capital punishment; it was not based on carefully thought-out doctrine.[24] When they did make such an attempt, the courts articulated two conflicting themes:

1. Voluntary manslaughter was indeed a murder but because of the law’s “regard for the frailty of mankind,” the punishment was reduced.
2. The defendant killed “in a frenzy” brought on by “sudden

provocation” at a time when “reason was dethroned,” so there was no mens rea.

The tension in these two explanations is obvious. Under the first, the defendant *is* a murderer because he has intentionally or with a depraved heart taken human life. Under the second, because the defendant had no mens rea, he is *not* a murderer; indeed, if he truly had no mens rea, he should perhaps be exonerated.[25] This tension has never been resolved.

This failure to explain the rationale of manslaughter has other implications. Thus, even today scholars are unable to agree on whether manslaughter is a “partially excused” or “partially justified” homicide (see Chapter 16). In addition, this ambiguity creates problems when the defendant, while acting “in the heat of passion,” kills the wrong person, either because the actual provoker ducks or because the defendant is mistaken as to who provoked him. If the basis of the reduced liability is that the killing is “partially justified” because the victim in some sense “asked for it” or “had it coming,” this rationale clearly is inapplicable to the innocent victim or the mistaken defendant. If, on the other hand, the rationale is that the defendant’s actions are “understandable” because of his loss of control, and therefore “partially excused,” the rationale would appear to cover even such a “misaim” case.

“Legally Adequate Provocation”

People are angered by many things. During that anger they sometimes (a) flail out in despair or (b) take intentional action against the persons they believe responsible for that event. Although the early decisions appeared willing to reduce the punishment of any such killing, by the middle of the nineteenth century, courts had limited the kinds of events that would generate such a reduction to the following:[26]

1. a battery, mutual combat, or aggravated assault
2. adultery
3. illegal arrest.

We will not speak here of the last of these categories. The first, however, is interesting because of its interplay with the doctrines of self-

defense. Initially, the writers and courts spoke of a “tweak on the nose” as being sufficient provocation to warrant reduced punishment if killing ensued: Honor, and not physical disabling, was at stake.[27] A second subcategory involved cases of “mutual combat” undertaken in “chance (or “*chaud*” — hot) medley.” If Jim and John got into a heated barroom debate that escalated from words to fists to weapons, the one who killed the other was held to be a manslaughterer rather than a murderer because the killing was done “on a sudden passion” during a “chance” (or *chaud*) occasion. If, however, during the same encounter, Jim tried to “retreat” from the argument and the use of deadly force but found himself pursued by John, whom he then killed, Jim might be acquitted of any homicide because the killing was *“se defendendo”* (see Chapter 16).

The second category, adultery, is the most interesting (and controversial). The doctrine was easily stated: If the defendant found his (the defendant was always male) spouse *in flagrante delicto* and killed either the spouse or the lover, or both, the killing was manslaughter. Although this might appear to be a case of “infidelity,” the leading, early English case described adultery with the defendant’s wife as the “highest invasion of [his] property.”[28] Although no case appears to have actually involved a spouse who walked in on the spouse and lover naked in bed but not actually *in flagrante delicto*, some courts came nervously close to restricting the exception to such a case. See, e.g., *State v. John*, 30 N.C. (8 Iredell) 330 (1848), where the husband saw *V* climbing out of the bedroom window and pursued him. The court rejected the claim of manslaughter: “to extenuate the offense, the husband must find the deceased in the very act of adultery with his wife.” The reason for the restriction may be clear; courts did not wish to encourage precipitous action by unduly jealous husbands. However, the restriction was also irrational: Jealous husbands who, for example, see their wives in “semi-undress” in the (undressed) presence of another man may in fact become enraged. To require them to wait until adultery actually occurs seems both unrealistic and unnecessary in assessing the level of their guilt.

At the other extreme of the “adequate provocation” doctrine was an unequivocal rule that words alone could never constitute adequate legal provocation.[29] Some courts, however, appear to have created an exception to this exception: If the words spoken by the victim informed the defendant of an event that, had the defendant witnessed it, would be

legally provocative, the words might qualify. However, other courts held that not even a confession of adultery would suffice. Thus, in *State v. Grugin*, 147 Mo. 39, 47 S.W. 1058 (1898), the defendant father expressly sought out the victim, whom he had been told had had sexual relations with the father's minor daughter. The victim declared, "I'll do as I damn well please about it." The father killed the rapist, and the court reversed a second-degree murder conviction, holding that the words could amount to legal provocation. A century ago, the Harvard Law Review declared that "words which . . . are a mere vehicle to convey intelligence of the fact which actuates the crime were not included in the original rule. . . ." Note, 27 Harv. L. Rev. 89 (1913). Nevertheless, many American courts continue to follow the "rule," e.g., *Sheppard v. State*, 243 Ala. 498, 10 So. 2d 822 (1942).

"Heat of Passion and Cooling Off"

The corollary of a requirement that the killing be done in the "heat" of passion is logically that if the defendant has cooled off, he cannot claim the reduction. Before the middle of the nineteenth century, the issue was not whether the defendant had, in fact, cooled off, but whether "enough" time had elapsed to allow him to cool off. This issue was seen as question of law, to be decided by the judge — if the judge decided that there was sufficient time then, at least in legal theory, the jury should never hear of the actions that provoked the defendant into killing the victim. This doctrine severely penalized "brooders," such as Hamlet. Thus, if *D* finds his wife and her lover in bed and kills them instantly, it is manslaughter. But if *D* does not kill instantly, but broods about the event for several hours (or days) and then lashes out, the law did not allow a defense. This is questionable, since it appears to be "rewarding" the person who does not try to control himself, while penalizing one who tries, but fails, to avoid lashing out.

Twentieth-Century Changes in the Doctrines

These restrictive doctrines were criticized as inconsistent and too restrictive. Gradually the courts loosened the rules.[30]

(1) The “Reasonable Man” Test

Adequate legal provocation became anything that could cause the “reasonable man” (now the RPP) to act in passion. Quickly, however, this change led to allowing other events to act as provocation, since reasonable people become angry over events other than those listed above. Today, even words may be sufficient. Thus, confessions of adultery or taunts relating to sexual potency or competency may suffice as provocation. *People v. Berry,* 556 P.2d 777 (Cal. 1976). The law with regard to racial epithets also seems to be changing, although this has been rather slow, at least in jurisdictions that have not adopted the Model Penal Code’s approach (see below).

In many jurisdictions the RPP now has many of the physical characteristics and experiences of the defendant. Thus, courts have allowed juries to consider, as part of the reasonable person’s makeup, the defendant’s age, gender, physical stature, physical disabilities, lack of sleep, and other such factors. Most courts refuse to consider any of the defendant’s “psychological” characteristics, fearing that this would allow “hotheads” who do not attempt to control their anger a reduction based on their failure to improve their character. This explanation, however, is unconvincing. Even a hotheaded defendant, after all, will be convicted of manslaughter and be punished for that crime; it may seem excessive to punish the defendant for murder just because he has failed to sufficiently alter his hotheaded nature.[31]

(2) The Cooling-Off Period Cools Off

Both as part of the adoption of the RPP test, and as part of a general individualization of the criminal law, the law with regard to the “cooling-off” period has also changed. First, whether the defendant has cooled off or had time to do so is now a question of fact for the jury to resolve. Second, more courts have spoken as well of the “cooled-off person” who has been “rekindled” either by the sight of the victim (initial provoker) or by words, informational or otherwise, spoken by the victim regarding the initial provocation. Thus, if *V* sodomizes *D* and escapes, only to be seen by *D* some days, weeks, or even months later, whereupon *D* immediately kills *V*, there is a greater likelihood today that

D will be found guilty of manslaughter rather than murder. Finally, at least some jurisdictions appear to allow "brooders," whose anger *increases* over time, to plead provocation to reduce the offense to manslaughter.

(3) Cumulative Provocation and Time Framing

Courts have been divided on whether the jury may consider "cumulative provocation" in determining a defendant's guilt.[32] In battered spouse cases, for example, which are also discussed in Chapter 16, it may be that the "straw that broke the camel's back" would not suffice to meet a test of legal provocation, but that an ordinary (or reasonable) spouse, having been subjected to humiliation or worse over a period of years, might "snap" in response to what would otherwise be a "trivial" action on the part of the provoker.

In a larger sense, this is a question of "time framing" — whether to allow the defendant to introduce evidence of recent (but not immediate) provocations and acts by the victim, or whether to focus exclusively on the moments immediately prior to the shooting. We will visit this question again, when considering justifications and excuses, and the extent to which earlier decisions by the defendant will affect his ability to raise a claim.

THE MODEL PENAL CODE APPROACH

Consistent with its general embrace of subjective liability, the Code rejects the rigidity of the common law on heat-of-passion killings. It provides that a "killing which would otherwise be murder" is manslaughter if it is done

> under extreme emotional or mental disturbance [EED] for which there is a reasonable explanation.

Several things should be noted about this provision. First, by declaring that the killing would "otherwise" be murder, the Code implicitly adopts the theory that a reduction to manslaughter is not a

matter of right, that is, that the defendant's reason was *not* "dethroned" and that he acted "purposefully, knowingly or recklessly" "under circumstances manifesting extreme indifference to the value of human life" with regard to death. Second, there is no "time limit" or "cooling-off" period. Third, the Code does not require "provocation" at all — if the defendant became emotionally disturbed over an event such as 9/11, it is possible that he would qualify for an EED claim. Fourth, *any* impetus for the disturbance is sufficient. Thus, for example, not only informational words but highly inflammatory taunts (racial, ethnic, or gender epithets), once explicitly excluded from the doctrine of heat of passion, might be covered by the MPC approach. Twenty years ago, a rioter in Los Angeles, outraged by a verdict of acquittal for several white police officers who had beaten a black defendant, chose a white trucker at random and hit him in the head several times with a brick. Had the victim died (which, fortunately, he did not), it is plausible that the Code would have allowed the rioter to claim EED; it is clear that the common law would not have allowed such a claim. However, a disturbance must still be "extreme"; an event of everyday life would probably not be sufficient.

Ironically, the language of EED, which was expected by the Code drafters to liberate the jury from the rigors of the common law and send all these cases to the jury, has been interpreted by many courts to require expert witnesses, usually psychiatrists or psychologists, to testify to an "emotional or mental disturbance." Eric Drogin, To the Brink of Insanity: "Extreme Emotional Disturbance" in Kentucky Law, 26 N. Ky. L. Rev. 99 (1999) ("Successive waves of judicial interpretation have effectively transformed Kentucky's EED doctrine into an insanity defense . . ."). Thus, if a defendant is unable (due to any cause, including lack of funds) to put on such evidence, these courts preclude reference in jury instructions to this Code section.

Furthermore, the Code appears to re-inject an objective standard by requiring that the explanation for the disturbance be "reasonable." However, the next sentence of the Code's provision declares that "[t]he reasonableness of such explanation of excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." Thus, the Code both subjectivizes and objectivizes the standard for the reduction to

manslaughter. The commentary to the Code *explicitly* refuses to explain what factors (e.g., age, gender, impotency) should be considered as part of the "actor's situation," preferring to leave to the courts the development of that definition.

Direct Attacks on the Concept of "Heat of Passion"

Both the increasing "subjectivization" of heat of passion and the very notion that anger should be relevant in assessing guilt have been attacked in the past two decades by many commentators and some legislatures as both sexist and too tolerant. Writers began to argue that the doctrine was clearly created to indulge male hierarchies,[33] and far too often applied to reduce the penalties for men who killed women (often their spouses or lovers) out of jealous rage. The notion that insults to honor would partially excuse a killing was also seen as pandering to male pride (similar to dueling).[34] Finally, modern cases where (male) defendants claimed their homophobia should mitigate their killings of gays or lesbians generated much debate; while courts usually rejected such claims, these critics joined the movement for repeal or severe revamping of the defense.[35] These critiques in some ways took the law "back to the future," where judges, and not juries, decided what constitutes "adequate legal provocation." In addition, a series of English court decisions that appeared to embrace a virtually totally subjective approach[36] were rejected by a very high English court in 2005[37] and heavily criticized by academic commentators.[38]

These criticisms have been somewhat successful. In the United States, Texas has relegated the entire issue of heat of passion and provocation to the sentencing stage — a killing is a felony of the first degree, but is punished as a felony of the second degree if the defendant, at sentencing, shows by a preponderance that it was "under the immediate influence of sudden passion arising from an adequate cause." V.T.C.A. Penal Code, §19.02.[39] Maryland has overturned three centuries of common law by declaring that "[t]he discovery of one's spouse engaged in sexual intercourse with another" is not adequate provocation. Md. Code, Criminal Law §2-207. Minnesota, while expressly allowing "words or acts" to be considered as provocation,

nevertheless singles out (probably in response to *Doughy*, mentioned in fn. 36 above) “the crying of a child” as inadequate provocation. Minn. Stat. §609.20. Several Australian states have abolished the defense entirely.[40] In England, Parliament, rejecting what was seen as the totally subjective approach adopted by the courts, legislatively replaced the claim with a “loss of control” criterion if the loss is caused by an adequate “trigger.” A defendant’s gender and age could be considered, as could characteristics of the defendant which were the target of the provoker, but clearly ruled out were matters of the defendant’s “temperament.” Sexual infidelity, is explicitly precluded as an “adequate trigger.” Coroners and Justice Act 2009, §§54-56.[41]

The Rules of Involuntary Manslaughter

Reckless and Negligent Manslaughter

Early common law cases spoke of a defendant who, while committing an “unlawful” act, killed someone as being guilty of “involuntary” manslaughter. The term “unlawful” included not only crimes but torts. Thus, to use an old example, if a roofer in a crowded city throws a beam down to the street and, in doing so, kills someone, it is manslaughter. However, if the case occurs in a remote area, the death is not manslaughter. The courts and writers were unclear as to the explanation, but it is certainly appropriate to consider the first roofer, but not the second, “reckless,” or “negligent.”

Serious confusion, however, arose in this area because some courts suggested that the two roofers were (respectively) “negligent” and “non-negligent” in tortious terms. Thus, the notion grew that a tortiously negligent actor could become liable for manslaughter. This view, however, has been emphatically rejected by virtually all courts, which require a “higher degree of negligence” for criminal liability generally, see Chapter 4, and for homicidal liability in particular. *Fitzgerald v. State*, 112 Ala. 34 (1896); *State v. Weiner*, 41 N.J. 21 (1964).[42]

As in tort, once an “objective” standard is introduced as a benchmark, the question becomes the degree to which the standard is subjectivized. In criminal law, where the defendant’s culpability is the main focus, that becomes critical. In many instances, the courts instill

the RPP with at least some of the defendant's characteristics. Thus, in *People v. Strong*, 37 N.E. 2d 568 (1975), the defendant intentionally stabbed the victim with a hatchet and three knives. Based upon his prior experience and his religious beliefs, he truly believed that he could do so without harming the victim. The majority concluded that these characteristics should be a part of the jury's RPP standard and that the defendant might be liable only for criminally negligent homicide, rather than second-degree murder (as a person without such beliefs or experience surely would be). On the other hand, *State v. Williams*, 4 Wash. App. 908 (1971), discussed on pages 76-77, supra, held that the trial court, applying a state statute which appeared to employ a tortious negligence standard for manslaughter, properly refused to consider any of the defendant's characteristics; (1) poorly educated; (2) unaware that his child's tooth infection could lead to gangrene and death; (3) imbued with certain cultural beliefs and (4) fearful that reporting the child's illness to the authorities might result in having the child removed from the home permanently. (The state statute was altered soon after *Williams* to require a "criminal" negligence standard, but the legislature did not directly address the issue of whether any of the characteristics in *Williams* should be considered in that standard.)

Misdemeanor-Manslaughter

Accidental deaths that occur while the defendant is committing a misdemeanor are sometimes held to be manslaughter. This doctrine acts in the same way as does the felony murder rule. However, courts have not surrounded it with the same limitations and safeguards that they have used in dealing with the felony murder rule, perhaps because there is no possibility of the death penalty. Thus, even misdemeanors that are not "inherently dangerous" in any true sense of that term can be used as the predicate for a manslaughter charge.[43]

In non-EED cases, a killing that is "merely reckless" (done with a subjective awareness of the risk of death but not under circumstances manifesting extreme indifference to the value of human life) is manslaughter. If, on the other hand, the killing is done with "criminal negligence" (no actual awareness of the risk, but with a gross deviation from the standard of care of an RPP), it is "negligent homicide," which

is punished less severely than manslaughter.

8.1 Homicide Under the Common Law and the MPC

Common Law Category	**INTENDED KILLINGS**	**NON-INTENDED KILLINGS**
First-Degree Murder	PREMEDITATION, DELIBERATION, AND WILLFULNESS Purposely or Knowingly	STATUTORY PREDICATES OF FELONY MURDER
Second-Degree Murder	INTENTIONAL Purposely or Knowingly	DEPRAVED HEART FELONY MURDER Recklessly under circumstances manifesting extreme indifference to the value of human life
Manslaughter (Voluntary)	HEAT OF PASSION Extreme Emotional or Mental Disturbance (EED)	HEAT OF PASSION; RECKLESS CULPABLE NEGLIGENCE EED or Reckless
Manslaughter (Involuntary)		CULPABLE NEGLIGENCE Criminal Negligence

KEY: Common law is in capitals; Model Penal Code language is in upper/lowercase.

Finally, and not surprisingly in light of its views on the felony

murder doctrine, the Code rejects entirely the misdemeanor-manslaughter analog.

One possible way to conceptualize the various tests, both common law and modern, with regard to homicides is shown in Table 8.1.

Examples

1a. Papa loved Mama, and Mama loved men (with apologies to Garth Brooks). Papa, a trucker, comes home unexpectedly one night and finds Mama and Neighbor in flagrante delicto. Papa kills Neighbor with the bottle of champagne he had brought to surprise Mama (as Brooks says, "If he was looking to surprise her, he was doing fine."). Manslaughter?

1b. As in the song, Papa finds the house deserted (except for his children) and heads downtown in his semi-tractor trailer truck. He gets to the local motel and, changing from first to fourth gear, plows through the room in which Mama and Neighbor are cavorting. One or both are killed. Murder or manslaughter?

1c. Same facts as 1b, except that Papa rams his truck into the wrong room, either because (a) the clerk gave him the wrong number, or (b) Papa misread the number on the room. What crime(s)?

1d. Papa, depressed by his discovery, and having no clue where Mama is, simply waits at home for her. When she arrives, he asks where she has been, and she responds "I've been with a real man, you chump," at which point Papa hits her with the champagne bottle, killing her.

1e. Suppose that, instead of having intercourse in the hotel room, Mama was having her foot massaged by her (obvious) boyfriend.

2. Mike Douglas, after a particularly hard day at the office, is driving home when he is caught in a traffic jam in mid-August. His air conditioning is out. He has been sitting in 106°F weather for one hour with no relief in sight. Just as he sees an opportunity to take an off-ramp, another car, driven by Donny DeVito, cuts him off. Furious and frustrated, Douglas shoots DeVito. Is Mike a murderer?

3a. Marie, an electrician, is called on Super Bowl Sunday, just an hour before kickoff, by Gus, a mechanically inept homeowner, who begs her to come to his house, which has experienced an outage. Expecting the job to take 15 minutes, Marie accepts it, but once there, determines that there is a more serious problem, which *could* result in a fire, although in her judgment the risk is low. Anxious to see the game, she puts in a temporary fix and tells Gus she'll be back tomorrow. Of course, the house burns down during the third quarter, and Gus is killed. Has Marie committed manslaughter?

3b. Same facts except that, in her anxiety over missing the game, Marie simply does not find the latent defect at all.

4. Glen does not know it, but both of his taillights are out. Because of this, Linda collides with his car from the rear, and kills Joshua, Glen's passenger. Driving without operative taillights is a strict liability misdemeanor. Is Glen guilty of manslaughter?

5. Hamlet's hunting license has, unknown to him, expired. Using all care, he shoots at a deer but nevertheless kills Polonius, whom he does not know is there. Hunting without a license is a misdemeanor. Manslaughter?

6. Paul was raised by a very religious family. At the age of eight, he attended church four nights a week. By 18, he was in seminary, and by 22, he was an ordained minister. His family always inveighed against abortion. For the first few years of his ministry, Paul preached against abortion on many occasions, but took no further action. As he grew older, however, he first joined, and then led, local and national antiabortion groups. He participated in numerous sit-ins outside abortion clinics and was frequently arrested. After an abortion provider was killed in another state, Paul's fury intensified. He resigned the ministry and devoted himself full-time to anti-abortion activities. Finally, he decided that he could no longer stand on the sidelines. To him, abortion providers were committing murder. He purchased a gun and practiced with it every day. After two weeks, he determined to kill the local doctor who performed abortions. Knowing that this was done on Fridays, Paul positioned himself outside the clinic at 6 a.m. and waited. As he sat

there, he was nagged by doubts about his course of action, but he convinced himself that it was necessary to save the lives of the unborn. He, himself, says: “I thought maybe I would feel, y’know, a lot of resolution and that kind of thing, but my stomach felt like literally a bottomless pit.” When the doctor arrived, Paul shot him four times as he stepped from his car. Paul is charged with first-degree murder. What result?

7a. Harry takes Hillary out on a date. Intent on having intercourse with her, he obtains some GHB, a colorless, odorless drug that is known as the “date rape” drug. The drug can produce lassitude and a temporary euphoria, and sometimes hallucinations. Unknown to Harry, the drug can also produce unconsciousness if it is even slightly “impure.” He asks the bartender, Henry, to put the GHB, which he tells Henry is a harmless substance, in Hillary’s drink. If Hillary dies as a result of the drink, what homicidal crime has Harry and/or Henry committed?

7b. Same facts. Now suppose that the state legislature has recently declared GHB a controlled dangerous substance, whose possession or delivery is a felony. Is there any different answer?

8. On a Friday afternoon, Ruth Clark, a suicide bomber, kills herself and 10 other people in a downtown mall. On Monday, the police arrest Donald Poker, the person who persuaded Clark to commit the act. On Tuesday, as Poker is being arraigned, Richard Regnis, whose wife and three children were killed in the explosion and who is still clearly distraught, jumps out of a courtroom seat and shoots Poker five times, shouting at him, “You killed my family, you creator of mass destruction!” What will be the likely result if Regnis’ attorney seeks to obtain a manslaughter instruction?

9a. Theresa, a model, was savagely attacked by her boyfriend, who threw acid in her face, resulting in her severe disfigurement. When she returned to work, virtually all of her co-workers were sympathetic. Maggie, however, greeted her with the comment “You look like you were run over by a lawn mower.” Every day, for weeks, Maggie continued her barrage of insults and insensitive comments. As Theresa walked into the office one day, Maggie

exclaimed, “Look, everyone, Scarface is back.” Theresa killed Maggie on the spot. What is the likely result?

9b. Suppose, instead, that Margaret, a new worker who had never seen Theresa before, quietly whispered to Fran “Theresa looks like Scarface,” but Theresa overheard that remark and killed Margaret on the spot.

10a. Bernice agrees to appear on a television talk show, believing that the purpose is to discuss her gardening prowess. As the show is being taped for future broadcast, the host suddenly announces, “Fooled you, Bernice. This show is not about gardening. In fact, this is about secret lovers. And here, now, is your secret lover, Barnaby.” Barnaby comes out and describes, in graphic detail, his seven-year passion for Bernice. He grabs Bernice’s hand and begs her to marry him immediately. Bernice has always detested Barnaby. She is deeply in love with another man, and she is extremely humiliated. She grabs a lamp on the set and hits Barnaby, killing him. With what level of homicide should she be charged?

10b. Now assume that the reason Bernice is upset is because Barnaby is of a different race than she. Any difference in the result?

11. Chester decides to rob the corner convenience store. His wife, Pauline, implores him, “No violence. No weapons. Just go in, take a few things, a little money, and leave.” Chester agrees. As he walks into the shop, however, Chester screams at the owner, Apu, “It’s you. I’ve been waiting 20 years for this.” Chester grabs a nearby snow shovel for sale in the store and hits Apu. “You killed my daughter 20 years ago. Now you’ll pay for it,” says Chester. Chester hits Apu 30 more times, killing him. Chester then takes several food items and the money from the cash register, and leaves. Twenty years earlier, Apu had been (non-negligently) driving a car when Chester’s daughter ran directly into its path. An investigation found that Apu had not committed any crime or tort. Chester had always thought Apu criminally responsible, but had moved away soon thereafter, and did not know that Apu was running the convenience store. For what level of homicide, if any,

are Pauline and/or Chester guilty?

12. Harry, the sorcerer's apprentice, was working hard in his lab when his mentor, Dumbledore, came in and told him to take the rest of the day off. Gleeful, Harry went to the florist to pick up a dozen roses, with which to surprise his new bride, Hermione. Well, he did surprise her. But he surprised Snape, too. Furious, Harry picked up the quidditch ball that he had brought back as a trophy for having won the latest tournament, and threw it at Snape. Snape, however, ducked, and the ball went out the window, where it killed Ron, Harry's best friend. Harry is charged with murder. Can he magically get the charge reduced?

13. Imam is a Sikh, whose religion requires him to wear a turban. Imam has been subjected to many outspoken abuse, and many people have addressed him as "towelhead." Among these folks is Imam's boss, Sarah. For the past two weeks, Imam has spent hours and overnights working on a major project. He is exhausted, but proud of his work. He hands the completed report to Sarah, who, taking one look at it, throws it at him, hitting him on the arm. As she does so, she says, "Do it again, Towelhead. Even you can't think this (expletive deleted) is sufficient." Imam picks up a tape dispenser and throws it at Sarah, killing her. What level of homicide?

14. In September 2010, Taylor jumped to his death from the George Washington Bridge, humiliated by the dissemination on MyTube and the Internet of a video taken by his roommate, Rave, showing Taylor and another man involved sexually. Is Rave criminally liable for Taylor's death?

15. Ludwig calls his girlfriend, Elise, on the phone. Although she answers, Elise says, "I can't talk now, I'm driving." Ludwig responds, "Don't be silly. You've got a hands-free phone. No prob." Elise agrees and continues to talk with him for five minutes, but the conversation is stopped short when she runs through a red light and crashes into a van, killing three people. (a) Is she liable for their deaths? How about Ludwig? (b) Would it make a difference if the state had a law, punishable by a $100 fine,

precluding use of a handheld cell phone while driving? (c) Suppose instead the two were texting?

16. Gus and Lynn are devout Christian Scientists. When their three-year-old daughter is diagnosed with leukemia, they steadfastly refuse to allow any treatment, confident that God will save their child. Tragically, she dies. Have Gus and Lynn committed manslaughter?

17. Gary and Cindy are college students who have been best friends since middle school. Gary is generally aware that Cindy has a peanut allergy; she is always careful to mention such at restaurants and to friends who make her any sort of food. However, Gary has never seen Cindy actually ingest peanuts and is clueless as to the severity of her allergy. Having mild allergies himself, Gary is sure that peanuts would simply give Cindy a rash, or a case of the hives at worst. Gary and Cindy are also huge jokesters and are always playing pranks on each other. One day, Gary decides to make Cindy a sandwich laced with a hint of peanut butter. He chuckles in his head as he imagines her confusion when she begins to feel itchy. Not wanting to cause serious discomfort to Cindy, he even stocks up on antihistamine medication. Unfortunately, Cindy's reaction is much worse than expected. Her throat constricts and, unable to find her epinephrine injector, she dies before Gary can find help. Is Gary guilty of manslaughter?

Explanations

1a. Papa is guilty of manslaughter. This is the classic case of "adequate legal provocation" even under the common law. But the facts as stated could hide an enormous amount of ambiguity. For example: Did Papa see Neighbor's car in the driveway? Did he hear heavy breathing as he approached the bedroom? Suppose Papa had to go to the refrigerator for the champagne, or to his truck for a tire iron? Most discussions of these events leave out the "ancillary" facts, but they might be enough to suggest either that (1) Papa was not as surprised as he claims; (2) Papa had "some" time to cool off before he killed.

1b. The Brooks song fails to tell us how Papa *knew* the room in which Mama was carrying on; if he had to ask the clerk for this information, there may be less opportunity for reduction. Moreover, Papa may have had time to cool off, either objectively or subjectively, while he was driving to the motel. Remember that under the common law, this was a question of law for the judge. Under modern common law, there is no "threshold" that the defendant must meet. Under the Model Penal Code, the passage of time, while one factor, is not determinative of a defendant's inability to have the slaying reduced to manslaughter, as long as he is still acting under the extreme disturbance.

1c. These are misaim cases, and the difference in the *reason* for the misaim would seem irrelevant. The question here is whether the law should mitigate Papa's conduct because of *his* mental state ("partial excuse") or preclude mitigation because the *victims* did not "ask for it" ("partial justification") (see Chapter 15). The issue here is whether the law should look solely at the mens rea of the defendant, without knowing the results of his actions, or whether the law should consider the fact that an innocent person was killed, EVEN IF the defendant was in a provoked, or otherwise extremely emotional, state. IF the issue is whether the defendant (or others like him) is morally culpable, then the law should consider whether the defendant had "lost control" and reduce the punishment accordingly. If, however, we consider the innocent victim, the calculus may be revised. Most courts will allow the defendant to claim heat of passion. Under the MPC, there is no requirement that the victim (or anyone) have "provoked" the defendant, and it goes to the jury. (Do you see a pattern here?)

1d. Under the original common law, Papa has no reduction because words alone are never adequate legal provocation. However, under more recent doctrine and under the Code, this will be a jury question.

1e. Movie buffs will recognize this crime. In *Pulp Fiction,* the boss had someone thrown out of a window for massaging his wife's feet. That crime is reported, but never seen. The answer under the common law is clear — nothing less than intercourse could be

adequate legal provocation. Under the test of the "reasonable person," however, and certainly under the MPC approach, this question might go to the jury.

2. Most of us have been frustrated by such cutoffs, losses of parking spaces, and so on. Indeed, the phenomenon described here has become so common that, in both England and the United States, it has a label: "road rage." Under the common law, this is an easy case. Unless DeVito's car has hit Douglas's car (arguably the equivalent of battery), there is no adequate legal provocation. Thus, although Douglas is *really* irate, there is no reduction. This is also the likely result under the Model Penal Code. Even if there is "extreme" mental or emotional disturbance, it is probably not due to a "reasonable explanation" (but the question is closer). Still, no reported case reduces the killing from murder to manslaughter.

   Since the late 1990s, a wide variety of "rages" have been proffered by defendants to reduce homicide liability. Recall the "air flight rage" situation when a passenger, incensed about a delay in landing, attacked (fortunately nonfatally) an airline attendant. Or the "hockey rage" father who, apparently upset by what he considered to be "rough play" in his son's hockey practice, killed the person he thought was encouraging the aggressive play. (During the trial, the defendant claimed self-defense, not rage, but the episode is unfortunately typical of hotheaded parents at Little League games.) After the (involuntary manslaughter) verdict, the victim's son said the defendant "just lost it," and told the defendant, "I don't hate you. I forgive you." See N.Y. Times, Jan. 12, 2002. Again, this sentiment reflects the tension in these cases. People (mostly men?) do "lose it" at times; should they be convicted of murder, or are they less culpable than a "depraved heart" killer? Can the criminal law change behavior patterns, both of the actual defendants and others, by punishing those who do not train themselves *not* to "lose it"?

3a. Marie could be found guilty of manslaughter. Her action here might be characterized as "reckless" under the common law or the MPC, but it is almost certainly not "under circumstances manifesting extreme indifference to human life" or "with a depraved mind."

Those tests might be met if Marie had not even put in a temporary fix but had rushed off with no regard for the risks at all. We told you football could be a dangerous game, Marie.

3b. Since Marie did not see the defect, she was not reckless; she did not subjectively perceive and disregard a risk. This is involuntary manslaughter under common law, and, at worst, "negligent homicide" under the Code. Under the Code, the question is whether her failure to see the defect is a "gross" deviation from what a reasonable electrician would see (if not pressured by the big game).

4. Under application of the misdemeanor-manslaughter rule, Glen is guilty of involuntary manslaughter, even if his failure to be aware of the dead taillights is not negligent. The Code rejects this rule and would require proof that Glen's failure to know of the situation was "grossly deviant" from the actions of an RPP.

5. This is not an easy case. Under a rigid application of the misdemeanor-manslaughter rule, Hamlet should be guilty. But unlike Example 4, the failure to have a license has little or no causal relation to the injury; Hamlet has been careful in his hunting. Thus, even under the common law, he should not be found culpable.

6. This is the true story of Paul Hill, who in 1994 shot and killed Dr. Bayard Barrett in Pensacola, Florida. See N.Y. Times, Sept. 24, 1995, sec. 4. Assuming that Paul has no claim of necessity (see Chapter 16), or insanity, or diminished capacity (see Chapter 17), he appears to be liable for first-degree murder. He premeditated the crime by purchasing the weapon in advance, practicing with it, and lying in wait for the victim. Under the common law, Paul has no other claims. However, under the Model Penal Code, he may argue that he is guilty only of manslaughter because his killing was committed under "extreme emotional or mental disturbance." The Code, unlike the common law, does not require provocation, much less adequate provocation. Its focus is on the mental state — or lack of it — of one who kills. Arguably, a person in Paul Hill's "situation," as the Code puts it, might gather that his conclusion was reasonable, even though he clearly knew that what he was

doing was illegal. In fact, Florida has not adopted the MPC, and Paul Hill was found guilty of first-degree murder.

7a. Begin by asking whether Harry has committed murder. Harry may be a bad actor, and a potential rapist, but under the common law, it is unlikely that he had a "depraved heart" *with regard to death.* Thus, this is probably not murder. And if it were murder, it would not be first degree, since the death was not premeditated. The same result would obtain under the MPC: Harry is not purposeful or knowing *with regard to death*, and even if he knew that there was *some* risk of death, it would be hard to argue convincingly that he acted under "circumstances manifesting extreme indifference to the value of human life." Under the common law, then, Harry is, at worst, guilty of manslaughter, but not voluntary manslaughter, since this did not occur in the heat of passion brought on by adequate provocation. The common law and the MPC, in slightly different language, would require that Harry exhibit "gross negligence" or "recklessness" in his conduct, which might be appropriate here, depending on Harry's (or the reasonable person's) understanding of GHB's potency.

Henry, not knowing the kind of drug he was distributing, would probably not even be "grossly negligent."

Caveat. In legal theory, Harry and Henry have both committed battery upon Hillary, since they have knowingly caused her to be touched by a drug to which she did not consent. The battery is likely to be a misdemeanor (since no serious bodily harm occurred as a result of the mere touching). If the common law notion of "misdemeanor manslaughter" were applied here, both might be guilty of manslaughter.

This hypothetical is based upon a real case, in which a jury convicted two defendants of involuntary manslaughter. In the actual case, the young men who laced the drinks failed to call emergency help; instead, they argued about what to do when the victim passed out.

7b. Is this now a felony murder? The first question would be whether Harry or Henry has committed a felony under the statute. Harry knew that GHB was a drug. His failure to know that it was a legally

proscribed drug is irrelevant (see Chapter 5 on mistake of law). Thus, he has committed a felony. But the felony is probably not "inherently dangerous," either in the abstract, as many courts have required, or even as perpetrated here. Thus no felony murder.

But Harry *might* be guilty of felony murder if his drugging of Hillary could be seen as an "attempt" to commit rape (or sexual assault) (see Chapter 9 for a discussion of why this could be rape). Most states provide by statute that a death that occurs during an attempt to commit rape will be first degree felony murder. The issue here would be whether Harry has moved sufficiently toward the target crime as to constitute an attempt. For a detailed analysis of that question, see Chapter 12. The short answer is that Harry is probably *not* guilty of attempt under most common law tests, but might well be guilty of attempt under the Model Penal Code. Under the Code, rape (or deviate sexual intercourse) is a predicate crime for which the rebuttable presumption of recklessness arises. Still, Harry can probably rebut that presumption fairly easily.

Henry will *probably* not even be guilty of the felony, since he did not know that he was dealing with a drug which *might* be legally proscribed. If, however, the statute is read as imposing strict liability, or if possessing or distributing any substance is a crime activating the "greater crime" theory (see Chapter 5), then Henry might be responsible for the felony possession. Even then, just as with Harry, this is probably insufficient to warrant felony murder liability.

8. Under the common law, Regnis will fail, for several reasons. First, although he may well have been provoked by Poker's homicidal acts, those acts were aimed not at him, but at others. Second, many courts would require that Regnis actually have *seen* the deaths of his family. Third, Regnis only acted 72 hours after his family's deaths, and 24 hours after Poker's arrest. Under the original common law, this would almost surely be held, as a matter of law, to be sufficient time to "cool off." Finally, Regnis sought out Poker, so the meeting is hardly "chance." Regnis premeditated the encounter and the killing; had Regnis simply been in the courthouse and inadvertently bumped into Poker, it might have been a situation of "rekindling" the cooled-off man. But this is not

the case here.

Under the MPC, the results are likely to be different. The Code does not require a provocation, nor does it preclude "brooders" from obtaining a possible manslaughter instruction. The question, rather, is whether a reasonable jury could find that Regnis was acting under "extreme mental or emotional disturbance." Surely a jury could so find, even though three days have passed since the bombing. Indeed, under the Code's formulation, which is much more subjective than the common law's, Regnis might obtain such an instruction three years after the event.

9a. This example has two problems. First, the provocation consists of "only" words, and not even informational words at that. Under the original common law, this would be sufficient to prevent Theresa from claiming heat of passion. At least some states today might recognize some insulting words as sufficiently provocative to raise a jury issue. But that's not the end of it. One insult, even as snide and dastardly as Maggie's, is unlikely to be sufficient provocation under the common law. Thus, Theresa is going to have to argue that the law should view the threats as "cumulative." As noted in the text, courts have been divided on whether to allow such evidence.[44] Given the persistence of Maggie's nastiness (combined, her defense counsel would argue, with Theresa's agony over her condition), Theresa's reaction is "reasonable." Certainly, in the words of the MPC, it is the result of "extreme emotional distress." We considered (and you should, too) having the insults here be racial in nature: Is the victim of constant racial discrimination, who suddenly hears the "n" word one time too many, from someone he has never met, entitled to have the jury consider a reduction to manslaughter?

The Model Penal Code would be more likely both to allow evidence of the words *and* of the cumulative nature of Maggie's acts. Teresa would be much better off in England, where judicial decisions prior to 2009 had made clear that any physical characteristic (a permanent limp, kyphosis (having a humped back, etc.)) would be part of the reasonable person's characteristic. That basic premise has been codified in the new statute.

9b. This exacerbates the problem. If, in Example (a), Margaret might be said to have "asked for it" by riding Theresa day after day, that can surely not be said about Margaret. Even if Margaret had spoken these words directly to Theresa, it would stretch the notion of partial justification to say that Margaret's barb "asked for" Theresa's reaction. On the other hand, if the reduction is a partial excuse, then the focus should be more on Theresa and the effect that Margaret's remark had on her.

10a. Under traditional common law, Bernice cannot plead heat of passion. Barnaby's profession of love would be "words only" and would therefore not suffice. And although the words are "informational," they do not inform her of an act that, had she seen it, would qualify as provocation. Even under modern common law, the words are insufficient. Barnaby's touching her hand is a bit more problematic. Although early common law referred to an "assault" as sufficient provocation, and although assault is usually defined as a nonconsensual touching, the assaults that were contemplated were "insulting" touching, which "aggravated" a man's (?!) honor. The question is whether to view the touching from Barnaby's viewpoint, which would mean that the touching was not intended as an insult, or from Bernice's, which might qualify it as an insulting touching. The better judgment, however, is that the touching alone would not meet the common law requirements.

The result might be different under the Model Penal Code. The Code does not preclude words, informational or not, as the possible basis of a manslaughter mitigation. If Bernice was truly distraught, she might meet the "extreme emotional or mental disturbance" part of the Code's test. The crucial issue would be whether her reaction is "reasonable" for someone in her "position."

From a purely subjective viewpoint, Bernice has lost control. Both common law courts and the MPC have moved toward increasing subjectivism to recognize that persons who have actually lost control are less blameworthy (and possibly less deterrable) than those who have killed with a "depraved heart."

10b. This example takes the question one step further. Certainly, we

wouldn't want to "validate" Bernice's racism by allowing it to mitigate her culpability. In recent years, several defendants have claimed "gay panic" when they killed someone who made a homosexual advance upon them. In fact, this example is based upon a real event in which a gay man announced, during the taping of a television show, his love for the male defendant, who then killed him, although the actual killing occurred several days after the taping of the show. The defendant was found guilty of second-degree murder. See *People v. Schmitz*, 586 N.W.2d 766 (Mich. App. 1998), but his conviction was reversed on other grounds. Although the courts have generally refused to allow a heat of passion (or EED) claim, the writers have been divided — some arguing that if the defendant truly was outraged, and had lost control, (s)he should not be lumped together with "depraved heart" killers. Others have argued that the law should not tolerate homophobia, even as a mitigation, and that the law should require the defendant to learn how to control his animosity toward others. Compare Bradfield, Provocation and Non-Violent Homosexual Advances: Lessons from Australia, 65 J. Crim. L. 76 (2001); Dressler, When "Heterosexual" Men Kill "Homosexual" Men: Reflections of Provocation Law, Sexual Advances, and the "Reasonable Man" Standard, 85 J. Crim. L. & Criminology 726 (1995). Lee, The Gay Panic Defense, 42 U.C. Davis L. Rev. 471 (2008).

11. Chester has killed Apu. But while it took at least several minutes to kill Apu, this will probably not be "premeditation," even in a jurisdiction where "premeditation may occur in a second." But it may be second-degree murder — malice aforethought homicide in the old common law. Chester will argue heat of passion but Chester had 20 years to cool off. That's more than enough time, certainly under the common law view that this was a question of law, not of fact. Under more modern views, however, the cooling-off question is for the jury — and Chester will argue that he was "rekindled" (although Apu did nothing to remind him of the original grief). Under the Model Penal Code, the issue is always one for the jury — which might be sympathetic to Chester and conclude that a "reasonable person" in Chester's "situation" would experience

"extreme mental and emotional disturbance."

What about felony murder? Certainly, Chester had larceny on his mind when he entered the store. And he committed larceny after he killed Apu. But there seems to be little connection between the larceny and the killing. Chester will argue that he did not kill Apu to facilitate the larceny — he was so enraged that he forgot the larceny. So, the killing was not "in furtherance of" his crime. He will then argue that, having killed Apu, he "remembered" the larceny and took the money, but that by that time Apu was dead so, once again, although the killing furthered the larceny (making it easier to steal the money), it was not in furtherance of the larceny. There are reported cases, for example, where *A*, in a rage, kills *B*, and then steals his money. Assuming that the idea of taking the money occurs AFTER the killing, courts have found no felony murder. This is a more difficult case, because Chester intended to steal before he saw Apu. But he will argue that there were two — or possibly even three — unconnected "events" in this scenario.

To the extent that Chester is culpable for Apu's murder, Pauline may be, as well. Recall that the felony murder rule imposes liability on accomplices in the felony for a felony murder, whether or not they actually aided in the killing. Here, Pauline would certainly be found to be Chester's accomplice in the predicate felony; her arguments against liability would then mirror Chester's.

12. This is difficult, because it raises the question of why the common law declared that acts in the "heat of passion" generated by "adequate legal provocation" reduced a killing to manslaughter. If the notion is that the provocateur somehow "deserved" his comeuppance because of his dastardly deeds, then Harry hasn't a chance — Ron certainly didn't deserve death just because he was passing by Harry's window. If, on the other hand, the argument is that Harry was transported by anger, then his ACT (and not its result) should be our focus, and Harry's act was surely provoked.

    This is also much easier under the Model Penal Code, which focuses exclusively on the defendant, and eschews the requirement that he be provoked by anyone, much less the deceased. If the jury could conclude (as surely it could) that Harry was reacting as many in his "situation" would, he will be convicted of manslaughter, not

murder.

13. Under the common law, Imam is likely to be guilty of murder. It is very unlikely that he can successfully claim "heat of passion," for several reasons: (1) insulting words are never adequate legal provocation; (2) the common law rarely recognized "cumulative provocation," so the fact that Sarah was constantly abusing him will not help him — indeed, it may undercut his claim, since he never reacted with deadly force before; and (3) the reasonable person of the common law probably is not a Sikh, and it is unlikely that a judge would tell a jury to assess Imam's actions as those of a "reasonable Sikh." The problem, of course, is that to a non-Sikh, "towelhead" does not demean or attack one's religious views. Imam has one possible claim — the file that hit him on the arm. Common law sometimes stated that "an assault" was sufficient provocation. But usually, the assault had to be more than a "mere" touching. But wait — Imam's not through — the "assaults" that counted in the common law were typically "insulting" touches. The writers and courts often wrote of a "mere fillip upon the nose" as being sufficient provocation, because the act insulted the defendant's dignity. It's not likely that this would be followed in the twenty-first century, but consider the possibility that a minor touching might qualify while the deepest verbal insults won't even get Imam to the jury.

    Under the MPC, the case is entirely different. The Code does not require a provocation — merely that the defendant act under "extreme mental or emotional disturbance." Sarah's constant attacks on Imam, combined with his exhaustion, as well as her direct rejection of his work, might raise a jury issue here. Moreover, the MPC asks the jury to consider the actions from someone in the defendant's "situation." As the text suggests, this may not include hotheadedness — but Imam's longstanding toleration of these insults might demonstrate that he does NOT have a short fuse, and that the jury should consider all these factors as part of his "situation" and the "reasonableness" of his explanation.

14. This, of course, is the nationally publicized case of Tyler Clementi.

Clementi's suicide was the latest in a series of such deaths that had, in one way or another, occurred after similar abuse. In another well-known incident, 13-year-old Megan Meier hanged herself fifteen minutes after she received a Myspace message, ostensibly from a 16-year-old neighbor boy, that declared, "The world would be a better place without you." In fact, the was message sent by a 49-year-old woman who believed Megan was spreading rumors about her daughter. At least six states have enacted statutes criminalizing abuse of the Internet and social media. Lyrissa Lidsky and Andrea Pinzon Garcia, How Not to Criminalize Cyberbullying, 77 Mo. L. Rev. 693 (2012).[45] These statutes raise significant First Amendment issues and carry relatively small sentences.[46] The question for this chapter, however, is whether the roommate, or the mother in Meier's case, is criminally responsible for their victims' deaths. As we saw in Chapter 7, there are a few decisions where a victim's suicide has been held to be "caused" by the defendant, but these cases usually involved serious physical violence (or even attempted murder) by the perpetrator. Assuming that causation can be proven, demonstrating that the cyberbully is criminally negligent or reckless will be quite difficult. As horrifying as the action of the roommate or the mother is, the likelihood of suicide or some similar self-injury is low. Even though it is highly unlikely that any person seeking to torment another on the Internet has not heard of one or more of these tragic results, the statistical likelihood of suicide from such an event is incredibly low. One survey, for example, indicated that 35 percent of surveyed teens said that they had been the subject of "rude" or "nasty" or "threatening or aggressive" messages. See Lidsky and Garcia, supra, at n. 45 page 259. Yet the usual reaction is either anger or frustration, not self-loathing. This then raises the question whether the (mathematically low) risk of self-injury is so trivial that not even a reasonable person would consider it. The alternative interpretation is that whether a risk is "substantial" is not quantitative but normative, and that *any* possibility that death would result from this kind of activity is sufficient to make the defendant "criminally negligent" or possibly even reckless.

15. If the risks of cyberbullying are not well-known or are too small to result in a conclusion of negligence (or worse) (see Example 14 above), the same cannot be said for using cell phones while driving. And the data are crystal clear here — the dangers from hands-free cells are just as high as those from hand-held. Even if neither Elise nor Ludwig knows that, they "should" be aware of those facts. Moreover, since she is driving there could be an argument made that she is engaging in an inherently a dangerous activity (while on the phone), and thus Elise's actions might well be "grossly negligent" under the common law and "criminally negligent" under the MPC. That many (possibly even a majority of) people continue to use cell phones while driving could potentially make the action less likely to be criminally prosecuted; however, negligence is judged by the *reasonable* person, not the *ordinary* person. Of course, even if Elise is liable, Ludwig may well argue (lack of) causation — Elise could (and should) have terminated the conversation, and it was her failure to keep watch that was an intervening cause that resulted in the collision. Ludwig is not an accomplice (see Chapter 14) because he had no intention, nor purpose, that a collision occur.

15b. Ironically, the statute might make the duo *less* liable for the deaths. Even if the legislature has acted unreasonably (by not banning all cell phone use, handheld or hands-free, given the data), El and Lud can certainly argue that the legislature has implicitly said that hands-free is not as negligent as handheld. That the legislature might have made a "politically sound" rather than a "statistically sound" judgment is not likely to undermine their position.

15c. If cell phone use is dangerous, texting while driving is even more so. Fifteen states ban cell phone use while driving; Forty-seven ban texting. http://www.ghsa.org/state-laws/issues/distracted%20driving (last visited Jan. 25, 2018). A Car and Driver test showed that driving while texting is 20 times more dangerous than driving while inebriated. http://www.caranddriver.com/features/texting-while-driving-how-dangerous-is-it. There is a stronger case that Elise (at least) is criminally negligent. Whether she (or Ludwig) actually considered

the possibility of a car accident is relevant under the MPC and probably under the common law as well if the prosecutor seeks to show "recklessness" or a "depraved heart." In a recent prosecution in Massachusetts, the texting driver was convicted of motor vehicle homicide and sentenced to 2.5 years in prison, with the last 18 months to be served on probation. http://www.usnews.msnbc.msn.com/_news/2012/06/06/12090348-massachusetts-teen-sentenced-to-prison-for-texting-while-driving?lite.

16. Every year there are news reports of such events, and prosecutors usually do not prosecute, either themselves infusing the RPP with the religious beliefs of the defendants, or assuming that at least one juror will do so if the case goes to trial. Even if the RPP should not be attributed with such a belief or trait, jurors often do so. Of course, there is, as well, the issue of whether a court could order life-saving treatment,[47] but that is a First Amendment, not a criminal, question. Some states deal expressly with the issue. On the other hand, if the parent has no religious reasons for failing to provide treatment, but just fails to do so, there is at least manslaughter or criminally negligent homicide.[48] The leading case is *Comm. v. Twitchell*, 416 Mass. 114 (1993). Allison Ciullo, Prosecution Without Persecution: the Inability of Courts to Recognize Christian Science Spiritual Healing and a Shift Towards Legislative Action, 42 New Eng. L. Rev. 155 (2007). Of course, if the neglect is not based on spiritual beliefs, the issue is entirely different. See, e.g., http://www.courttv.com/graphics/13th/shim.gif (second-degree murder where parent failed to provide insulin to an 11-year-old diabetic daughter).

17. It is unlikely that Gary would be liable for voluntary manslaughter under the common law. Gary clearly did not intend any serious harm or death to come to Cindy, so he had no "depraved mind." But Gary may be liable for involuntary manslaughter if a jury finds that he was reckless or criminally negligent. Gary's liability will depend on the reasonable person standard that the jury applies — and to what extent they take into account Gary's specific characteristics. The prosecutor will argue that a reasonable person

should have known the risks of exposing someone to a known allergen — including the risk of death. Gary was well aware of Cindy's peanut allergy for years, and exploited this knowledge for his own entertainment. Gary will argue that a reasonable person in his shoes would have no reason to suspect that Cindy could die from exposure to peanuts, given that he had never seen such a reaction from her before and was never informed of the severity of her allergy.

The analysis would be similar under the MPC, except we could more quickly dismiss the argument that Gary acted recklessly. As previously discussed, recklessness requires that an actor subjectively recognize the risk of death; here Gary did not have this subjective understanding.

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1. The question sometimes arises in nondeath cases. Thus, in *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992), the mother, who was addicted to cocaine, was charged with delivering the drug through the umbilical cord to a "human being," her newly born child, in the 90 seconds between the time the child was "born" and the time the cord was severed.

2. This is what we earlier referred to in Chapter 4 as "traditional" mens rea. In a recent case, not involving a homicide, the court embraced that concept of malicious. In *State v. Burgess*, 205 W. Va. 87 (1999), defendant admitted that he had killed Henry's cow in order to steal the meat, and that he shot it — once — through the head. Charged with "maliciously" killing the cow, defendant argued successfully that the most humane way to kill an animal was with one shot. Said the court, reversing his conviction: "(This) is the same method used throughout West Virginia by farmers and slaughterhouses every day . . . when one unlawfully dispatches a domestic animal belonging to another person by using a commonly accepted, humane method, and there is no evidence of any other form of malice, the killing is not malicious."

3. James Fitzjames Stephen, A Digest of the Criminal Law 161-162 (1887).

4. The other prototypical malice aforethought murder is *Banks v. State*, 85 Tex. Crim. 165 (1919) (where the defendant fired a shotgun into a passing train, killing someone inside the train). Surely the risk of actual death from such an event is small — perhaps less than .0001. But the court had no trouble finding the defendant guilty not only of murder, but of capital murder.

5. Some state statutes used the word "killing" rather than "murder." Although it was probably inadvertent, the distinction was relatively unimportant in most instances. However, in *People v. Aaron*, 409 Mich. 672 (1980), the court seized on this semantic difference to abolish judicially the doctrine of felony murder. See pages 218-225.

6. The first such statute was enacted in Pennsylvania in 1794 and was quickly followed by other states. The statutes also defined as first-degree murder killings by "lying in wait, torture, and poison." The first of these is virtually taken verbatim from the fourteenth-century statute first establishing malice prepense as the critical distinction for murder. All three types of killing require premeditation. It is difficult (though not impossible) to conceive of an intended *poisoning* that was not premeditated. And it is only slightly less possible to think of an *intentional* death by torture that does not require preplanning. One might conclude, therefore, that these phrases are superfluous, if not redundant. 7. This view continues. See *State v. Harms*, 643 N.W.2d 359 (Neb. 2002): "The purpose to kill may be formed at any moment before the homicide is committed."

8. *Banks v. State,* 85 Tex. Crim. 165 (1917).
9. Although the Code provides that all "murderers" may be eligible for the death penalty, that penalty is not imposed on all murderers. Instead, the Code establishes a procedural scheme that requires specific findings on a list of "aggravating" *and* "mitigating" circumstances that must be considered in determining whether the killer should be sentenced to death. The aggravating factors, taken together, are intended to cover most of the killings that motivated earlier courts to interpret broadly the words ("premeditation and deliberation") of the earlier statutes. The list of mitigating factors is intended to cover most of those cases where a jury would usually decide that the defendant is not so blameworthy as to be sentenced to death. Because of several decisions by the United States Supreme Court on the constitutionality of the death penalty, a significant number of states that have the death penalty have adopted a procedure similar to that recommended by the Code. See MPC §210.6.
10. The word "murder" actually stems from a fine (the "murdrum") imposed by the first Norman kings of England upon a town if the town refused to disclose the murderer of a Norman. If the victim was proven to be a Saxon, however, no fine was imposed. Thus, "the worst kind of killing" was initially designated by victim rather than by mens rea.
11. N. Cameron & S. France, The Bill in Context, in Essays on Criminal Law in New Zealand 1, 4-5 (1990).
12. Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill, Criminal Law: Case Studies and Controversies, 212 (New York: Wolters Kluwer, 2017)
13. Id.
14. *Kennedy v. Louisiana,* 554 U.S. 407 (2008) (death penalty cannot be imposed upon any rapist of a child).
15. *Commonwealth v. Almeida,* 362 Pa. 596 (1949); *Commonwealth v. Redline,* 391 Pa. 486 (1958); *Commonwealth ex rel. Smith v. Meyers,* 438 Pa. 218 (1970).
16. See Annotation, What Constitutes Termination of Felony for Purpose of Felony-Murder Rule, 58 A.L.R.3d 851.
17. This does *not* mean that the mother could not be convicted of "depraved heart" murder.
18. See Stewart, Murder by Child Abuse, 26 Willamette L. Rev. 435, 440 (1990).
19. See Guyora Binder, Making the Best of Felony Murder, 91 B.U. L. Rev. 4032 (2011); Guyora Binder, The Culpability of Felony Murder, 83 Notre Dame L. Rev. 965 (2008).
20. The United States Department of Justice Bureau of Justice statistics for 1994 show that of all violent crimes, only 20 percent resulted in any injury at all, and that only 1 percent of all victims required any hospitalization. In 1992, less than a third of robbery victims were injured, and only 3 percent required medical treatment. See Moran, FBI Scare Tactics, New York Times, May 7, 1996, at A23.
21. *People v. Aaron,* 409 Mich. 672 (1980).
22. That statute provides that the defendant may plead an affirmative defense in a felony murder case if he can prove that he "(a) did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (b) was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law abiding persons; and (c) had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and (d) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."
23. In the real case, the defendant was convicted of first degree murder, not on the basis of felony murder, but on the basis that the defendant dragged the boy for almost four-and-a-half miles, and a jury could conclude that during that time he deliberated. *State v. Davis,* 107 S.W.3d 410 (Mo. App. 2003).
24. This explains why provocation affects only murder liability. If *D* is "adequately provoked" by

V but only breaks his leg, the provocation is irrelevant.

25. For example, Neb. Rev. Stat. §28-305 provides that "A person commits manslaughter if he kills another without malice . . . upon a sudden quarrel," and California similarly provides that manslaughter is "the unlawful killing of human being, without malice. . . ." Cal. Penal Code §192 but Judge Stephen argued that "Homicide, which would otherwise be murder, is not murder, but manslaughter if the act is done in the heat of passion . . . ," J. Stephen, A Digest of the Criminal Law (1877), and the Model Penal Code a century later uses almost exactly the same formula, defining manslaughter as "a homicide which would otherwise be murder [if] committed under the influence of extreme mental or emotional disturbance."

26. One of the authors of this book has attempted to show that the common law decisions did not in fact so restrict the juries but treatise writers misconstrued the decisions, and courts began following those writers rather than the much more liberal, and subjective, decisions. See Richard Singer, The Resurgence of Mens Rea I: Provocation, Emotional Disturbance, and the Model Penal Code, 27 B.C. L. Rev. 243 (1986).

27. Jeremy Horder, Provocation and Responsibility (1993).

28. *R. v. Mawgridge*, (1706) Kelyng, J. 119.

29. One of this book's authors, however, reviewing the cases, has concluded that "there is no basis in the early cases for the doctrine." Singer, *supra* n. *22*, 27 B.C. L. Rev. 243, 256 (1986), even if the doctrine were restricted to "insults."

30. Other countries have also "subjectivized" the doctrine. Michal Gilad, Provocation and Multiculturalism, 46 Crim. L. Bull 1097, 1113 (2010) (Ireland, South Africa and Israel); S. Yeo, Unrestrained Killings and the Law (1998) (India).

31. Even if the theory here is that *D* has been reckless with regard to whether he might kill, that should require some showing that *D* has either killed, or come close to killing, at earlier times. This would require evidence of the extent of his anger and loss of control.

32. For example, "Continuing strain in a marriage" may constitute sufficient provocation in New Jersey, *State v. Erazo*, 126 N.J. 112 (1991) and Wisconsin, *State v. Felton* 110 Wis.2d 485 (1983), but in Illinois, a history of marital discord "undermines, rather than supports, such a claim." *People v. Chevalier*, 131 Ill. 2d 66 (1989).

33. Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia, 14 Am. U.J. Gender, Soc. Pol'y & L. 27 (2006); Victoria Nourse, Passion's Progress: Modern Law Reform and the Provocation Defense, 106 Yale L.J. 1331 (19997); Suzanne D. Rozelle, Controlling Passion: Adultery and the Provocation Defense, 37 Rutgers L.J. 197 (2005).

34. Richard Holton and Stephen Shute, Self-Control in the Modern Provocation Defence, 27 Oxford J. Legal Stud. 49 (2007).

35. Joshua Dressler, When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advance, and the "Reasonable Man" Standard, 85 J. Crim. L. & Criminology 726 (1995); Cynthia Lee, The Gay Panic Defense, 42 U.C. Davis L. Rev. 471 (2008); Robert Mison, Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation, 80 Cal. L. Rev. 183 (1992).

36. For example, the defendant's addiction to glue sniffing was considered a characteristic of the RPP, at least when the provocation consisted of taunts about his addiction. *R v. Morhall* (1995) 3 W.L.R. 330. In *R. v. Doughy* (1986) 83 Cr. App. R. 319, the court considered the stress generated by no sleep when the defendant father almost inadvertently "silenced" his crying infant baby. In *R. v. Weller* (2004) 1 Cr. App. R. 1, the defendant's jealously and possessiveness were characteristics of the RRP. The height of subjectivity in England was *R. v. Smith (Morgan)* (2003) 3 W.L.R. 654 (House of Lords).

37. *Attorney General v. Holley* (2005) All. R. 371 (Privy council).

38. Sarah Christie, Provocation: Pushing the Reasonable Man Too Far?, 64 J. Crim. L. 409 (2000); Jesse Elvin, The Doctrine of Precedent and the Provocation Defence: A Comment on *R v.*

James, 69 Mod. L. Rev. 819 (2006); Edward M. Hyland, *R. v. Thibert*: Are There Any Ordinary People Left?, 28 Ottawa L. Rev. 145 (1997).

39. The Texas story is extraordinary. Until the mid-1970s, the killing of a spouse (usually the wife) found in adultery was not merely partially excusable, and hence manslaughter, as under the common law and in the rest of the states, but justifiable, and hence noncriminal. See Bill Neal, Sex, Murder, and the Unwritten Law: Gender and Judicial Mayhem, Texas Style (2009). In the mid-1970s, Texas joined the majority of states in allowing the claim to reduce (but not justify) the crime of conviction. Now it is "merely" a sentencing consideration.

40. Carolyn B. Ramsey, Provoking Change: Comparative Insights on Feminist Homicide Law Reform, 100 J. Crim. L. & Crim. 33 (2010); Adrian Howe, Reforming Provocation (More or Less), 12 Austl. Feminist L.J. 127 (1999).

41. Anna Carline, Reforming Provocation: Perspectives from the Law Commission and the Government (2009), Web JCLI; http://webjcli.ncl.aac.uk/2009/issue2/carline2.html; C. Withey, Loss of Control, 174 Crim. L. & Justice Weekly 197 (April 3, 2010).

42. This may not be the case where the legislature has *explicitly* adopted tortious negligence as a possible predicate for liability. Compare the definition given in a British case: "All sober and reasonable people would inevitably have realised that the defendant's conduct must have subjected the victim to some harm, regardless of whether the defendant realised that or not." *R v. A* (2005) All E.R. (D) 38 (Jul); *State v. Barnett*, 218 S.C. 415 (1951).

43. See, e.g., *Todd v. State*, 594 So. 2d 802 (Fla. 1991); *State v. McLaughlin*, 621 A.2d 170 (R.I. 1993).

44. A classic case is *Freddo v. State*, 127 Tenn. 376 (1912), Defendant, a "quiet, peaceable, high-minded young man," had been raised to abhor profanity. A coworker, knowing of his sensitivity, taunted him by deliberately calling him a "son of a bitch" at every opportunity. One day, Freddo "snapped" and killed the coworker. The appellate court, conceding that defendant was "in the heat of passion," nevertheless upheld a murder conviction, declaring that "the law regards no mere epithet or language, however violent or offensive, as sufficient provocation for taking life. . . ."

45. See generally http://www.cyberbullying.us/research.php; Ian Rivers et al., Bullying: a Handbook for Educators and Parents (2007); S. Hinduja, J.W. Patchin, School Climate 2.0: Preventing Cyberbullying and Sexting One Classroom at a Time (2012); J.W. Patchin, S. Hinduja, Cyberbullying Prevention and Response: Expert Perspectives (2012).

46. Ravi was not charged with Clementi's death; instead, he was indicted for bias intimidation, invasion of privacy, hindering apprehension and tampering with evidence. Convicted on all counts, his ultimate sentence was thirty days in jail. The state prosecutor in the Meier case could find no basis on which to proceed, and a federal prosecutor "creatively" interpreted federal law to charge computer fraud and abuse. The jury found the mother guilty, but the trial court overturned the verdict. *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

47. E.g., Utah Criminal Code, §76-5-109(4)(6). "A parent or legal guardian who provides a child with treatment by spiritual means alone through prayer, in lieu of medical treatment, in accordance with the tenets and practices of an established church or religious denomination of which the parent or legal guardian is a member or adherent shall not, for that reason alone, be considered to have committed (child abuse)."

48. See, e.g., Mass. G. L.: "A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof." c. 273, §1 (1992 ed.).

CHAPTER 9

Rape

OVERVIEW

Rape is the taking of sexual intimacy with an unwilling person by force or without consent. Historically, rape was regarded as an offense that could be committed only against a woman not married to the defendant, and it was seen as both a crime of violence against her and a property crime against her husband or her father. Today, the law recognizes that rape can be committed against females and males, and it is viewed both as a crime of violence and as a violation of an individual's basic right to decide with whom to have sex.[1]

Probably no crime has been more sharply affected by contemporary society's rapidly changing attitudes. Influenced by the newly arrived voices of women in the law, legislatures have enacted sweeping changes in the statutory definitions of rape and the evidentiary rules for trying rape cases. That this law reform has been controversial is not surprising. It reflects shifting perceptions about our most intimate human activity, appropriate sexual behavior by males and females, the relative status and power of men and women in society, the proper balance between convicting the guilty but not the innocent, and the legal consequences of the marriage relationship.

A discussion of how the law should define rape and establish procedures for trying rape cases can elicit intense emotional responses. Many people feel strongly that the common law treated women as chattel, keeping them in a subordinate social position. For example, under the common law, a wife could not accuse her husband of rape. Furthermore, any crime committed by a married woman (except killing her husband) was deemed to have been coerced by her husband, and she

could not be punished for it. The common law essentially treated a married woman as totally passive and subject to the will of her husband. Though she may have received some modest advantage from her marriage status, the disadvantages she suffered under the law far outweighed any advantages.

Thus, many critics argue that retaining *any* remnants of the common law, especially the common law of rape, simply preserves women's profoundly disadvantaged legal status. Others, while perhaps agreeing with these criticisms, argue that the common law, including the common law of rape, had some good points that should not be discarded rashly in the process of revising rape laws. Proponents of keeping some common law principles express concern about possible harmful consequences of contemporary law reform, such as increasing the risk that innocent people will be convicted. The discussion is made more complicated by changing social contexts in which acts that are (or can be seen as) rape occur, especially "date rape"; by perceived tensions in the sexual relations between men and women; and by the pressures generated both by biology and culture.

Everyone will undoubtedly approach this subject in light of his or her individual characteristics, experiences, and attitudes. Nevertheless, we should each try to understand the complexity of the issues involved and the different viewpoints others may have.

THE COMMON LAW APPROACH

Definition

The common law defined rape tersely as "carnal knowledge of a woman forcibly and against her will."[2] Rape included only sexual intercourse; it did not include other sexual acts such as oral or anal sex or consensual sex with minors. Those acts were usually punished as other crimes. Because of the brevity of the common law rape definition, courts had to explain its terms in greater detail.

Generally, the prosecution had to prove:

1. the defendant had *sexual intercourse* (penetration by the penis of the vulva);
2. with a *woman not his wife*;
3. using *physical force* or the *threat of force*; and
4. *without her consent*.

Rape was a felony at common law and there were no degrees. Like most other common law felonies, rape was punishable by death. The extreme consequences of a rape conviction may have affected both how the common law defined rape and how judges and juries applied that definition.

Spousal Immunity

At common law a man could not rape his wife.[3] Thus, under the doctrine of spousal immunity, a husband who forced his wife to have sexual intercourse could not be convicted of rape, regardless of how much force was used. Several arguments were put forth to justify this rule:

1. A wife was deemed to have "consented" by marriage to have sexual relations with her husband throughout the course of their marriage.[4]
2. A wife was considered to be the property of her husband.
3. After marriage, both the husband and wife became one person under the law, and neither one retained a separate legal existence.[5]

Force

A major issue courts faced was explaining the element of "force or threat of force" in the common law definition of rape. Though case law on the subject is sparse, "force" was generally considered to consist of physical compulsion or violence (beyond that involved in the act of intercourse itself) that effectively subdued the woman. Usually (though

not always), such force would result in physical injury to the victim.

Many courts also required that the complainant *physically resisted* the defendant before a jury could find he used sufficient force to be convicted of rape. This approach seems to condone the use of force by males in obtaining sexual gratification until or unless the female physically resists. *If* the female does resist, *then* the male must stop. Moreover, requiring resistance converts what appears to be an element of rape focusing on the defendant's behavior, force, into an inquiry as to how the woman reacted. In these jurisdictions, a woman's refusal to have sex was protected by the law of rape only if she put up physical resistance.

The amount of required resistance varied. Though some courts expected the female to have "resisted to the utmost"[6] or "to follow the natural instinct of every proud female,"[7] most jurisdictions required only "reasonable resistance." Even in a jurisdiction that required only reasonable resistance, a woman who submitted when attacked by a stranger rather than risk death or serious injury often could not prove rape because she had not "resisted" her attacker. The common law afforded far too much protection for the rapist who could subdue his victim quickly or chose a less assertive victim.

While requiring substantial physical resistance makes the complainant's lack of consent abundantly clear to the defendant and provides compelling evidence that the sexual act was forced and nonconsensual, it also (1) puts the victim at greater risk of injury because her resistance may escalate the level of violence,[8] and (2) allows the use of force by the male until or unless the victim physically resists. Many victims describe an inability to resist when placed in the position, or fear that more harm will come to them if they resist.

Threat of Force

Courts generally did not require proof that the defendant actually used physical force or that the victim resisted if the defendant threatened the victim with serious harm. They did require, however, that the victim's fear of serious harm be reasonable. The threat usually had to be one of

death or serious bodily injury to the victim or to a third person. Often the defendant was armed with a deadly weapon and used it to threaten the victim. Under such circumstances resistance would be futile.

Threats of economic harm, damage to reputation, or other nonviolent intimidation usually did not satisfy this element of rape, though the defendant may have committed another crime, like extortion. Thus, if a defendant threatened the victim with the loss of her home or damage to her reputation to obtain sexual intimacy, his threat would not satisfy the "threat of force" element of rape.

Consent

If the woman consented to sexual relations, then the defendant could not be convicted of rape. Consent was a factual question for the judge or jury to decide, and it was not always clear. Words or actions clearly manifesting a willingness to have sex were the most obvious means of expressing consent. Conversely, words or actions clearly manifesting a lack of willingness would normally be sufficient to establish that the woman did not consent. Some courts concluded that behavior short of physically fighting back, such as saying "no" or other actions expressing unwillingness to have sex, did not establish the absence of consent. In these cases the requirement of *nonconsent* is effectively transformed into a requirement that the victim *resist*. Defendants successfully argued that the victim had consented even in cases in which the defendant was a stranger or had used force, brutality, or otherwise harmed or intimidated the complainant.

Attacking the Credibility of the Complainant

Often, the only testimony on the question of consent is that of the complainant and the defendant. This is not surprising because sexual acts are usually done in private and, typically, there are no other witnesses. As a result, rape prosecutions often turn on the participants' testimony (which often is in conflict) and their credibility. In many

cases, the defense counsel tries to persuade the jury that the complainant had consented by focusing attention on her character and credibility, usually by delving into her past sexual history. The common law generally allowed such cross-examination. Under the common law, women who claimed that they had been raped could expect to be questioned extensively at the trial on their sexual history. This inappropriate badgering is prohibited under the modern rules of evidence.

Legally Ineffective Consent

Over time, the common law expanded the definition of rape so that, in a few types of recurring situations, rape occurred even if no force was used. These cases generally involved victims who were considered incapable of giving legally effective consent because of age or incapacity.[9] For example, an early English statute punished intercourse with a female under age 10 as a felony; it did not require proof that it was without her consent. Subsequently, Coke relied on this statute to define rape to include “unlawful and carnal knowledge of . . . a woman child under the age of ten with her will or against her will.”[10] The definition of rape was thus expanded to include such cases apparently on the ground that children of such tender years lacked the maturity necessary to comprehend the nature of the sexual act.

The definition of rape was also broadened to include intercourse with a woman who was unconscious or mentally incompetent. Because such individuals were not aware of what was occurring or did not sufficiently understand the significance of sexual intercourse, legally they could not consent to the act.

Fraud

Someone who obtained sexual intercourse by fraud was not a rapist under the common law, as long as the complainant understood that she was having sexual intercourse. Flattery, promises, or other attempts to

manipulate or persuade the woman, even if deliberate and untrue, did not establish the crime of rape. These types of cases were considered “fraud in the inducement.” This rule could be pressed to the extreme. Someone who shows up at a woman’s house in the dark and passes himself off as her lover does not commit rape (even though she was mistaken as to his true identity) because the woman understood that she was having sexual intercourse. Though somewhat controversial, the majority rule today is still that fraud in the inducement does not constitute rape.[11]

If, however, the defendant deceived the woman about the nature of the act, he could be convicted of rape. This was considered “fraud in the *factum.*” For example, if a gynecologist told a female patient he needed to insert a medical instrument into her vagina as part of a medical exam, but inserted his penis instead, this would be fraud in the factum because the woman was deliberately misled about the nature of the act, and therefore he could be convicted of rape.[12] If, however, a man falsely pretended to be a doctor and told a woman she had a disease that could best be cured by having intercourse with an anonymous donor who had been injected with a special serum, he could not be convicted of rape because the woman understood that she was having sexual intercourse which is only fraud in the inducement.[13]

American Common Law

Early American statutes adopted the common law approach to rape, though they varied in their specific definitions. Statutes defined rape in various ways, such as “sexual intercourse” with a woman other than one’s wife “forcibly,” “against her will,” or “without her consent.” Most American statutes also treated all forms of rape as a single crime for grading purposes and punished them with the same severity.

In summary, the common law defined rape as (1) sexual intercourse by a man with a woman not his wife, (2) by force or threat of force, (3) without consent, or (4) with a victim who could not consent because she was unconscious, mentally disabled, or of a young age, or (5) by fraud in the *factum.*

THE ACTUS REUS OF RAPE

Rape requires a voluntary act by the defendant, though intentional intercourse is seldom in dispute. The prosecution must prove penetration. Occasionally, a defendant might raise the defense of impotence or intoxication. A claim of impotence is generally an evidentiary claim denying penetration, while intoxication usually is relevant to mens rea (did the defendant *know* the woman did not consent?) rather than to the actus reus of rape.

THE MENS REA OF RAPE

The common law did not specify the mens rea of rape. This caused numerous problems. The prosecutor had to prove the defendant *intentionally* had intercourse with a woman he *knew* was not his wife.[14] The prosecution also had to establish the defendant *intentionally* used force or threatened serious physical harm.

The more difficult issue for courts was defining the mens rea toward *consent.* Did the prosecution have to prove the defendant knew or, instead, only that he *should* have known that the woman had not consented? Even if he used force? Or must the woman also resist?

The 1976 *Morgan* case, decided in the House of Lords, finally resolved this uncertainty in England by requiring the prosecution to establish that the defendant *knew* that the woman had not consented.[15] According to the defendants in this case, the victim's husband convinced them to come to his house and have sex with his wife. He told them not to be surprised if she struggled because she was "kinky" and only enjoyed sex in this way. The defendants entered the husband's home and had sex with his wife even though she resisted them.

The House of Lords concluded that rape was a specific intent crime and that, consequently, intention applied to all of its elements: nonconsensual sexual intercourse. Therefore, it determined that a defendant's *belief* that the woman was consenting, even if unreasonable, negates knowledge of nonconsent. There is language in the *Morgan* opinion suggesting that "recklessness" is sufficient for conviction. The

court said: “[T]he mental element [of rape] is and always has been the intention to commit that act [sexual intercourse] or the *equivalent intention of having intercourse willy-nilly not caring whether the victim consents or not* [emphasis added].”

Morgan is consistent with a criminal law jurisprudence that puts primary emphasis on punishing the mens rea of the defendant and only punishes someone severely if he knew that he was inflicting a serious harm on another person. It is conceivable that, in some cases of sexual activity, the male honestly but erroneously believes he is engaged in a mutually desired physical act, while the female does not desire to engage in a sexual act and is seriously harmed by it. If, however, the criminal law should be more protective of victims and focus primarily on the harm done rather than on the mens rea with which it was done, the *Morgan* case can be persuasively criticized as favoring fairness to defendants over preventing harm to victims.

The *Morgan* case caused a great deal of controversy because it appears to most observers that the defendants clearly knew that the victim had not consented. (The House of Lords affirmed the defendants’ conviction on the ground that the judge’s instructions were harmless error; that is, no miscarriage of justice had occurred because no jury could have concluded that the defendants honestly believed that the complainant had consented.) Critics argued that the case would permit a future defendant to claim his victim was willing to have sex with him, even when the defendant had used force and any reasonable observer would conclude that the victim had clearly manifested her lack of consent. Parliament subsequently enacted a new rape law that only required the prosecution to prove the defendant was *reckless* as to the victim’s nonconsent.

THE MODEL PENAL CODE

The Model Penal Code’s (MPC) definition of rape was instrumental in provoking rape law reform throughout the United States. The MPC recognizes that the common law definition of rape created difficult problems of meaning and proof and concludes that the law of rape must

be modernized. However, it does not use sex-neutral terms for rape for either the defendant or the victim, and it retains marital immunity for husbands. It also requires prompt complaint and corroboration of the allegation[16] and provides a mistake of age defense.[17] Its underlying policy seems based on the view that claims of rape are often groundless[18] and that defendants need more protection, not less.[19] Because the MPC does not sufficiently embody the emerging consensus on how the law of rape should be reformed, most states have not adopted the MPC's proposed definitions for rape.

Nonetheless, the MPC breaks new ground in three important ways:

(1) *It expands the behavior that can constitute rape.* All forms of sexual penetration of the female by the male, including vaginal, oral, and anal penetration, are considered rape under the MPC.

(2) *It provides for degrees of rape.* The MPC has both first- and second-degree rape and a new crime, "gross sexual imposition," to distinguish among the more serious and less serious harms. This approach permits both grading and punishment to reflect more accurately the culpability of the offender and the harm done to the victim.

(3) *It focuses on the actor's behavior rather than on his internal thought processes.* The MPC acknowledges the difficult task often faced by the prosecution in proving the actor knew that the complainant had not consented, especially when in most cases of rape, there were no witnesses to the event. The MPC's solution is to focus on objective criteria, specifically "upon the objective manifestations of aggression by the actor" rather than trying to decipher his *state of mind* concerning the complainant's *consent.* The essential element of rape in the MPC is the use of *force* or *threat* of serious physical harm by the defendant. *Nonconsent* and *resistance* by the victim *are not* elements of the crime. Thus, the prosecution does not have to prove the defendant *knew* his victim had *not consented* or that the victim had *resisted.* The victim's behavior has evidentiary significance only.

Though these MPC revisions are, by today's standards, woefully out of date, they were an improvement at the time they were promulgated. There is a push by the American Law Institute (author of the MPC) to revise the rape standards. This is a work in progress in 2018.[20]

Second-Degree Rape

Section 213.1(1) of the Model Penal Code provides that anyone who compels the victim to have sexual intercourse "by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone" is guilty of rape. It is a felony of the second degree.

The MPC elements of rape are

1. *sexual intercourse* (broadly defined)
2. by a *man with a woman not his wife*
3. by *force*, or
4. by *threat* of serious physical harm or kidnapping to the victim or a third person.

Rape also includes cases where

1. without her knowledge the actor uses drugs or other means to substantially impair the woman's ability to appraise or control her conduct or to resist;
2. a male has intercourse with an unconscious female or with one who is under 10 years old.[21]

First-Degree Rape

Generally, rape is a second-degree felony (MPC §213.1(1)). However, if the actor satisfies the elements of rape and inflicts serious bodily harm on anyone or the complainant was not a "voluntary social companion of the actor . . . and had not previously permitted him sexual liberties," the crime is elevated to a felony of the first degree. This definition can make prosecution in "date rape" cases more difficult.

Gross Sexual Imposition

Finally, the Model Penal Code creates a new crime, "gross sexual

imposition," which includes intercourse by a male with a female not his wife if he

1. compels her to submit by any threat that would prevent resistance by a woman of *ordinary* resolution; or
2. knows that she is so mentally impaired that she is incapable of appraising the nature of her conduct; or
3. knows that she is unaware that a sexual act is being committed upon her or that she mistakenly believes the actor is her husband.[22]

Element 1 breaks new ground by expanding the type of threat that will support criminal responsibility. Under the common law, the threat had to be one of physical violence. The MPC, however, includes nonviolent but nonetheless coercive threats, such as economic loss, provided that the threat would induce a woman of ordinary resolution not to resist. The drafters provided illustrations. Thus, threatening a woman with the loss of her job could support a conviction under this provision. In contrast, a policeman who tells a woman he will not give her a ticket if she has sex with him should not be convicted of gross sexual imposition. This threat is so trivial that a female of ordinary resolution would not be intimidated by it.[23]

MODERN RAPE STATUTES

A primary focus of contemporary law reform has been to change the definition of rape. Most modern rape laws, reflecting a concern for gender equality and recognizing that coercive sexual activity between individuals of the same gender occurs, are gender-neutral and reach most coerced sexual activity between individuals of the opposite or same gender. Many have also abandoned the "force" standard for rape to a consent one, or in requiring force, allow the sexual act alone to satisfy the definition of rape.

In many new statutes, the definition of prohibited conduct has been greatly expanded to encompass, in addition to sexual intercourse, a

wider range of sexual acts, such as cunnilingus, fellatio, anal intercourse, and any other intrusion into the body, including those accomplished by the use of objects.[24] Many states have thus renamed the crime of "rape" as the crime of "criminal sexual conduct" or "sexual assault."[25]

A number of jurisdictions have eliminated the concept of nonconsent entirely from the definition of rape or restrict its use to an affirmative defense. Instead, the statutes in these jurisdictions use modern definitions of force or the threat of serious bodily harm as the essential definitional elements of rape. The use of these behavioral criteria is intended to shift the fact finders' focus from the internal thought processes of the defendant to his objective conduct.[26] In theory, they also put less emphasis on the complainant's behavior and character.

Though a few states retain spousal immunity in some form, many state laws have eliminated or restricted spousal immunity from the definition of rape.[27] Increasingly, legislatures have concluded that, though husbands and wives agree generally by their marriage to have sexual relations with each other, each still retains the right to decide whether to have sex on any particular occasion. Thus, a husband does not have a legal right to demand sex from his wife. More important, these new laws acknowledge that marriage does not entitle the husband to use force or the threat of force against his wife to obtain sex.

Modern laws also reflect changing ideas about the nature of the harm done. Rape is now seen not only as a crime of violence but also as a crime that violates a person's most personal sphere of privacy, thereby inflicting severe and long-lasting psychological damage.[28]

Moreover, society's attitudes toward permissible sexual conduct have changed. In the past, the law was unduly protective of aggressive male sexual behavior, tolerating physical assertiveness unless and until the female made it very clear by physical resistance that she did not desire to have sex with the male. Now the law more readily acknowledges that males have no right to use compulsion in sexual relationships. True equality of genders means that the law must protect the right of both men and women to decide with whom they will share sexual intimacy.

Many states have also passed laws limiting the scope of permissible

cross-examination of complainants to protect them from being humiliated and having their privacy invaded. For example, many states prohibit the defendant from asking about the complainants sexual history, with a few narrow exceptions. Reformers believe that these laws will encourage both the reporting and prosecution of rape cases.

Rape by Force or Threat of Serious Bodily Injury

Force

State statutes vary on how they define the "force" or "threat of force" element of rape. Some statutes do not define "force" at all, leaving it for case law to fill in an operational definition. Most modern laws, however, seek to define more precisely the level of force necessary for rape. In providing a more explicit definition for this element, some courts require the defendant to use physical force that restrains the victim or to threaten death or serious bodily harm to the victim or to a third person.

Additional Force

Most statutory definitions of force require the defendant to use additional force beyond that necessary to accomplish penetration. Several state laws use the term "forcible compulsion," which, though seemingly providing a consistent definition, can have different meanings. For example, New York law defines this term as the use of physical force or a threat of serious harm.[29] It does not take into account the complainant's behavior in determining whether the defendant used "forcible compulsion." Washington law, on the other hand, defines this term as the use of "physical force which overcomes resistance" or a threat of serious harm.[30] The Washington statute requires fact finders to focus on the behavior of *both* the defendant *and* the complainant.

Focus on the use of force by the defendant may not, as a practical matter, eliminate pressure on the complainant to physically fight back. In the controversial *Berkowitz* case, a Pennsylvania court concluded that a male college student who removed a female student's clothes without

additional physical force or threats did not use "forcible compulsion," even though the woman said "no" throughout the sexual act.[31] The court held that her *verbal* resistance was relevant to consent but not to whether the defendant used forcible compulsion. Consequently, the court reversed his conviction for rape but reinstated a conviction for indecent assault.

In a somewhat similar case, however, a California court reached the opposite conclusion.[32] In the *Iniguez* case, the defendant had met the victim for the first time earlier that evening. Later, he awakened her while she was sleeping on the sofa in the living room at a friend's house, pulled her pants down, and inserted his penis into her vagina. She did not resist because she was afraid.

The court held that the defendant's conduct satisfied the statutory language of sexual intercourse "accomplished by means of force, violence or fear of immediate and unlawful bodily injury." The *fear* element was met because the woman's fear of bodily injury was reasonable under these circumstances. In California, a rape conviction can be obtained even in cases where the defendant does not use additional force and the victim does not resist, provided that the victim honestly and reasonably fears immediate and unlawful bodily injury.

Inherent Force

Some states do not require the defendant to use additional force beyond that necessary to accomplish the proscribed sexual act before he may be convicted of rape. In other words, force is established by the sexual act itself, not any additional physical contact.

In New Jersey, sexual assault could be committed by sexual penetration when the defendant "uses physical force or coercion, but the victim does not sustain severe personal injury."[33] In *State of New Jersey in the Interest of M.T.S.*, the New Jersey Supreme Court held that "physical force" as used in its statute means "any unauthorized sexual penetration."[34] It does *not* require *additional* physical force.[35] Simply using the amount of force inherently necessary to accomplish sexual penetration is sufficient for conviction unless the defendant reasonably believed that the victim had "freely given *affirmative permission*."

Moreover, the victim is under no obligation to express nonconsent or to have denied permission.

In reaching this conclusion, the court stressed that New Jersey sexual assault laws had been reformed to afford maximum protection for victims and to make it clear sexual assault should be seen primarily as a crime against personal autonomy rather than as a crime of violence.

Nonphysical Force

Some states by statute have broadened the concept of nonphysical force. California criminalizes sexual intercourse with a nonspouse if accomplished by "duress" or "menace."[36] Other states criminalize the use of coercion,[37] extortion,[38] or a "position of authority"[39] to achieve sexual intercourse. Pennsylvania prohibits the use of "physical, intellectual, moral, emotional or psychological force, either express or implied."[40] The respective ages and prior relationship of the defendant and the complainant can be considered.

Other states, however, limit force to a basic meaning of physical compulsion or threat of serious physical harm. In *State v. Thompson*, the court affirmed a trial court's dismissal of an indictment for sexual assault in a case where a high school principal allegedly intimidated a student to have sexual intercourse with him by threatening to prevent her graduation.[41] The court held that "force" must be interpreted as conveying its ordinary and normal meaning of physical compulsion.

Threat of Force

Even when the defendant does not actually use force, he still can be convicted of rape if he *threatens* death or serious bodily injury to the victim or to another person.

This element can be confusing. Does the intent of the *speaker* or the perception of the *listener* determine whether the words constitute such a threat? If the mens rea of the defendant is essential for rape, then he can be convicted only if he *intended* to frighten his victim. Some courts have required the prosecution to prove that the defendant intended his words

as a threat.[42] However, if fear felt by the complainant is enough to establish the element, then the listener's understanding of his words controls. If that is the case, must her understanding be reasonable? Most courts require that the victim's fear be reasonable under the circumstances.[43]

Most states specify that the "threat of force" required for rape must be a threat of physical harm to the victim or a third person that is sufficient to create fear in a reasonable person.[44] But obtaining sex by using other types of threats, such as economic harm or damage to reputation, is often made criminal under state extortion or criminal coercion statutes instead of rape statutes.

Dispensing with the Force Requirement

Increasingly, state statutes define rape as nonconsensual intercourse even in the absence of force or threat of force. Thus, sexual intimacy without the *affirmative* manifestation of consent by words or actions is a crime. Usually it is a less serious degree of rape or sexual assault, and spousal immunity often applies.[45] Criminalizing sexual intimacy obtained without affirmative permission affords maximum protection to the right of individuals to decide when and with whom they will share sexual intimacy. This approach, according to some critics, may result in the conviction of some defendants who honestly (and perhaps even reasonably) thought the other person was willing to have sex with them. Though, cases of this are rare.

Resistance by the Victim

Less than half of the states, either by statute or by case law, no longer require the complainant to resist, though some states still do.[46] Eliminating resistance as an element of rape is seen as decreasing the risk that victims who fight back may suffer greater physical injury than if they remained passive. It also does not make the criminal

responsibility of the defendant dependent on the willingness of his victim to offer physical resistance. Otherwise, some defendants might avoid responsibility if they happened to select non-aggressive victims. Additionally, it recognizes that many victims of rape do not physically resist for a variety of reasons — for example, a woman's lifetime socialization to be nice, her hesitation to cause a scene, embarrassment, or a "strategic decision not to resist in order to avoid a major injury."[47] Further, it recognizes that when a victim is confronted with a stressful situation, the body can react in a number different ways, what is commonly known as "fight or flight." However, studies have shown that some victims of rape experience one of two terror-induced altered states of consciousness called "dissociation" and "frozen fright."[48] Both responses render the victim totally passive.

As noted above, however, other states still require the complainant to offer some resistance unless threatened with death or serious bodily injury. This requirement raises the question of whether saying "no" satisfies the resistance element. The argument there is that our culture still teaches men that women are often ambivalent about whether to have sex and that, even when a woman is saying "no," she really means "yes." Based on this cultural conditioning, some men may *honestly* believe that a woman is not resisting when she says "no" or takes other evasive action. However, there has recently been a lot of education on this issue and the general consensus is that verbal resistance *is* resistance.

This controversy poses difficult policy choices for the criminal law. How should the criminal law treat the male who honestly believes that "no" really means "yes"? Should the criminal law punish someone who has no subjective awareness that he might be committing any crime, let alone a serious crime that can result in a long prison term? (Indeed, until not too long ago, rape was a capital offense in many American states.) If so, should it punish him as severely as an actor who does know that his victim does not want to engage in sexual intimacy? The harm done to the victim who does not desire sexual intimacy may be the same in both cases. However, there is a significant difference in moral blameworthiness between someone who does not comprehend the other person is unwilling and one who does.

Others argue that the criminal law is an instrument for social change

and that it should be used to help transform the culture. Thus, they argue a woman is raped when she says “no” and the man proceeds to have sex anyway — even if the defendant did not intend to commit rape. If the criminal law gets too far in front of the common social and cultural understanding, however, it runs the risk of using arguably morally blameless individuals solely as an instrument for the common good. This could violate Kant’s command that no one should be used solely as a means to an end.

Consent

The modern trend is to eliminate nonconsent as an element in the statutory definition of rape. Nonetheless, consent is still a definitional component or an affirmative defense in a number of states.[49] A few statutes require the prosecution to prove that the defendant knew the complainant did not consent or was negligent as to her consent.

Most recent American cases permit a mistake defense but only if the defendant can show he honestly and *reasonably* believed the victim had consented.[50] Some states require proof of *recklessness* as to consent to convict the defendant of rape,[51] while a number of states have made sexual intercourse without obtaining *affirmative* consent a crime.[52] Some states provide for degrees of rape with different mental states required for nonconsent, while others have actually made nonconsent a strict liability element. In a strict liability state, the defendant may be convicted of rape if the victim did not consent, even though he honestly and reasonably believed the victim had consented.[53] This is a minority rule, however.

Reformers argue that retaining consent as an element inappropriately focuses the jury’s attention on the complainant’s behavior rather than on the defendant’s behavior. It also allows defendants to claim they believed the complainant had consented in almost any situation, making it too difficult to convict rapists. On the other hand, requiring the initiator of sexual conduct to obtain the unambiguous agreement of his or her partner ensures that physical intimacy is mutually desired, providing more protection to victims.

Deception

The general rule in most states is that sexual intimacy obtained by deception does not constitute rape.[54] This approach is consistent with the common law, which considered fraud in the factum to be rape, but not fraud in the inducement.

Rape in the First Degree

Many state statutes aggravate the crime of rape if, in addition to the use of force or the threat of force, an aggravating circumstance is present. Examples of such a circumstance are commission of another felony, use of a deadly weapon, or the infliction of serious injury on the victim.

Spousal Immunity

Although every state legislature has formally abolished its marital rape exemption, reminders of the exemption still remain in the statutory law of several states.[55] These additional hurdles are found in decreased sentences for the accused, proof of force or resistance, and shorter time frames for a woman to report a rape by her husband. These make spousal rape more difficult to prosecute. The modern trend is to eliminate or restrict marital status as a definitional element or as an affirmative defense. Increasingly, legislatures and courts are recognizing that a woman does not give irrevocable consent to sexual intimacy to her husband solely by marriage nor does the marriage relationship entitle the husband to use force to obtain sexual intimacy.[56]

In some states that allow some form of spousal immunity, filing for divorce or living separately will eliminate any claim of spousal immunity,[57] though obtaining a protective order without more may not.

Rape Because No Legally Effective Consent

Most state statutes include within the definition of rape a situation where the defendant does not use force but where he knows, or in some states *should* have known, that the victim is incapable of giving legally effective consent because of physical or mental incapacity. Some states follow the MPC and consider a defendant's belief about the victim's capacity to give legally effective consent as relevant to the mens rea of rape. Others require the defendant to use the affirmative defense of mistake of fact. This approach requires the defendant to carry the burden of persuasion and also to establish that his belief was reasonable.

Intoxication

Some state statutes now provide that intoxication, even if voluntary, may preclude consent even when the victim consciously participates in sexual activity.[58] Courts have held that intoxication may impair the victim's judgment about the nature or harmfulness of the sexual behavior, thereby invalidating consent.[59] Defining and applying these standards to individual cases consistently and fairly to all participants in intimate sexual activity may be difficult.

Age

Nonforcible sexual intimacy with children is often called "statutory rape," though some states are now using more pejorative terms like "rape of a child."[60] The degree usually depends on the age of the victim and sometimes on the age of the defendant.

Summary

Most modern statutes define rape as (1) obtaining sexual intimacy with another (2) by force or threat of force or (3) without legally effective consent due to incapacity. Some states also include nonconsent as an element in the definition or allow the defendant to use a reasonable belief that the complainant consented as an affirmative defense. Rape will be aggravated to the first degree if another harmful act occurs, such

as using a deadly weapon, seriously injuring the victim, or committing another felony. Spousal rape is criminalized in all states but how spousal rape is treated compared to nonmarital rape varies with each state.

EVIDENCE REFORMS

Rape Shield Laws

Until recently, it was common defense strategy in rape cases to attack the credibility of a female complainant by attacking her character.[61] Defense counsel would cross-examine a complainant concerning her past sexual history and reputation, implying that women who had sex outside of marriage were immoral and thus not believable. Defense counsel justified these tactics, arguing that the complainant's past behavior was relevant to determining her behavior during the alleged rape.

Today, many state laws, referred to as "rape shield laws," expressly forbid or severely limit such an inquiry.[62] For example, past consensual sex with the defendant is generally admissible on the issue of consent. Usually, judges must hold a hearing prior to trial to rule on whether inquiry by the defense into a complainant's sexual history is relevant and admissible.

These laws prevent people who file rape charges from having their privacy invaded and from being humiliated in court based on matters that are not relevant to their credibility or the issues. Protecting rape victims in this way, in turn, may encourage the reporting and prosecution of rape. On the other hand, critics are concerned that rape shield laws may deprive criminal defendants of their Sixth Amendment right of confrontation.[63] Some courts agree, ruling that rape shield laws are unconstitutional if they preclude the admission of relevant sexual history.[64]

Examples

1. Shortly after her husband left for work early in the morning, Sarah was startled to find Andrew, whom she did not know, in her bedroom where Sarah had just placed her one-year-old baby in the crib. Andrew, clearly agitated, walked over to the baby's crib and, pointing angrily at the baby, said: "You know what I want. Get on the bed and take off your clothes and no one will get hurt." Frightened and concerned for the safety of her baby, Sarah complied. When Andrew took off his clothes, Sarah, fearing Andrew might be HIV-positive, said to him: "Please use a condom. If you don't have one, I do." Andrew took the condom offered by Sarah and then had intercourse with her.

2. Jane and Tom meet for the first time at a bar and have some drinks. Tom offers to give Jane a ride home. On their way there Jane accepts Tom's invitation to come up to his apartment. After kissing Jane for a while on the couch, Tom starts unbuttoning her blouse:

   a. Jane tells Tom that she does not want to have sex with him. Tom pulls out a knife and says: "If you don't have sex with me, I could get angry." Jane, terrified, says nothing and lets Tom have intercourse with her.
   b. Jane tries to push Tom (who has no weapon) off and says: "I don't want to have sex with you." Tom, calling her a tease, pins her arms and manages to have intercourse with Jane.
   c. Jane, confused by this sudden turn of events, says nothing. Tom lies on top of her, while she does and says nothing, and has intercourse with Jane.
   d. Tom starts fondling her. Jane lies down and fondles him as he unbuttons her blouse. When Tom takes off his clothes, she takes off hers. Tom and Jane begin to have intercourse. Just as Tom is about to reach climax, Jane says, "I've changed my mind. I don't want to do this, and I want you to stop right now." Tom says, "I just need a few more minutes to finish." He remains on top of her for approximately two or three more minutes until he reaches climax.
   e. Jane says: "Stop, Tom. I don't want to have sex with you. We just met tonight." Tom replies: "You're right. You don't even know me. Don't you feel foolish coming up here? For all you

know, I could be a serial sex killer who preys on women just like you." Though Tom does not intend to frighten Jane, she becomes very frightened after suddenly realizing that what Tom just said could well be true. She moves away from Tom and replies in a faltering voice: "God, you're right. You could be a maniac." Trying to calm the situation and reassure herself, Jane approaches and Tom puts her hands in his hands. Tom, thinking Jane has changed her mind, starts again to undress her. Jane, truly concerned that Tom may be another sex serial killer like Ted Bundy, says nothing while helping Tom take off her clothes. They then have sex.

f. Tom secretly puts a "roofie" into a drink and offers it to Jane, who wastes little time in finishing it. A "roofie" is the drug Rohypnol, which is a sedative and muscle relaxant that soon makes a person drowsy and disoriented. Jane feels dizzy, groggy, and unsure of what she is doing. Tom undresses her while she is mumbling words that don't make sense and they have intercourse without any resistance from Jane. When Jane wakes up the next day, she doesn't remember anything.

g. Jane says to Tom: "I believe you should only have sex with the one you love." Tom replies: "It was love at first sight for me, Jane. I think you are the girl I will marry." Jane, moved by Tom's earnestness, says: "Oh, Tom. I'm so glad you feel that way. Let's make love." They have intercourse and, as Tom leaves that night, he turns to Jane and says: "I don't want to see you again."

h. Jane and Tom go to Jane's apartment rather than to Tom's. After kissing Jane for a while on the couch, Tom starts unbuttoning her blouse. Jane says: "I want you to leave. I expect my boyfriend to come back from a business trip later tonight." Tom leaves. Jane leaves the door unlocked for her boyfriend and then, after turning out the light, goes back to sleep. One hour later, Tom enters the apartment, goes into Jane's bedroom, and whispers in her ear: "I can't wait to have sex with you." Thinking it is her boyfriend, Jane pulls him into bed without turning on the light and they have intercourse.

i. Jane and Tom go to Jane's apartment rather than to Tom's. After kissing Jane for a while on the couch, Tom starts unbuttoning her blouse. Jane says: "No. I want you to leave." Tom does. Jane goes to bed and falls asleep, forgetting to lock her apartment door. Several hours later, Tom enters Jane's bedroom and, seeing Jane asleep, lies on top of her. Jane awakens and is very frightened. Afraid, Jane says nothing and offers no resistance, while Tom has intercourse with her.

3. Richard, age 42, instructed 13-year-old Elizabeth, his daughter, that the Bible commanded a daughter to perform a mother's duties if the mother could not. Elizabeth believed devoutly in the Bible and accepted Richard's teaching on this subject. After several months of stressing her special responsibilities as a daughter to act when her mother could not, Richard went into Elizabeth's room one evening and told her that, because her mother would not have sex with him, Elizabeth must follow the Bible and take on those responsibilities. Without using any physical force other than normally used in the act, Richard undressed, and Elizabeth allowed him to have sexual intercourse with her.

4. Mary Kay, a high school history teacher, kept Jamie, a strapping, six-foot mature male 14-year-old student of hers, after school often during the spring semester. Having him serve as her paid student assistant, she groomed him with praise and responsibility. One day after all the other students had left, Mary Kay started to kiss Jamie and then to fondle him. Jamie responded, and they had intercourse. They continued the relationship for several months. Mary Kay became pregnant and these events became known. Jamie and Mary Kay insisted that they loved one another and wanted to get married.

5. Demi, a top computer executive, is attracted to Mike, her administrative assistant. Demi and Mike have been working late on a special project the past few weeks. One night, Demi asks Mike to have sex with her. Mike politely declines. Demi tells Mike she will fire him if he does not. Mike, who has just purchased a house and needs his salary, feels he cannot afford to lose his job. They have sex.

6. Dr. Brown, a gynecologist, is about to give his patient, Heather, a vaginal exam. Contrary to professional protocol, he suddenly tells his nurse to leave the examination room on the pretext of locating some test results. Pretending to put on a latex glove, Dr. Brown inserts his bare hand into Heather's vagina and touches it for his own sexual gratification rather than to conduct a proper exam.

7a. Max picks up Roberta, a prostitute, in his van and agrees with her to have sexual intercourse for $100. He gives her a counterfeit bill and has intercourse. The next day Roberta realizes the bill is phony.

7b. Max picks up Roberta, a prostitute, in his van and agrees to have sexual intercourse for $100. Just before having intercourse, Roberta tells Max she wants her money first or she won't have sex. Max, who does not have the $100 and had hoped to tell Roberta this after they had sex, says to Roberta: "I don't have any money." He then physically overpowers Roberta and has sexual intercourse with her.

8. Hector and José, corporate trainees, shared a room with single beds at a company retreat. After several drinks, Hector and José retired for the evening. José got into bed. Hector sat on the side of José's bed and started to rub his back. José said nothing. Hector then rolled José over, pulled down his pants, and fondled his penis, which became erect. José said nothing. Hector then sat anally on José's still erect penis and moved up and down. José, who froze at this point, said nothing. Did Hector commit rape?

9. Chris and Christine met at a college party. Both had several drinks while they were talking and dancing. Chris led Christine into a nearby bedroom, where they undressed, got into bed, and had intercourse. They then fell asleep. Upon waking, Christine called the police while Chris was still asleep and told them she had been raped. She said that, though she was conscious during intercourse, she did not really understand what she was doing with Chris because of her extreme intoxication. The police then took a blood sample from each of them. They both had a blood alcohol level of .08 — the legal threshold for driving under the influence in the state. Can Chris be convicted under a statute that defines third-degree rape as "sexual penetration accomplished with any person if

the victim is incapable of giving consent because of any intoxicating agent"?[65]

10. Jim, 51, signed onto an Internet chat room for preteens and conversed with young girls online. Jim initiated a conversation with Amy, who told Jim that she was 10 years old. Once Amy warmed up to him, Jim asked her to turn on her virtual camera, which was attached to her computer screen, so that he could see her. Jim then asked Amy to take off her shirt and slowly rub her chest. As she did what he asked, Jim watched from home on his computer screen and became sexually aroused. The next day Jim was arrested for sexual fondling in the first degree, defined as "touching a child under the age of 12 in a sexual manner for sexual gratification."

11. Jo Anne, a heavy crack cocaine user, could not afford to pay cash for her drugs. Instead, she would offer sex in exchange for drugs. Harry, a dealer who has not sold drugs to Jo Anne before but knows of Jo Anne's past sex-for-drugs dealings with other dealers, has sex with Jo Anne. Later, Jo Anne files a rape complaint, alleging Harry forcibly raped her. Harry claims Jo Anne is making a false claim of rape because he did not pay Jo Anne with cocaine for the sex as promised.
    a. At his trial, Harry's attorney wants to cross-examine Jo Anne about her past exchange of sex for drugs with other dealers.
    b. At the end of the trial, Harry's lawyer argues that the only proof of rape is Jo Anne's testimony. He asks the judge either to dismiss the case for lack of corroboration or to instruct the jury that there must be evidence in addition to the complainant's testimony to establish the elements of rape.

12. Larry, 32 years old, was Marcia's junior high school history teacher. Marcia, who was 13, had a reputation of sleeping around. She was also barely maintaining the minimum grade point average necessary to stay in school. One day, Larry kept Marcia after school and told her he would give her a failing grade if she did not have sexual intercourse with him. Marcia agreed, and they had sex. A few weeks later, Marcia reported the incident to the police.

13. Sal and his wife, Carmen, needed a babysitter for their two small

children. Carmen interviewed Pam, who, though only 14, looked and acted much older. Because of Pam's maturity, Carmen hired her to babysit the kids. One evening, Sal came home early from work and asked Pam to have sex with him. Pam eagerly agreed, and they had intercourse. A week later, Pam, angry because Sal would not sleep with her again, reported the incident to the police. Sal was shocked to learn Pam was only 14. She easily looked 18, and Carmen had never told him Pam's age.

14. Alex, 12, engaged in consensual sexual intercourse with his girlfriend, Faith also 12. Faith became pregnant and a criminal investigation followed. State law provides, in part, "Rape is an act of sexual penetration accomplished by any person if the victim is less than 13 years of age." The prosecutor wants to have Alex and Faith adjudicated as juvenile delinquents for an act that would have constituted first-degree rape if committed by an adult. Can both parties be adjudged juvenile delinquents?

15. One night, Ally is awoken to her roommate's boyfriend Joe on top of her. Joe was trying to remove Ally's pajamas, and Ally told him to stop. Joe did not listen and continued to undress Ally. Ally tried pushing Joe off of her but she was not strong enough. Joe then punched Ally in the face, and she stopped fighting back. Joe inserted his penis into Ally's vagina. Afterwards Ally left the room and went to the hospital. Joe was awoken by police arriving at the apartment. Joe was surprised to see that not only was he naked, but he was in Ally's bed. Joe has been diagnosed with sexsomnia, a disorder that involves engaging in sexual behavior while asleep. Joe argues that his sexsomnia is what caused him to have sex with Ally. If the jury believes Joe's defense, should he be convicted of rape?

Explanations

1. This is the paradigm case. Andrew has committed rape under the common law. He had intercourse with a woman not his wife forcibly and without her consent. Andrew could also be convicted of rape under modern statutes. Though he did not actually use

physical force to subdue Sarah, he threatened serious physical harm to a third person, Sarah's one-year-old baby. This implied threat should be sufficient for conviction. In some states, the fact that Andrew committed a burglary by entering Sarah's house unlawfully to commit rape would aggravate the rape to first degree.

If the jurisdiction required the victim to resist, Andrew might argue that he thought Sarah consented because she did not even say "no," let alone resist. He would also argue that Sarah's request that he use a condom was further evidence of consent.

Andrew's defense should not succeed. In many states, a victim no longer has to resist the use of force by the defendant. Even states that do require the victim to meet physical force with physical force do not expect physical resistance from a victim who is confronted with a threat of serious physical injury to herself or to a third person. Though Andrew's words did not expressly threaten Sarah's baby, it is clear from the context (an uninvited stranger unlawfully enters a woman's home and points at a vulnerable child using words that demand compliance with sexual demands as the price of not harming the baby) that Andrew was threatening a person other than the victim with serious physical harm.

Even in states that retain nonconsent as an element of rape, Sarah's acquiescence to intercourse under these facts is very similar to an acceptance of a contract offer under duress. Sarah had no real choice. If she refused, Andrew would seriously harm her young child. Nor would her request that Andrew use a condom establish that Sarah consented or that Andrew believed (or reasonably could have believed) that she had consented to intercourse. In contemporary society it is a reasonable precaution for everyone, especially rape victims who have no knowledge of the rapist's sexual history, to insist on precautions against the spread of serious diseases.

2a. Tom has committed rape. Jane clearly told Tom that she did not want to have sex. Rather than accept her decision about not sharing sexual intimacy with him, Tom threatened her with serious physical harm. Though the common law did, and some states still might, require Jane to physically resist Tom if he used physical force, most states no longer require the complainant to offer any

resistance when confronted with a *threat* of serious physical harm on the view that resistance would be both futile and potentially dangerous.

Tom should not be able to avoid conviction by testifying that he thought Jane had consented to sex. Consent is not an element of rape in many states, and even if it were, his threat of serious physical harm and use of a deadly weapon are very strong evidence that he knew Jane did not consent.

In many states, the use of a deadly weapon would aggravate the rape from second degree to first degree because the harm done to the victim also includes fear that her life is in danger.

2b. Tom has committed rape. He has used force to have intercourse with Jane. Even in those states in which consent is an element, Jane has clearly stated that she does not consent to sex and, in addition, has physically resisted.

2c. This is a more difficult case. Some states require that the defendant use force that overcomes physical resistance or threatens the victim with serious physical harm.[66] Tom might not be convicted of rape under this approach because he has, arguably, used only that force normally involved in having intercourse and has not threatened Jane. Moreover, Jane offered no physical or verbal resistance.

Other states consider the defendant's act of nonconsensual sex *by itself* to be rape. Thus, even though Tom might argue that he has not used any force beyond that normally involved in sexual activity, his failure to obtain Jane's *affirmative assent* to sexual intimacy would be rape, though probably of a lesser degree.

If lack of consent is an element, the prosecutor might be able to prove that Tom knew or should have known that Jane did not consent. If consent is an affirmative defense, then Tom would have the burden of establishing that he reasonably believed that Jane had consented.[67]

2d. Jane initially consented to an act of intercourse. She sexually fondled Tom, took off her clothes, and joined in an act of intercourse. Whether Tom committed forcible rape depends on whether Jane can effectively withdraw her initial consent *during* intercourse and, if so, whether Tom continued the act against her

will. Known as a "postpenetration" rape, this offense occurs when the victim (a) initially consents to intercourse, (b) withdraws consent during the intercourse, and (c) the perpetrator forcibly continues in what has become nonconsensual intercourse.

Some states, like California, hold that a sexual partner can withdraw consent anytime during sex and that, if he or she does, the other participant is not entitled a reasonable time to complete intercourse. Instead, the other person must stop the act immediately. Other states reach a contrary conclusion. In California, Tom's argument that he had "passed the point of no return" and should not be expected to stop might be of no avail.[68] Other states have adopted this postpenetration rape standard.

2e. If Tom threatened Jane with death or serious physical injury to have sex with her, then he can be convicted of rape. But did Tom intend merely to state his perception of the obvious, or did he intend his words to intimidate Jane into having sex with him? In those states that define "threat" by the defendant's state of mind, Tom could not be convicted of rape (assuming he did not have this intent). In those states that define threat by whether the victim honestly and reasonably feared death or serious physical injury, Tom might be convicted of rape.

2f. Because of the drug (known on the street as a "date-rape drug"), Jane was incapable of consenting to sexual intimacy. Even though Tom did not use physical force or threaten force and Jane did not resist, she was not "conscious" for the purpose of legally consenting to intercourse. Tom knows this because he slipped the drug into her drink for this very reason. Thus, he can be convicted of rape.

2g. Tom has not used any force or threat. Tom has clearly lied to Jane and misrepresented both his affection for her and his future intentions. But this is not fraud in the factum; Tom has not deceived Jane as to the nature of the sexual act. It may be fraud in the inducement, but the law of rape does not criminalize obtaining sexual intimacy by deception. Jane was still able to make her own decision about sharing sexual intimacy. Thus, Tom has not committed rape. For better or worse, the law of rape does not

protect humans from persuasion or seduction, even if it is deliberately dishonest and manipulative.

2h. In some states Tom has committed rape. To be more exact, this kind of rape is called fraud in the inducement. He has not used force or threats of physical harm nor was Jane unable, because of incapacity, to give consent. However, since he faked her partner's identity, Jane was induced to have sex based on fraud. Many states would not allow rape in this circumstance, however, since Jane fully understood that she was about to have sexual intercourse, and she gave legally effective consent.

2i. Tom has, arguably, used force or the threat of force by creating a situation in which Jane honestly and reasonably feared bodily harm. Thus, under these circumstances Tom has used an implied threat of force by entering a stranger's bedroom uninvited at night and engaging in intercourse. Many states would not require Jane to resist or even to say "no" in this perilous situation.[69]

3. Whether or not Richard's despicable behavior constitutes rape depends on the law of his state. Some courts have held that coercion is inherent in the parent-child relationship and, therefore, no physical force or threat of force is required to convict a parent of rape.[70] In addition, Richard is also likely to be guilty of statutory rape (nonforcible intercourse with a minor who, because of her age, cannot consent) and incest (intercourse with a close family member). Other courts, however, have held that if the complainant is over the age of majority, even a past pattern of incest will not, by itself, satisfy the force requirement.[71] Here the victim is not over the age of majority, so Richard could be convicted of rape.

4. Mary Kay has committed "statutory rape" — that is, nonforcible intercourse with a minor, who, because of age, cannot give legally effective consent. The degree will depend on the state's particular statute. Mary Kay has not used force, threat of physical harm, or fraud, and Jamie was a willing participant. Indeed, they now want to be married. Nonetheless, most states do not permit minors under the age of 15 to give legally effective consent to intercourse.

    Some state laws, following the lead of the MPC, define the

crime of statutory rape and its degree by referring to the ages of the victim and of the defendant. In these states, consensual sex between individuals close in age is not a crime. This approach will not help Mary Kay; she is significantly older than Jamie.

A few states, however, have statutory rape laws that protect only females. If Mary Kay and Jamie lived in such a state, Mary Kay could not be convicted of statutory rape. Indeed, when Jamie reaches the requisite age, they can be married.

5. Demi has not committed rape. In most (but not all) states, rape requires force or the threat of physical injury. Demi has threatened Mike with economic harm, which does not satisfy the force element of rape. However, she may have committed extortion and, in a few states, rape. This is also a clear case of sexual harassment.

   Under the MPC, a male might be convicted of "gross sexual imposition" under §213.1(2) if the prosecutor can persuade a jury that this threat of economic injury "would prevent resistance by a woman of ordinary resolution." Since Demi is not a male, however, she cannot be convicted. This lack of gender equality is one reason the MPC has not been influential in shaping modern rape law reform. Does the MPC's open-ended standard sweep too broadly?

6. This scenario is based on the movie *The Hand That Rocks the Cradle*. Dr. Brown would not have committed rape under the common law because he did not have sexual intercourse with Heather. Whether he could be convicted of rape under contemporary statutes is problematic.

   Most modern statutes cover a broader range of areas protected against penetration (usually including the vagina, anus, and mouth) and the means used (usually including not only the penis but fingers and any other objects used for this purpose). Unlike the common law, modern statutes probably would include the act of digital penetration in the definition of conduct covered by rape.

   However, it would be difficult to convict Dr. Brown under a statute that requires the use of *force* because, arguably, he did not use any force greater than that necessary to accomplish the penetration. Dr. Brown might be convicted of a lesser degree of rape under a statute that only requires *nonconsent* for rape because

he inserted his bare hand into Heather's vagina without her consent. Heather consented to a professional medical exam, not to an ungloved digital penetration of her vagina by Dr. Brown for his sexual gratification.

7a. Max has not committed rape even though he used fraud to obtain sexual intercourse. His use of counterfeit money may be considered fraud in the inducement because Roberta understood that she was having sexual intercourse for money. Max might have committed fraud or theft (as well as possessing and passing counterfeit money), but he did not commit rape.

7b. Max has committed rape. True, he had hoped to obtain sexual intercourse by fraud. However, when Roberta told him no money, no sex, she withdrew her consent to sexual intercourse. Max then used physical force to overpower her and have intercourse. The fact that the victim is a prostitute and has regularly exchanged sex for money does not change the nature of the crime. Even though her sexual activity might violate laws on prostitution, Roberta's sexual autonomy is still protected by the law of rape and should be.

8. Hector did not use force beyond the inherent force necessary to accomplish anal intercourse. The prosecutor would have a difficult time convicting the defendant of sexual assault in a jurisdiction that requires *extrinsic* force or threat of force as an element of the crime. If only *inherent* force — the force necessary to accomplish the sex act — is required, then the prosecutor could establish that element.

But what if the prosecutor must prove that the sex act was committed without the *consent* of the victim? If *words* indicating affirmative agreement to have sex are required to establish consent, then the prosecutor would probably prevail. He could show that José said nothing indicating assent to this act. If, however, *conduct* can constitute consent, the defense would claim that José's compliance and seeming enjoyment *are* behaviors manifesting affirmative assent.

If affirmative assent is not required to establish consent, the defense would argue that José did not even say "no" or do anything else, like moving away or pushing Hector away, to indicate that he

was an unwilling participant. Thus, the *absence* of any *resistance* — verbal or physical — proves that José *did consent.*

It is entirely possible that Hector honestly and reasonably believed that José consented to have sex but that José, in fact, did not consent. Whether Hector will be convicted of a serious sex crime will then depend on whether consent is an element of the crime or an affirmative defense. If it is an element, the crucial issue becomes what, if any, culpability is required toward consent. If it is a strict liability element, then the only question for the jury is whether José consented; Hector's attitude toward his consent is irrelevant. If consent is an affirmative defense, Hector would have to convince the jury by a preponderance of the evidence that he made an honest and reasonable mistake about José's consent. Should mistake of fact be a defense for sex crimes? How did you analyze Example 2c?[72]

9. The prosecutor would argue that the law is clear. A victim is incapable of consenting to sex if she is too drunk to consent. Though conscious during the event, her extreme intoxication prevented Christine from having the ability to appreciate the nature and consequences of the act and, therefore, to give lawful consent. The law is clear on its face: The prosecution does not have to prove Chris *knew* (or even *should* have known) she was too drunk to consent. Nor does the prosecution have to prove that Chris or someone acting on his behalf was responsible for getting her drunk. Her blood alcohol level was so high that she was legally incapable of operating a motor vehicle. Surely, it prevented her from having the capacity to consent to sexual intercourse. Even if she voluntarily agreed to get drunk, she did not thereby voluntarily agree to have sex with a stranger. This enlightened law protects victims from themselves as it should. Excessive drinking is too often the cause of unwanted sex.

   The defense would counter that Christine undressed herself, voluntarily got into bed with Chris, and was conscious during the sexual act. At no time did Chris use force or threaten her, nor did Christine say "no" or otherwise indicate in any manner her lack of consent. To the contrary, she was fully conscious while having sex and her cooperative behavior was perfectly consistent with saying

"yes." Even though Chris knew she had been drinking, there was nothing to indicate Christine was so drunk that she did not understand what she was doing. Moreover, to read the law as the prosecutor does would convert a crucial element of rape in this state — consent — into a strict liability offense because the prosecutor would not even have to prove Chris *should* have known Christine lacked the capacity to consent. Mutual intoxication in this case should not increase the defendant's risk of conviction, while at the same time relieving Christine of responsibility for her own actions.

How would you rule? Would you decide the case the same way if Chris had called the police and Christine had been charged with rape? Should rape be a strict liability crime in this situation?

10. The defense would argue that the prosecution could not establish a necessary element of the crime, that is, that he "touched" a child in a sexual manner for sexual gratification. Instead, Amy touched herself. Moreover, it would claim that this is a clear case of *factual impossibility* because he could not have touched her in the manner prohibited by the statute.

    The prosecutor would respond that Jim told Amy to partially undress and touch herself in a sexually explicit manner for his own sexual gratification. Thus, Jim caused an *innocent agent* (a young child who did not understand the sexual nature of her behavior) to engage in the conduct prohibited by the statute and that his purpose, sexual gratification, is clearly established by his arousal. The prosecutor may well prevail in this age of "virtual crimes" committed over the Internet, even though Jim never physically touched Amy himself.

11a. This is a close case under most rape shield laws. This evidence would seriously damage the credibility of the complaining witness by showing that she had engaged in sex for drugs in the past. However, it is relevant to defendant's claim that the complainant consented to have sex and also sheds light on the complainant's motive — that is, she may be filing a rape charge in retaliation for Harry not paying her as promised. This evidence would probably be admitted.[73]

11b. Most states now consider the testimony of a rape victim to be legally sufficient to prove rape and do not require additional corroboration evidence. The jury will be instructed that the prosecution must prove its case beyond a reasonable doubt and will have to decide who is telling the truth.

12. The prosecutor might bring a rape charge if his state is one of the minority jurisdictions that permit nonphysical threats (such as Larry's threat to give Marcia a failing grade) to satisfy the threat of force element. Since Larry's threat did not involve one of physical violence, most jurisdictions would not consider this a case of rape.

    However, the prosecutor could readily bring a statutory rape charge (also called "rape of child" in a few states) because Marcia was clearly under the age of consent, set by many states today at 16 years old. The degree of the charge would depend on Marcia's age and in some states on Larry's age. The law simply considers children and young adolescents as legally incapable of giving consent. Thus, even if Larry might argue that Marcia voluntarily agreed to have sex with him, a statutory rape charge will succeed. In some states this type of threat might also constitute extortion.

13. Sal can be charged with statutory rape. Though Pam was a willing partner, the law protects young people from sexual exploitation by adults. In some states, Sal might have a defense of reasonable mistake of fact because his belief that Pam was 18 appears to be reasonable. However, many states do not permit this defense to a charge of statutory rape, while others limit it to cases involving victims of a certain minimum age. Some states provide for degrees depending on the age of the victim.

14. The prosecutor would argue that the clear language and plain meaning of the state statute apply to the conduct of both Alex and Faith. Each engaged in an act of sexual intercourse with someone who was under the age of 13. The legislature unmistakably intended to punish this type of behavior in order to prevent sexual victimization of young children even if the offender is another child. If the legislature had intended to exclude responsibility when the perpetrators are of the same age or close in age, it could easily have done so by requiring an age differential between perpetrator

and victim as many states do. It did not. In this case, an adjudication of juvenile delinquency only results in commitment to a state agency for supervision and rehabilitation until each reaches the age of 21.

Even with that, there may not be a prosecutor willing to prosecute two 12-year-old kids for having intercourse. And at a minimum, defense counsel would argue that, though the prosecutor is correct in her literal reading of the statute, this result is absurd and contrary to public policy. This law was intended to protect juveniles, not to ensnare them as perpetrators when they simply engage in consensual sex with another child of the same age. An adjudication of juvenile delinquency would stigmatize them, possibly for life. He would note that both children might have to register as sex offenders in this or another state well past the age of 21. Rehabilitation in such circumstances will be difficult. Moreover, if this joint adjudication is allowed, there would be nothing to prevent future prosecutors from seeking to prosecute future under-age sexual partners as adults in a criminal court (see Chapter 17) where the penalties are much more severe.

As a judge, would you allow the adjudication of delinquency or dismiss the petition?

15. No, it is unlikely that Joe will be responsible for the rape. While it appears that all of the elements of rape have been satisfied, there is one key element missing. If Joe truly suffers from sexsomnia, then the actus reus is not satisfied because there was no voluntary act. A defendant cannot be convicted if he acted without both the actus reus and mens rea. Also, if Joe was asleep at the time of his conduct, he likely would not have the requisite mens rea to commit rape. Therefore, if the jury believes Joe's defense, he cannot be convicted for raping Ally.

    However, if it is discovered that Joe knows he suffers from sexsomnia and did not take the proper precautions, then it is likely that he could still be found to have committed a rape in this instance.

    Do you think this is the correct outcome?

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1. See generally, Stephen J. Schulhofer, Unwanted Sex (1998); Susan Estrich, Real Rape (1987).

2. 4 William Blackstone, Commentaries on the Law of England 210 (1769).
3. This rule applied only to persons who were actually married. It did not apply to couples living together who were not married.
4. Matthew Hale, a seventeenth-century jurist, said: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given up herself in this kind unto her husband which she cannot retract." 1 Matthew Hale, History of the Pleas of the Crown 629 (1778). This marital consent theory emerged in a time when marriage vows themselves (and the conjugal consent implied therefrom) were virtually irrevocable. It is outmoded in contemporary times when changing divorce laws make it much easier to end the marriage relationship.
5. *State v. Smith*, 401 So. 2d 1126 (Fla. 1981) (holding that the unity concept no longer applies in Florida). See also *State v. Smith*, 85 N.J. 193, 426 A.2d 38 (1981), for an excellent overview of this common law doctrine.
6. *State v. Dizon*, 47 Haw. 444, 452, 390 P.2d 759, 764 (1964) (applying a "relaxed" version of the utmost resistance rule).
7. See *State v. Rusk*, 289 Md. 230, 255, 424 A.2d 720 (1981) (Cole, J., dissenting).
8. Law Enforcement Assistance Administration, Battelle Memorial Institute Law and Justice Study Center, Forcible Rape 7 (Prosecutor's Volume 1977). But see Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953 (1999).
9. This concept is similar to the capacity to enter into a legally binding contract or to commit a crime or a tort. The law requires at least a minimal ability to comprehend the nature of the transaction or event and to understand its consequences.
10. 3 Coke, Institutes of the Law of England *60 (1597).
11. See *People v. Evans*, 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (1975).
12. See *People v. Minkowski*, 204 Cal. App. 2d 832, 23 Cal. Rptr. 92 (1962), for a similar fact pattern.
13. *Boro v. Superior Court*, 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122 (1985). But see Falk, Rape by Fraud and Rape by Coercion, 64 Brook. L. Rev. 39 (1998).
14. A man who had intercourse with his wife's twin under the mistaken belief that she was his wife could not be convicted of rape.
15. *Regina v. Morgan*, [1976] A.C. 182.
16. MPC §213.6(4) & (5).
17. MPC §213.6(1).
18. However, a number of studies show that although the general public believes that false accusations frequently occur, a number of false reports is actually between 2-8% of all rape cases, which is comparable to the false report rate for other crimes. Julie Valentine, National Institute of Justice, National Institute of Justice (NIJ) Sexual Assault Nurse Examiners' (SANE) Toolkit Research Findings for Salt Lake County 8 (2013).
19. Leigh Bienen, Rape III — National Developments in Rape Reform Legislation, 6 Women's Rts. L. Rev. 170-213 (1980).
20. See http://www.prosecutorintegrity.org/sa/ali/ (last visited Jan. 25, 2018).
21. MPC §213.1.
22. MPC §213.1(2).
23. The MPC also creates the crime of *deviate sexual intercourse by force or imposition*, which has virtually the same definitional scheme as rape except that it includes coerced sexual intercourse between an actor and victim of any sex. MPC §213.2.
24. See, e.g., Mich. Comp. Laws Svc. §750.520a(r) (Supp. 2012) (criminal sexual conduct).
25. See, e.g., Mich. Comp. Laws Ann. § 750.520b (West 2012); Tex. Penal Code Ann. §22.021 (West 2012) (aggravated sexual assault).
26. At least one state, Washington, may consider rape in the first and second degree and rape of a

child to be *strict liability* offenses, requiring no mental state with respect to *any* of the elements. *State v. Brown*, 899 P.2d 34 (Wash. 1995); *State v. Chhom*, 911 P.2d 1014 (Wash. 1996).

27. Beginning in 1976, states began to dissolve their marital rape exemptions, and by 1993, spousal rape was a crime in all 50 states and the District of Columbia. However, that does not mean that spouses were not still given some immunity. Klarfeld, A Striking Disconnect: Marital Rape Laws Failure to Keep Up With Domestic Violence Law, 48 Am. Crim. L. Rev. 1819 (2011). See Anderson, Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, 54 Hastings L.J. 1465 (2003); Connerton, The Resurgence of the Marital Rape Exemption, 61 Alb. L. Rev. 237 (1997).

28. See, e.g., the California statute, which states: "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." Cal. Penal Code Ann. §263 (West 2012).

29. See, e.g., N.Y. Penal Law §130.00(8) (West 2012). "Forcible compulsion means to compel by either . . . the use of physical force; or . . . a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself, or another person, or in fear that he, she, or another person will immediately be kidnapped."

30. Wash. Rev. Code Ann. 9A.44.010(6) (West Supp. 2012). "Forcible compulsion means physical force *which overcomes resistance*, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped (emphasis added)." This definition requires the victim to resist physical force. *State v. Weisberg*, 65 Wash. App. 721, 829 P.2d 252 (1992).

31. *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994).

32. *People v. Iniguez*, 7 Cal. 4th 847, 872 P.2d 1183, 30 Cal. Rptr. 2d 258 (1994).

33. N.J. Stat. Ann. 2C:14-2c(1) (West 2012).

34. 129 N.J. 422, 433, 609 A.2d 1266 (1992).

35. Id., 129 N.J. 422 at 444.

36. Cal. Penal Code Ann. §261(a)(2) (Supp. 2012).

37. N.J. Stat. Ann. §§2C: 14-1j and 2c(1) (West 1995 and Supp. 2012).

38. Del. Code Ann., tit. 11, §778(5) (West 2012).

39. Wyo. Stat. Ann. §6-2-303(a)(vi) (West 2012).

40. 18 Pa. C.S. §3121 (West 2012).

41. 243 Mont. 28, 792 P.2d 1103 (1990).

42. *People v. Evans*, 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (1975).

43. See, e.g., *People v. Warren*, 113 Ill. App. 3d 1, 446 N.E.2d 591 (1983).

44. *State v. Rusk*, 289 Md. 230, 424 A.2d 720 (1981).

45. Wash. Rev. Code §9A.44.060 (West 2012) (third-degree rape).

46. Anderson, Reviving Resistance in Rape Law, 1998 U. Ill. L. Rev. 953 (1999).

47. Kaarin Long, Caroline Palmer & Sara G. Thoome, A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule Its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases, 31 Hamline J. Pub. L. & Pol'y 569, 582-583 (2010). [Hereinafter Long et al.]; Schafran *supra* note 12.

48. Schafran supra note 12.

49. See, e.g., Tex. Penal Code Ann. §22.021 (West 2012); *People v. Stull*, 127 Mich. App. 14, 338 N.W.2d 403 (1983) (consent is affirmative defense to rape); *Commonwealth v. Hill*, 377 Mass. 59, 385 N.E.2d 253 (1979) (lack of consent is an element of rape); *Goldberg v. State*, 41 Md. App. 58, 395 A.2d 1213 (1979) (consent is an element of rape). Note that the MPC would simply require the defendant to carry the burden of producing evidence on this issue. He would not carry the burden of persuasion. MPC §1.12.

50. See, e.g., *State v. Oliver*, 133 N.J. 141, 627 A.2d 144 (1993); *State v. Smith*, 210 Conn. 132, 554 A.2d 713 (1989); *People v. Mayberry*, 15 Cal. 3d 143, 542 P.2d 1337 (1975).

51. *Hess v. State*, 20 P.3d 1121 (Alaska 2001); *State v. Marchet*, 219 P.3d 75 (Utah 2009).
52. Anderson, All-American Rape, 70 St. John's L. Rev. 625 (2005).
53. *Commonwealth v. Lopez*, 745 N.E.2d 961 (Mass. 2001); *State v. Reed*, 479 A.2d 1291 (Me. 1984).
54. *People v. Evans*, 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (1975). But see Cal. Penal Code Ann. §261(a)(4) (2012).
55. Klarfeld, A Striking Disconnect: Marital Rape Laws Failure to Keep Up with Domestic Violence Law, 48 Am. Crim. L. Rev. 1819 (2011).
56. *State v. Smith*, 401 So. 2d 1126 (Fla. 1981).
57. *Commonwealth v. Chretien*, 383 Mass. 123, 417 N.E.2d 1203 (1981) (conviction of husband for raping his wife after she had filed for divorce and obtained a judgment nisi upheld even though divorce had not yet become final).
58. Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 Ariz. L. Rev. 131 (2002).
59. *People v. Giardino*, 82 Cal. App. 4th 454 (2000).
60. Washington now uses this term instead of the term "statutory rape." Wash. Rev. Code 9A.44.073, 9A.44.076, 9A.44.079 (West 2012).
61. See *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976).
62. See Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51 (2002); Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1997).
63. See generally Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980).
64. See, e.g., *Commonwealth v. Spiewak*, 617 A.2d 696 (Pa. Super. 1992).
65. See, e.g., SDCL 22-22-1(4) (West 2012).
66. See, e.g., *State v. Weisberg*, 65 Wash. App. 721, 829 P.2d 252 (1992).
67. See, e.g., *State v. Camara*, 113 Wash. 2d 631, 781 P.2d 483 (1989) (consent is an affirmative defense to a charge of rape); *People v. Williams*, 841 P.2d 961 (Cal. 1992).
68. *In re John Z.*, 60 P.3d 183 (Cal. 2003).
69. *People v. Iniguez*, 7 Cal. 4th 847, 872 P.2d 1183, 30 Cal. Rptr. 258 (1994).
70. *State v. Eskridge*, 38 Ohio St. 3d 56, 526 N.E.2d 304 (1988).
71. *State v. Schaim*, 65 Ohio St. 3d 51, 600 N.E.2d 661 (1992); *Commonwealth v. Biggs*, 320 Pa. Super. 265, 467 A.2d 31 (1983).
72. For a similar case see *R. v. R.J.S.*, [1994] 123 Nfld & P.E.I.R. 317.
73. *Johnson v. State*, 332 Md. 456, 632 A.2d 152 (1993).

CHAPTER 10

Theft

OVERVIEW

Some people always want what the other person has. And they'll do anything to get it: take it, trick the owner into giving it up, hide it, perhaps even destroy the property if they can't have it.

These unhappy facts of life have given rise to one of the most arcane areas of criminal law: property offenses. The doctrines of the various crimes that constitute property offenses — larceny, embezzlement, taking under false pretenses, extortion, and others — are laced with rules and a host of exceptions to those rules. Courts have created fictional devices to reach the "right results" when the rules would not allow such a result. The doctrines also reflect tension between courts and legislatures about the reach of the criminal law and the impact of the death penalty.

There are three "major" property offenses: *larceny, embezzlement,* and *taking under false pretenses.* At the risk of grossly oversimplifying, one might say that the characteristics that distinguish these crimes from each other are as follows:

1. *Larceny* is a taking of the *possession* of another.
2. *Embezzlement* is the *conversion* to the defendant's use of another's property lawfully obtained.
3. *False pretenses* — unlike the previous two, which are offenses against *possession* — is a taking of *title* by *deceit.*

These simplifications hide a vast array of interlocking and overlapping requirements and fact patterns. The ingenuity of persons who want someone else's property is vast and unlikely to be hemmed in

by specific differences among the "elements" of various crimes. Nevertheless, it may help if you keep your eye on these skeletal definitions.

THE IMPACT OF HISTORY

The Death Penalty

Prior to the common law,[1] most legal systems, including both Greek and Roman law, treated most infringements against property as torts, with damages as the only remedy.[2] In sharp contrast, the common law punished larceny as it punished all felonies, with death, until the early part of the nineteenth century.[3] Many judges, however, gave restrictive readings of the "elements" of larceny to avoid imposing the death penalty in opposition to either the penalty itself or to its imposition for "mere" invasions of property. In the eighteenth century, as the death penalty became more discretionary, the need to restrict the reach of property offenses ebbed, and courts upheld liability in larceny (most notably in *Pear's Case*, infra). And when in the nineteenth century the death penalty was removed as a possible penalty for most property offenses unconnected with potential physical violence, courts gave increasingly broad readings to the elements of larceny. Similarly, legislatures enacted a wide range of new statutes proscribing other interferences with property, but not punishable by death.

LARCENY

The "elements" of larceny are easily stated:

1. There must be a *trespassory*
2. *taking*
3. and *asportation*
4. of the *personal property*

5. *of another*
6. with the *intent*
7. to deprive him of it *permanently* (or *for a long period of time*).

Trespass

The first element of larceny limits the crime to acts that violate possession of an item. If the defendant has already obtained lawful possession of the property, his later use or conversion cannot be a "trespass" and he has not committed larceny. Thus, if George, with Ralph's permission, borrows Ralph's Maserati, and decides later that he loves the car too much to return it, George may be a dastardly evildoer, but he is not guilty of common law larceny because his initial taking was not a trespass.

That limitation, however, conflicted with the need to protect trade in mid-Renaissance England. In *The Carrier's Case, Anon. v. The Sheriff of London*, 64 Seld. Soc. 30 (1473), a London dealer (call him Henry) had hired the defendant (Jerry) to take some goods from London to Southampton. The goods were inside packages. Jerry got about halfway, broke open the packages, and hid the contents. In a prosecution for larceny, Jerry argued that he had obtained possession of the goods lawfully and consensually and therefore was not guilty of the crime because there was no trespass. Jerry *was* right, but he lost anyway. The court announced a new fiction. Jerry, it said, had possession of the packages *qua* (as) packages. Had he simply sold those packages, he would not have "trespassed" on the goods. But since he had "*broken bulk*" of the packages (removed the items from the pakages), he had trespassed on the goods inside and hence was guilty of larceny.

The fiction of "breaking bulk" was only the first of many such fictions that the common law courts would create, some favorable to the defendant, some not, in trying to square specific acts with the definition of larceny. A second judicially created fiction was *constructive possession*, which elaborated on the distinction between "custody" and "possession." Usually, we think of anyone who has "dominion" over an item as "possessing" it. However, the courts concluded that a person who had only temporary and extremely limited authorization to use the

property had only custody and not possession. This was said to be the case with employees[4] and bailees but not with carriers, apparently because they had authority for longer periods of time than did bailees or employees. Constructive possession remained with the owner, such that a taking by an employee was trespassory.

The doctrine of constructive possession was also used in the case of persons finding lost items. Even if the owner did not know where the item was, he was said to have constructive possession of the item. Then, if the finder, *F*, knew, or could suspect, who the owner was and intended at the time of finding to convert the item, the finding became trespassory.

The constructive possession fiction did not apply to the merchant deliverer situation nor to a host of other similar (but not identical) relationships. For example, if *A* gives *B* her first edition of Shakespeare, believing *B* to be *C*, an antiques dealer, *B* has obtained possession voluntarily, and his later conversion of the book is not larceny. Similarly, if *D* owes *E* $10 but gives him $100 in error, *E* has not committed larceny of the $90 excess because he obtained it nontrespassorily. *Cooper v. Commonwealth*, 110 Ky. 123 (1901). Now the courts *could* have found *B* and *E* to be "bailees" or, alternatively, could have concluded that *A* and *D* retained "constructive possession" as well. But they did not, and it was left up to legislatures to deal with these situations.

One such exception to the general involuntariness requirement *was* created by the courts, relatively late, in the infamous *Pear's Case. R. v. Pear*, 168 Eng. Rep. 208 (1779). Pear rented a horse from Victim, intending all the while to take the horse and sell it. Pear argued that his initial taking of the horse was consensual and not trespassory. The court responded by finding that his intent at the initial rental to take the horse vitiated the consensual aspect of the rental and created "larceny by trick." Had Pear formed the intent to take the horse *after* he rented it, it would not be larceny (but *might* be embezzlement) (see infra).

This muddle of rules as to when a trespass does (or does not) occur baffled both courts and prosecutors. And when courts required that the prosecutor indict for the precise crime committed, and prove *that* offense or lose, the stakes were substantial.

Asportation and Taking

Although "taking" and "asportation" seem to describe the same actions, the common law distinguished between them. *Asportation* (a sufficiently clumsy word to justify vilification of the common law courts) occurred only if the defendant actually "moved" the property. Where the property is incapable of being "carried away," such as a house or a heavy object, it may not be the subject of asportation. See Annot., 70 A.L.R.3d 1202 (1976).

The movement need not be far; there are cases holding that even a change of position of two or three inches is sufficient. However, if the item is not moved at all, there is no asportation and hence no larceny. Of course, the courts were always ready to create a fiction if justice required it. Suppose that George "sells" Jamal that red Maserati of Ralph's. George gives Jamal convincing fake copies of title, and Jamal, after depositing $50,000 in George's hand, drives the car away. Even if George has never entered the car, he has "asported" it. The fiction of *innocent agency* turned Jamal into George's "agent," so that when Jamal took the car, it was "really" George driving it away.[5]

Taking, on the other hand, required "caption," defined as exercising *control and dominion* over the property. If the property was not *capable* of being taken, a mere asportation was insufficient. For example, if a clothing store attached a coat to a mannequin by a chain, even if the defendant "moved" (and therefore asported) the coat, his conduct was not a "taking," since the coat could not (short of a blow torch) be removed.

Personal Property

Larceny never applied to real property (possibly because it could never be asported). However, with regard to items that are "fixtures" on the land, the common law really outdid itself in creating confusion. If Mary Ann trespassed on Celia's land one day, cut down eight cedar trees, and immediately removed the lumber, there was no larceny because the act was seen as affecting not personal property but real property. If,

however, Mary Ann got tired after the hewing, went home to relax for an hour or two, and then returned, her subsequent asportation of the downed lumber was *now* larceny, since the trees had become Celia's personal property.[6]

Documents representing either real property or causes of action were not the subject of larceny. The fiction upon which this result rested, that the documents "merged" into the things they represented, may have been helpful in other branches of the law but was a hindrance in criminal law. On the other hand, some *incorporeal* items, such as electricity, *could* be the subject of larceny while others, such as ideas, could not. Thus, when David Ellsberg stole papers from the Pentagon, photocopied them, and publicized them, he was guilty under the common law (if at all) only of the larceny of the value of the paper. The ideas were not items that could be "stolen" under common law larceny.

The common law also held that theft of *services* (as opposed to property) did not constitute larceny. Thus, if Basil hires Joanne to fix his car and then takes off in the repaired auto without paying, Basil has not committed larceny because services are not property and, hence, their "taking" is not criminal.

Finally, the common law distinguished among animals. Not surprisingly, wild animals (*ferrae naturae*) that merely "lived" on a victim's land were not "his," and hence could not be personal property, the subject of larceny. But the law went further: Cows *could* be stolen, but domesticated dogs could not because, while not wild, pets were "base" animals below the law's cognition.

Of Another

It would seem obvious that you cannot "steal" your own property. However, the obvious is never necessarily the legal. Since larceny is a crime *against possession, not ownership*, if Ben loans Greg his putter for a week but then decides in the middle of the week that he wants it back, and simply takes it from Greg's golf bag, Ben can be guilty of the larceny of "his" putter. Similarly, if Greg had a lien on the putter, Ben could be guilty of larceny. You can also steal from a thief; although he

obviously does not have “title” to his goods, he does have “possession” such that removing his property, albeit stolen, constitutes larceny.[7]

One aspect of this rule is the effect of a so-called *claim of right.* If George wrongly believes that Stan owes him Stan’s red Maserati (for whatever reason) and takes it, George is not guilty of larceny. One way of expressing this rule is to say that a claim of right negates the “specific intent” of larceny. However, as we have already seen (in Chapter 4), the specific-general intent distinction is tenuous at best. The better analysis is simply to say that the defendant acting under a claim of right does not “know” that the property belongs to “another,” and hence does not meet the culpability requirements with respect to the material elements of the offense. Moreover, consistent with other “specific intent” crimes, any mistake (either of fact or law), no matter how unreasonable, will “negate” liability for larceny.

When the taker has some interest in the property but does not have “full” possession, the common law concluded that a co-owner (partner, spouse, tenant in common) cannot commit larceny from another co-owner. When, however, the partners are in the process of dissolving their relationship, this rule may not always apply.

With Intent

Get ready for another great Latin phrase, *animus furandi.* Under this phrase, the defendant had to “intend” to “deprive” the possessor “permanently” of the item. Suppose that George intends to take what he knows to be Ralph’s car but intends to return it within a day or a week. Here the law was somewhat haphazard. If George intended to return the exact same car, then usually there was no larceny. If, however, the property was otherwise fungible (such as money), many courts found there *was* larceny, even though Ralph would get “the equivalent” money returned. George had in fact deprived Ralph of the “very” paper that he had taken. That, said the criminal law, was sufficient.

Moreover, George’s liability in each instance would depend in part not only on his intent to return the item but on the *reasonableness of his belief that he could do so.* If George was merely wishfully thinking that

he could return the same car or even the same amount, it is larceny. Thus, if George intends to use Ralph's car in a demolition derby or even in a stock car race, his ability to return the car in the same condition he takes it is so small that he will be guilty of larceny *even though* his "subjective intent" was not to deprive Ralph of it permanently. In a sense, if George was "reckless" as to his ability to return the property, that was a sufficient basis for liability. Similarly, even in those jurisdictions that would allow George a defense if he intended to return the equivalent amount, if George intended to use the money to gamble on a horse (even a "sure winner"), he would be guilty of larceny because he was "reckless" as to whether he would actually get that money back in order to return it to Ralph. On the other hand, an objectively plausible intent to return the property prevents liability even if some unexpected obstacle prevents an actual return. *Schenectady Varnish Co. v. Automobile Ins. Co.*, 127 Misc. 751 (Sup. Ct. 1926). For example, if George only intended to drive Ralph's car around the block, a relatively safe block with very little traffic, before returning it, and as he was turning the last corner a car ran a red light and collided with him, George would not be guilty of larceny.

To Deprive

The mens rea of larceny is *animus furandi* (intent to steal), not *lucri causa* (because of gain). Although most thieves take property so that they can use the stolen item, that is not required by the definition of larceny. The focus is on *the loss to the possessor*, not the gain to the defendant. Thus, if George, jealous of Stan, takes the Maserati and has it destroyed, it is larceny even though George never expected to retain the car.

Permanently

As already suggested, if George takes Stan's car but only intends to make Stan walk to work for a week and then to return the car, most

courts would find that the taking was not larcenous because the intended deprivation was not "permanent." Thus, "borrowing" an item was almost never enough for larceny. Suppose, however, that the defendant knows that the owner needs the item during the time it will be missing? Greg, intending to return it immediately after the tournament is over, takes Ben's favorite putter the night before Ben is to participate in the Masters, or Sheila takes Madeleine's stocks and bonds for a week, knowing that Madeleine will have to declare bankruptcy without them. Some courts began to include in the definition of larceny an intent to deprive of "important" or "economically significant" possession, even if the taker had the purpose to return the property after this usefulness was exhausted.

Injury to aesthetic interests, however, was never included within larceny. If Tom removes Mary's Monets from the wall of her summer house for the one month during which Mary will be there, intending to replace them as soon as Mary leaves, Tom has not committed larceny, even though he has inflicted harm on Mary, because Mary's only harm was aesthetic. Again, suppose that Tom has removed the Monets not to upset Mary but to use as collateral in obtaining a loan. Since Tom's (reasonably achievable) intent is to return these very paintings, it is not larceny.

Contemporaneity

As if all these factors weren't enough to cause apoplexy, the courts further required that the mens rea and the actus reus coincide. Only if, at the time of the taking, *D* had the requisite mens rea did the taking constitute larceny. Thus, if Greg takes Ben's putter out of his golf bag without Ben's knowledge with every purpose of returning it after ten minutes' practice, but then decides to keep it, Greg has not committed larceny because his intent at the time of the taking was not to deprive Ben of the putter permanently. His later conversion may be immoral, unethical, and even not nice, but it's not larceny.

Here again, however, the common law created new fictions to cover egregious cases. In this instance, courts developed the fiction of *continuing trespass*. Since Greg's original taking was trespassory, the

courts concluded that the trespassory nature "continued" as long as Greg had the putter. Therefore, at the time Greg decided to keep it, there was a coincidence of mens rea and actus reus, and Greg could be guilty of larceny. But even here, things were complicated. Some courts limited the application of this fictional doctrine to cases where the original taking was not only "trespassory" but done with an immoral, even if not criminal, mens rea. Thus if, when he picked it up, Greg thought that the putter was his, the taking, though objectively a trespass,[8] was held *not* to be "continuing"; hence, when he later converted it to his own use, the conversion did not transform the original taking into larceny.

Finders

Assume that Alice mislays, or loses, her treasured collection of classic mini-cars, and John finds them and takes them home. Is this larceny? At first blush, John's taking does not seem to be trespassory, but the common law established early on a fiction that lost or mislaid property was still in the constructive possession of the owner. Thus, John's taking was trespassory. However, the law still would not convict John unless:

1. The property bore some indication that it belonged to someone (although it was not necessary that the specific possessor be indicated).
2. At the time of the finding, John expected and intended to keep it.

Thus, if John finds the cars, and there is no indication of ownership, he is not guilty of larceny. Even if there is such indication (the owner's mailing label would be nice), it is not larceny if John takes them, intending to return them to Alice, but only later decides to enjoy the cars himself (the contemporaneity requirement).

Hasn't this trip through larceny been fun? Every time it looks as though we've got a firm "rule," it turns out squishy. Rules gave way to exceptions, which then became qualified by sub-exceptions, which in turn were changed by fictions to reach a "right" result. And that, as Justice Holmes put it, has been the life of the law. Super clear, right?

EMBEZZLEMENT

Not even all the fictions and exceptions to the general requirements of larceny could meet the needs of society nor the ingenuity of bad-minded folk. Suppose, for example, that Marvin is a bank teller, and Laurel, a depositor, gives him money to deposit for her account. If Marvin puts the money into the till and then removes it for his trip to Rio, he would be guilty of larceny from the bank since the money would first go into possession of the bank (the till), and his later taking would be trespassory. However, if Marvin immediately puts the money in his pocket planning an immediate trip to Rio, it is not larceny. Since Laurel has voluntarily parted with her money, Marvin's initial "taking" is not trespassory from her. And since he has not "tricked" her into giving up her money, *Pear's Case* and the doctrine of larceny by trick are not applicable. Moreover, the bank never possessed the money so there can be no trespass against it. Thus, Marvin is not guilty of larceny.

It made little sense to hold Marvin guilty of a crime depending on whether the money physically went into the till. Yet this was exactly the result in the (in)famous *Bazeley's Case*, 168 Eng. Rep. 517 (1799), where Bazeley was acquitted of a larceny charge. Of course, the courts could have established yet another "fiction," for example, that the money remained in the depositor's "constructive possession" until put into the till, but it chose not to do so. The legislature quickly filled this gap by creating the statutory misdemeanor of *embezzlement*.[9] The elements of embezzlement then became

1. a *fraudulent*
2. *conversion*
3. of *property*
4. of *another*
5. by one who is *already in lawful possession* (not mere custody) of it.[10]

The key differences between embezzlement and larceny are (1) an actual conversion must occur; and (2) the original taking must *not* be trespassory — that is, the conversion here is *against ownership and not possession.* (Note that it is still necessary to distinguish between "title"

and “ownership”; if *title* is misappropriated, it is false pretenses, discussed next.)

Conversion

Conversion requires that the defendant “seriously interfere” with the property — unlike larceny, in which even a movement of a few inches is sufficient to qualify.[11] Like larceny, however, embezzlement does not require that the conversion be for the benefit of the defendant. It can benefit another or in some cases result in little or no gain to anyone, but merely a loss to the owner. Indeed, as in larceny, the focus is on the loss of the owner, not the gain of the thief.

In Lawful Possession

As we have seen, the crime of embezzlement was statutorily enacted to fill the gap in larceny law where possession was initially obtained lawfully; lawful possession is usually the issue in deciding whether the defendant committed larceny or embezzlement. Given the fictions that common law courts previously created to fill *other* gaps in larceny law, there can be confusion. Thus, an employee may either have possession of property given to him by his employer (and hence be guilty of embezzlement if he converts it) or be only in custody (since his employer retains “constructive possession”) and hence be guilty of larceny if he “takes” the property. For example, if Jim gives John (his employee) $500 in cash, and John heads for Rio, it is fairly clear that this is larceny and not embezzlement, for the “constructive possession” fiction applies. Suppose, however, that Jim gives John a check for $500 and John cashes it, but then takes the proceeds and heads for Rio. Did Jim ever have possession of “the cash,” such that John has committed larceny? Or is this a case of embezzlement? Courts differ.

Fraud

The requirement that the conversion be “fraudulent” is somewhat misleading, at least if we think of “fraud” in the normal usage of that term, which suggests that at the time he actually got the property, John (a) intended to convert it to his own use and/or (b) induced the owner to part with it on the basis of deceit. The term, at least as used in embezzlement statutes, does not necessarily suggest either of these.

As with larceny, embezzlement is said to be a “specific intent” crime, so a person who converts property under a mistaken claim of right, or with the intent to return the very property he takes, is not guilty of the crime. Also as with larceny, the intent to return the equivalent property is a defense. However, in contrast to larceny, where an intent to return equivalent property that is offered for sale *may* be a defense, embezzlement occurs even with such an intent.

FALSE PRETENSES

The common law defined larceny as an offense against possession, and embezzlement as an offense against ownership-possession. Thus, if George persuades Stan to loan him his Maserati for a day, and then converts it to his own use, it is embezzlement even if the initial taking was not trespassory. It’s larceny by trick if George always intended to convert it. But if the defendant obtained not merely possession of the item but *title* as well, the common law courts held that this was neither larceny nor embezzlement. Thus, if George persuades Stan to *give* him the Maserati so that George can allegedly donate it to a charity, or on the false representation that George needs to sell the car to save his dying mother, George has committed neither of these two crimes. Since, in almost all cases of title passing, possession also passes, the common law courts surely could have held that larceny covered the offense. However, because courts hesitated, for some unclear reason, to create another common law property offense,[12] Parliament stepped in by enacting a statute to plug this loophole and prohibit *obtaining property by false pretenses.* As explained by case law, the offense requires:

1. a *representation*

2. of a *material present or past fact*
3. which the *defendant knows to be false*
4. and which he *intends* will and
5. does *cause the victim*
6. to pass *title*
7. of his property.

While the requirements of causation and "property" seem to be fairly straightforward elements, the other elements have created difficulties for the courts.

Representation

The misrepresentation has to be affirmative. The failure to disclose a fact does not constitute common law false pretenses, unless there is a preexisting fiduciary duty between the parties. Thus, if John sells Joe a book labeled "Modern Tax Law," knowing that Joe believes it to be current whereas John knows that the book deals with a repealed Code, John has not obtained the money by false pretenses unless he *affirmatively* tells Joe that the book is "current." His failure to correct Joe's misunderstanding is insufficient.

Present or Past Fact

Although the statutory language contained not even a hint of the limitation, common law courts quickly held that only the representation of a *present or past fact* could be the basis of a conviction of this new crime. If the defendant fraudulently pays the seller with counterfeit money, this is false pretenses because the representation is that the money is valid. If, however, the defendant fraudulently promises the seller that he will pay tomorrow, and does not, this is not false pretenses because the misrepresentation regards the defendant's future intent or acts, and that is a "false promise," not a present fact.

This distinction is often hard to make. A defendant's (intentionally

false) statement that he “will” pay tomorrow could be construed as a misstatement about a present fact, his current state of mind. Moreover, although one hears echoes of the common law’s refusal to protect fools, it is not clear why persons who rely on promises about the future are “bigger fools” than those who do not ascertain the accuracy of representations as to present or past facts.[13] (Or, to put it another way, why persons who deceive using present facts are more dangerous, or more blameworthy, than those who deceive by making promises.)

Supporters of the distinction argue that it is necessary to protect legitimate business deals. Virtually all contracts concern themselves with promises to be performed in the future. Persons often contract with one another with the full expectation of performing in the future. If every failure to perform a contract could be construed as obtaining by false pretenses, business agreements would be undermined. One cannot be sure whether a borrower who has defaulted made a false promise or simply changed his mind about the use of borrowed money (or was unable to pay it back). If criminal liability were this likely, contracts would become far less prevalent, and commerce would surely decline.

Those who think that it should be possible to convict on the basis of false promises argue that juries are as capable of deciding this mens rea as they are in other cases. And empirically there appears to be no flood of “bad” prosecutions in jurisdictions that recognize false promises as bases for false pretenses.

Title

The distinguishing factor between false pretenses and the other two offenses we have considered is that *title must pass* at some point to the defendant, whereas in the other two it does not. In many instances, it is clear whether title passes, but some cases are not obvious. Thus, suppose that only part of the title passes, such as when there is a conditional sale induced by false representation. Although full title does not pass until the sale is complete, courts usually conclude that “enough” indices of title have passed to warrant a conviction of false pretenses. On the other hand, if a defendant induces a victim to depart with property for a

specific purpose (e.g., to buy a piece of nonexistent land; to give a (fictitious) bribe to a third party), it is held that this is not false pretenses but larceny by trick because title would only pass if the purported goal were actually achieved.

Mens Rea, Knowledge, and Intent to Defraud

Since this crime is limited to representations regarding present or past facts, the prosecution must show not only that the representation was false,[14] but that the defendant knew the falsity of her representation when she made it. Although on principle, one might be willing to convict a defendant who states facts recklessly, the majority view seemed to be that this was not sufficient for liability.

In addition to knowing that the statements she makes are false, the defendant must "intend to defraud." As in larceny and embezzlement, therefore, this "specific intent" requirement is not present if the defendant is acting under a claim of right or intends to return the property.

CONFUSION

All of these conflicting doctrines, exceptions, fine-edged distinctions, and springing fictions gave both courts and prosecutors headaches, particularly in light of the view, held at least by most courts through the early part of the twentieth century, that the prosecutor could allege only one such crime in an indictment. If the wrong crime were alleged, there was no remedy except to retry the defendant for the "other" crime. Thus, if George were convicted of larceny by trick, he could successfully appeal by arguing that he had not intended to convert at the time that he obtained the property. If he were then retried for embezzlement, he could argue that the evidence showed that he *did* intend to convert then, and that he could therefore not be guilty of embezzlement. These flimsy lines between larceny and embezzlement, and between false pretenses and larceny by trick, generated severe displeasure with "the system."

During the middle part of the twentieth century, state legislatures began attacking these problems, but the attacks were often piecemeal, such as adding a line or two to the larceny statute or embezzlement statute that tried to reach all the various possibilities. Some statutes provided that one who commits embezzlement or false pretenses “shall be deemed guilty of larceny.” Still other states allowed the prosecuting attorney to join several counts in one indictment, thus potentially leaving to the jury the job of determining the exact crime committed by the defendant. However, there was the danger that the jurors would not agree on the crime or, if they did, that an appellate court would find that they had selected the wrong one.

Moreover, a number of these statutes seemed wildly untamed. For example, some statutes penalized as embezzlement a breach of faith, even if there was no expropriation. Other states altered the kinds of property that could be the subject of these crimes, varied the requirements for lost or mislaid property, and so on. In short, there was little uniformity among the statutes.

The Model Penal Code has sought to bring some uniformity to the states. Even here, however, notions of past precedent, ambiguity in statutes, and the ingenuity of defendants still plague the courts. Until and unless we find a way to either be more precise with our language or allow more flexibility in the process of charging and convicting of crime, the dead hand of the past will continue to govern much of the doctrine of property offenses.

GRADING

When larceny was punishable by death, Parliament (and later the states) enacted statutes providing that really trivial (petit) larcenies be exempted from that punishment. This method used was to assess the value of the goods taken: If the amount was less than 30 pence (the value of one sheep), death was not an available penalty.[15]

Even after the abolition of the death penalty for larceny, American jurisdictions have continued to use the value of goods taken as the demarcation between “grand” and “petty” larceny, with the former

obviously being punished more severely. Some states have three or four degrees of larceny, depending on the amount taken. Whether this is a sensible approach is not clear, particularly in cases where the defendant is mistaken as to the amount he intends to take (or risks taking). As discussed in the materials on mistake (Chapter 5), there are instances where such a mistake might be relevant, particularly under the Model Penal Code. Thus, if the defendant *thinks* he is stealing a nickel but the nickel is a valuable coin worth thousands, most jurisdictions would hold that the defendant takes the risk that his crime is greater than he believes (see the discussion in Chapter 6 of the "greater crime" theory). The MPC, however, would make the defendant liable only for the amount he *thought* he was taking. Of course, if the defendant decides to simply take a pocketbook, he takes the risk that it will contain the Hope Diamond because that defendant has no knowledge as to the amount he is taking.

Measuring the value of the goods, is not always easy, particularly where the value of goods changes drastically and quickly, as in futures or works of art. Usually the market value as of the day the item is stolen is used, but there are problems involved in determining both market value and the "time" at which the item was "stolen," particularly in cases of "continuing trespass," which require a "conversion" that occurs principally in the defendant's mind. Problems also occur if the defendant takes several items over a period of time (e.g., a bank teller who embezzles $500 a week for ten weeks), but the courts generally allow aggregation of these amounts *if* they are from the same victim and appear to be part of a "single" plot.[16]

THE MODEL PENAL CODE

Although several states preceded it, the Model Penal Code (MPC) is the leader in the current movement for statutory reform and consolidation of theft crimes. The MPC provides for one crime of "theft," which can be committed in a variety of ways, including larceny, or embezzlement, or false pretenses (the MPC also includes extortion, receiving stolen goods, and similar offenses in its general sections on theft). The fine distinctions between crimes based on the intention of the parties and

crimes based on the victim's understanding and intent have been eliminated; the MPC takes the position, reaffirmed by most other modern statutes, that thieves are equally dangerous or culpable and the harm of such crimes equally serious, no matter how caused.

It is important to note the provision that the prosecution will not be thwarted if its evidence at trial suggests a different "method" of committing theft than was pled in the indictment; a charge of "theft," without more, will suffice for conviction as long as the actual proof shows that the conduct violated a specific statutory prohibition.

Because it combines all thefts, the MPC does not require a "taking" or an "asportation." The MPC calls "criminologically insignificant" the question of whether the item has been "moved" or not. Instead, the MPC requires that the defendant "unlawfully take or exercise unlawful control over" movable property or "unlawfully transfer" immovable property. As the MPC Commentary puts it: "[T]he critical inquiry is twofold: whether the actor had control of the property, no matter how he got it, and whether the actor's acquisition or use of the property was authorized."

The MPC does not require that the defendant intend to "permanently" deprive, as the common law did, but it does focus on the deprivation of "economic" value, thereby ignoring the aesthetic or psychological value of items, such as Ben's putter or Mary's Monets. Indeed, since the MPC requires that the defendant deprive the victim of the "major portion of the economic value" of the putter, it is not even clear that taking the putter for one golf tournament (even if it is *the* golf tournament) would be sufficient.

Additionally, a trespass is not needed, and all property, both movable and immovable, is a proper subject of theft. The MPC also abolishes the "property" limitations erected by the common law, providing that "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power," are possible subjects of theft.

Unlike the common law, the MPC emphasizes the gain to the defendant rather than the loss to the victim. Actions designed to destroy or damage the tangible property of another are dealt with as "criminal

mischief" rather than as theft under the MPC. As the commentary puts it: "The provisions against theft contemplate cases where the actor uses the property for his own purposes."

Whether the defendant had the intent at the time of "taking," or formed that intent afterward, is likewise not relevant to the defendant's liability under the MPC. Not surprisingly, the MPC does not limit "deceptive" takings to representations about "past or present facts," and includes all promises as to future action, if not actually fulfilled, as potential grounds of liability. However, reflecting the fear that many good intentions often go awry, the text of the MPC expressly warns that a person's intention to deceive shall not be inferred "from the fact *alone*" that he did not fulfill the promise. Finally, the MPC allows false promises to be the basis of a charge of theft by deception but continues the common law's reluctance to criminalize those who merely capitalize on others' misimpressions, unless they helped create those impressions or had a fiduciary duty to dispel them.

The MPC also rejects the common law rule that one cannot steal from one's spouse, although it does not criminalize the taking of items generally shared, unless the couple has separated.

The MPC has a specific provision that broadens the claim of right defense to all theft crimes and focuses on the way in which a claim negates culpability. The MPC also recognizes a claim of right based defense based on a mistake of law, as well as establishes a defense that the property was for sale as long as the defendant either intended to pay for it promptly or reasonably believed that the owner, if present, would have consented.

Section 223.0 of the MPC sets three levels of "theft" — petty misdemeanor (under $50 and as long as there was no threat or breach of a fiduciary obligation), misdemeanor ($50-$500), and third-degree felony (over $500) — and distinguishes punishment on the basis of the types of items stolen.

Examples

A hint on how to analyze theft questions: First determine which of the three kinds of common law theft the crime may be before deciding whether it meets all of the sub-rules. Probably the best way to do this is

to decide what the crime is not. Thus:

A. Did the victim intend to give title? Or only possession?

If the former, it can only be false pretenses. If the latter, it can only be either larceny or embezzlement. To decide which of the latter it might be, ask:

B. Did the defendant come into the property lawfully (usually by consent)?

If so, then the offense can only be embezzlement. If not, then it can only be larceny. (*Caveat:* If the consent was obtained by deceit, it can be larceny by trick.)

C. Once you have determined which of the three major offenses it could be, *then* explore the intricacies of that offense.

1a. Harry buys the *National Enquirer* every week from Joe, the neighborhood grocer. This week, discovering to his chagrin that he did not have enough money, Harry took the paper without telling Joe, but intending to pay Joe the next time he visited the store. Has Harry committed any property crime with regard to the paper?

1b. Suppose Harry tells Joe that he's taking the paper, and Joe nods. Afterward, Harry decides to stiff Joe unless Joe "reminds" him to pay for it.

1c. Same facts, except that Harry knew at the time he took the paper he would not pay for it.

2. Larry asks his neighbor Joan if he can borrow her lawn mower, intending at the time to sell it. He does so.

3. Evelyn and John have been married 15 years. Evelyn has lost $10,000 in a miscalculated investment in Bitcoin. To pay for her losses, she takes John's Rolex watch and sells it.

4. Jessie, tired and impoverished, but driving a Maserati, pulls into the Hampton Inn, where she signs in. She is not required to give a credit card deposit. The next morning, she leaves the Hampton Inn without paying as she had intended to do all along.

5a. Alexander strolls into Pop's bookstore one day. Picking up the classic Agatha Christie (*Murder on the Orient Express*), he browses through it. Finding it intriguing enough, he decides to steal it. As he makes his way toward the door, however, he spots Jeremy, who works for the store, looking at him. Fearful that Jeremy has seen him take the book, Alexander replaces it on the shelf, exactly where it was at the start.

5b. Same facts, except that Alexander went to the bookstore with the purpose of taking the Christie book.

6. Melinda goes to the bank and receives change for her $10 bill. In the middle of the $1 bills, however, there is a $1,000 dollar bill. Melinda keeps the $1,000 bill.

7a. Happy Hennigan, the used car man, knows that the car he is selling Juanita has a defective motor block and will probably run only 500 miles before dying. Assuming that he makes no representations of the fitness of the car, even when asked by Juanita, of what crime is he guilty when he takes her money?

7b. Happy sells Juanita the car above. She knows at the time she buys it, but he does not, that it is a very rare antique auto that, even with a cracked block, is worth $50,000. Has she "stolen" the car and, if so, under what rubric?

8. Martin Miner knows that Billingsley Buyer believes that Miner's mine is valuable. Miner, however, knows it is dry. What offense, if any, if Miner sells it to Buyer?

9a. Bernard, a lawyer, believes that a certain stock will quickly rise in value. He takes several bonds belonging to clients and secures $10,000 from the First National Bank, using the bonds as collateral. He buys the stock, which goes up. He makes a $20,000 profit, pays the bank its $10,000, and returns the bonds. Has Bernard committed any property offense?

9b. Same facts, but Bernard leaves an envelope, to be opened in a week if he does not return the money and bonds, explaining his whole scheme and asking for forgiveness. He actually returns both items. What offense?

10. Lloyd, a car mechanic, fixed Bobby's car, for which Bobby has yet to pay him. Bobby has removed the car from Lloyd's garage. One day, Lloyd spots Bobby's new thoroughbred dog. He picks up the dog and sells it to the nearest Poodle Palace, netting $500, which he applies toward Bobby's bill. What crime has Lloyd committed?

11. James has spent all day conversing with Johnnie Walker Black and by now is severely drunk. He fantasizes that Ralph's Maserati belongs to him, and he takes it for a very long drive, never intending to return it. Neither the police nor Ralph thinks this is funny. Has James committed larceny?

12a. Vince is late for a racquetball match, but his car is in the garage. He knows that his neighbor, Jeff, is away in Europe, and will not return for another week. Vince hotwires Jeff's car, drives it ten miles to the courts, plays his match, and returns the car, filling the gas tank. He also slides a $50.00 bill into Jeff's glove compartment to pay for the wear and tear on the car. Vince's arch nemesis, Rick, has seen all that transpires and tells the police, who charge Vince with larceny. Is Vince guilty?

12b. Suppose that months ago, Jeff allowed Vince to drive his car to another match, giving him a key, and that Vince and Jeff both forgot, so that Vince retains the key. If Vince used that same key to take the car, is it still larceny?

12c. Suppose the reason that Vince took the car was not to go to a racquetball match, but to take his 11-year-old son, who had just cracked his head on a cement floor, to the hospital. Is it larceny now?

13. Rosita's rapid transit system charges $2.00 per ride, but you can purchase a monthly ticket for $60 and use it as often as you wish. The card explicitly declares that it is "not transferable." Rosita buys a monthly card on the first of the month. Thereafter, she stands next to the turnstile of the train, and swipes her card for anyone who wishes, charging them $1.00 for each ride. Rosita is charged with larceny from the transit system. What result?

14. A college student, Bryan, was the sole lifetime beneficiary under a

large trust administered by Paul. Bryan received a large monthly distribution from the trust, and whenever he ran short, he simply called Paul for extra money, because the trust provided that Bryan was to receive whatever he needed. Bryan's roommate, Anthony, found out about the trust arrangement and decided to see if he could make it pay off for him. Anthony sent an email to Paul, which appeared to be from Bryan, and which asked for several thousand dollars to cover medical expenses. The email further stated that, since he was in the hospital, Bryan would send Anthony to pick up the money. The next day, Anthony showed up at Paul's office and received the money on the promise that he would take it to Bryan in the hospital. The roommate left town with the funds. What offense?

Explanations

1a. First, which kind of crime is this "potentially"? Since Joe didn't know of the taking, he did not intend title to pass. Thus, it cannot be false pretenses. Moreover, since Joe didn't "entrust" the paper to Harry, it is not embezzlement. Thus, if anything, it is larceny.

But Harry has probably *not* committed larceny. Because the item was for sale, and Harry did intend to pay for it, he did not have the "animus furandi" required by the law. (This is the American rule: English courts generally see this case as larceny.)

The Model Penal Code has a subsection that deals expressly with items of property "exposed for sale." The section adopts the American view and provides that if a defendant took such an item, "intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented," there is no theft.

1b. Now we seem to have title pass when Joe allows Harry to take the paper. Joe does not expect to see the paper again, so this appears to be a case of false pretenses, if anything. But it is probably not anything. Why? Because at the time he took the paper, Harry lacked the proper mens rea: He didn't intend to deceive Joe.

This might seem to be a case of larceny by trick, as in *Pear's Case*. Here, however, the possession was not trespassory as it was

there; Harry did not have the intent to take the paper when he removed it from Joe's store.

Assuming that the "exposure for sale" provision did not exculpate Harry, the MPC would find Harry guilty of unlawful control of the paper without regard to when the "proper mens rea" occurred to Harry.

1c. Since title to the paper passed to Harry with Joe's blessing, this could only be false pretenses — Harry got title by inducing Joe to give him the paper. Under the common law, however, Harry's false promise as to his future payment is insufficient. The (mis)representation must be as to present facts. This would be true even if Harry had the money in his pocket to pay for the newspaper; unless he says, "I don't have enough money, Joe. I'll pay you tomorrow," Harry has committed no common law offense.

Under the Code, a false promise can be sufficient to convict of theft by deceit, so that Harry's precise mental state would be important here.

2. This is not false pretenses since Joan never expected title to pass, nor embezzlement because Larry's intent effectively makes his initial taking trespassory, much as in *Pear's Case*. Thus, this is larceny by trick and not embezzlement.

Under the MPC, however, the common law distinctions are unimportant. Whether title passed (or was intended to) is irrelevant. Larry's taking is "by deception," and his control is therefore "theft" under the Code.

3. Since Evelyn took the watch without John's permission, it is not a "title" crime. It might be either embezzlement or larceny, but we need not bother with the distinctions between those crimes here since both agreed that spousally owned property could not be the subject of either offense.

The MPC expressly abolishes the "spousal exception." However, "household belongings or personal effects, or other property normally accessible to both spouses" still cannot be the subject of theft as long as the parties are living together. The watch is a "personal effect" and is "normally accessible to both spouses." Thus, while taking some items from a spouse may now be theft

under the Code, Evelyn is probably not going to the slammer.

4. This is obviously not false pretense. There is nothing to which title has passed. Neither is it embezzlement or larceny, since intangible property can't be the basis of these crimes under common law. This has changed in modern statutes and in the MPC, which has a specific provision (§223.7) dealing with "theft of services."

5a. This is not false pretenses since title never passed. Nor can Alexander be guilty of embezzlement. Even if one were to argue that he had lawful possession when he decided to keep the book, that decision is not sufficient: There must a significant interference with ownership (conversion), which is absent here. Has Alexander committed larceny? He has taken and asported the book, although not off the premises of the store. That would suffice for that part of the crime. But did he have the requisite intent when the taking occurred? If not, he is not guilty of larceny. But could he be convicted of *attempted* larceny? See Chapter 12.

Under the Code, Alexander exercised illegal control over the book as soon as he formed an intent to deprive the bookstore of it, even if it never left the premises. No express requirement of asportation or "taking" is present in the Code, although it is usually difficult to exercise "control" over property unless some physical movement occurs with regard to it.

5b. This *is* larceny; the taking and intent coincide. Larceny in this aspect is really an inchoate crime. Alexander's *intent*, not the actual loss, is the gravamen of the crime.

Similarly, under the MPC, there is not even a minimum requirement of taking or asportation, and Alexander clearly exercised some unlawful dominion or control over the book.

6. This is not false pretenses because the bank did not intend for title to the $1,000 bill to pass. Nor is it trespassory since Melinda did not know at the time she received the package of bills that there was a $1,000 bill inside. It might be "embezzlement" under current statutes but not under the common law since the common law usually required an "entrusting" of the property, and there was no reliance by the bank on Melinda here.

Some common law courts might find that the $1,000 was still in the "constructive possession" of the bank, although this fiction was usually restricted to employer-employee situations.

Under the MPC, Melinda exercised unlawful control once she realized that she had the $1,000 bill and did not return it to the bank. This is theft by unlawful taking.

7a. Under the common law, Happy's happy. Obviously, Juanita consented to pass title to her money so this could only be false pretenses. But it is not false pretenses because the common law required an affirmative misleading; passive nondisclosure, in the absence of a fiduciary duty, would not suffice. Under modern statutes, however, this may be theft. Even here, however, the question is close. Section 223.3 of the Model Penal Code, for example, requires that the defendant "reinforce" a false impression, and there is no reinforcing here. The only exceptions involve fiduciaries or those who have previously set the false impression.

7b. Again, since Hennigan wished title to the car to pass, unless Juanita has affirmatively represented that she knows that the car is an "old heap" and repressed her expert qualifications, there are no false pretenses. (Of course, if Hennigan wished to replevin the car, he *might* have trouble under *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887), the classic contracts case.)

8. Since title to the mine passed, it can only be false pretenses and not larceny or embezzlement. However, this is not false pretenses under the common law unless Miner has created or reinforced in an affirmative way Buyer's impression: As long as Miner stays silent, it is not illegal.

Even under the MPC, there may be no crime here since Miner has not "created or reinforced" Buyer's impression and does not stand in a fiduciary relationship to Buyer.

9a. As to the bonds, Bernard is not guilty of false pretenses since he never "assumed" title to the bonds. And the possession is not trespassory, unless you consider the constructive possession fiction, which generally required that the employer give the employee the specific property and not merely authority. However, Bernard is

guilty of embezzlement; while he didn't take title, he converted the property of which he was lawfully possessed. Even if he didn't personally continue to exercise dominion over the property, his acts were a severe interference with the property rights of the bond owners.

As to the bank loan, Bernard *is* guilty of false pretenses since he took title to the money. Even though he returned the monies and the bonds, this is not relevant. Similarly, Bernard took the monies under false pretenses; that he returned them may mitigate his sentence but not his basic culpability.

9b. Bernard is still guilty of the crimes above. Although he hoped that he would be able to return the items, he took a serious risk that the owners of each of the items, respectively, would lose them. This is sufficient for liability.

10. Lloyd is probably not guilty of larceny under the common law for two reasons. First, dogs are "base animals" and cannot be the subject of larceny. Just as important, however, Lloyd has a "claim of right" against Bobby's property. While Lloyd probably does not, under law, have a lien against Bobby's dog, any belief, however unreasonable, that he does so "negates" Lloyd's specific intent (animus furandi) and exculpates him from larceny liability.

The MPC abolishes the "base animals" limitation of the common law, but it continues the "claim of right" defense. However, under the wording of the Code, the defendant must have an "honest claim of right to the property or service involved." If Lloyd had taken Bobby's car and sold it, the Code would clearly exculpate. But it is not clear whether the claim of right can exist against "equivalent" property. However, the commentary would strongly suggest that an honest belief that he can take any property, not just the original property involved in generating the belief, would exculpate.

11. There are two ways of explaining why James has not committed larceny. First, he was truly unaware that the property belonged to Ralph and therefore did not have the requisite mens rea. In that unfortunate jargon of the common law, he lacked the "specific intent" required for larceny. The other explanation, which is the

same explanation in different words, is that his “claim of right,” however misguided, is a “defense” to the charge of larceny. In either event, James is exonerated.

The MPC reaches the same result under either the claim of right provision or under the general definitions of culpability. As the commentary to the Code puts it, “The claim-of-right defense . . . can thus be regarded as redundant.” However, the Code includes a special section on the claim of right to underscore the point about culpability.

12a. Most likely. Larceny is the taking of property; returning it doesn’t negate the taking. Whether Jeff suffers a permanent loss or not, the property was taken and “asported,” as the old common law would require. Vince may argue that he did not “intend” to “deprive” Jeff of the property and was “only borrowing” it. But even if Vince left Jeff a note to that effect (not part of the facts given here), he has deprived Jeff of that property. Just suppose Jeff had returned from his vacation early or promised the car to someone else. That’s sufficient deprivation to constitute larceny. However, Vince can make the argument that he never intended to permanently deprive Jeff of the property and he always intended to return it. This would likely not fly under most state statutory schemes because this “permanently” language is not used as often in today’s statutes.

12b. You bet. Jeff’s earlier acquiescence was only for that one trip and match. Unless Jeff expressly permitted Vince to “use the car any time you need to get to a match,” there was no consent to the most recent taking of the car. Vince can again make the argument (likely unsuccessful) that he never intended to permanently deprive Jeff of the car.

12c. This is a trick question. Vince has still committed larceny. Whether his taking of the car is justified such that he will not be convicted, or punished, depends on many other factors. For example, could he have called an ambulance? Could he have hailed a passing car? Was there public transportation? For discussion of *these* issues, see Chapter 16.

13. Rosita will walk and live to ride again. Larceny is the taking of the

property of another. But Rosita has not deprived the transit system of any property it ever owned. She has deprived the system of money it *would have had*, but not money it ever possessed. Under the common law, depriving someone of services was not larceny — that's why legislatures had to enact statutes making "larceny of services" criminal. Under modern statutes, Rosita would be charged with "theft" and the difference between larceny and theft of services would be irrelevant. See *People v. Hightower*, 18 N.Y.3d 249 (2011).

14. Anthony committed larceny by trick because Paul's consent to Anthony's taking of trust money was induced by the misrepresentation that Anthony would take the money to Bryan. Larceny consists of a taking and carrying away of tangible personal property of another by trespass, with intent to permanently deprive the person of his interest in the property. If the person in possession of property has not consented to the taking of it by the defendant, the taking is trespassory. However, if the victim consents to the defendant's taking possession of the property, but such consent has been induced by a misrepresentation, the consent is not valid. This type of larceny is larceny by trick. Here, the roommate obtained the money from the banker on the promise that he would take it to Bryan. This misrepresentation induced Paul to give possession of the money to Anthony. Anthony then proceeded to take the money and carry it away, intending all the while to permanently deprive Bryan of the money. Thus, all of the elements of larceny are satisfied.

    In this case, Paul intended only to convey possession of the money to Anthony so that he could give the money to Bryan. Paul did not intend to convey title. Because Anthony did not obtain title by means of his misrepresentation but simply obtained possession, the offense of false pretenses was not committed.

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1. No group of crimes so reflects the various tensions in the centuries during which they were developed as do property offenses. For an extraordinary in-depth analysis of the historical development, see J. Hall, Theft, Law and Society (1952).

2. There were some exceptions: Stealing a bather's clothes and theft of livestock were criminally punishable in Rome. Housebreaking and theft at night, which indirectly involved the potential threat to persons, were also treated criminally (under the common law scheme, they would be

dealt with as burglary).

3. There is some suggestion that "larceny" was initially (1000-1250 A.D.) limited to forcible takings (what we now call robbery), but the history is somewhat cloudy.

4. The common law could not be quite so rule-bound. If the employee had "significant" authority, he obtained possession and not mere custody. See *Morgan v. Commonwealth*, 47 S.W.2d 543 (Ky. 1932).

5. Not all courts agreed. See *Smith v. State*, 11 Ga. App. 197 (1912) (asportation and hence larceny); *State v. Labrode*, 202 La. 59 (1942) (no larceny). See Annots., 19 A.L.R. 724 (1922); 144 A.L.R. 1383 (1943).

6. It is sometimes explained that if the "trees" are laid on the owner's ground, the "lumber" becomes his property, and the taking is thus from his possession.

7. One suggestion is that this deters thieves from stealing from other thieves. But that would be true only if the second thief *knew* that the possessor was a thief. This seems a stretched explanation.

8. In tort, mistake of fact is not a defense to a claim of trespass. It may negate mens rea, but it does not negate the trespassory nature of the taking.

9. It has been suggested that common law courts were not prepared to treat as larceners, and thus subject to the death penalty, employees who simply misappropriated property that they received on behalf of their employers. But this seems unlikely, since those same courts treated disloyal employees as guilty of larceny if they misappropriated property given to them by their employers, and indeed erected the new fiction of constructive possession to explain it.

10. The initial statute against embezzlement was limited to bank tellers, but subsequent additions to the idea were eventually generalized to include any person who had been "entrusted" with the property in question.

11. In this sense, larceny, which requires only an "intent to deprive" and not an actual deprivation, can be seen as an inchoate offense, while embezzlement is a "result" offense.

12. It might be remembered that *Pear's Case*, which created the crime of "larceny by trick," was decided 30 years after the false pretense statute was enacted. Ten years after *Pear's Case*, the courts refused to bring embezzlement with the common law larceny crime, thereby impelling Parliament to enact embezzlement statutes.

13. Although there apparently was some authority that the lie had to be one calculated to deceive a reasonable man (see *Commonwealth v. Norton*, 93 Mass. 266 (1865)), the modern rule is that the victim's failure to act reasonably is irrelevant.

14. For some reason, if the defendant believes the representation to be false but it turns out (much to the chagrin of the defendant) to be true, the crime has not been committed. It is *possible* that such a defendant could be convicted of attempting to obtain property by false pretenses, but since there was never a possibility that the fact would be false, such a conclusion is problematic at best. See the discussion of impossibility in Chapter 12.

15. The animosity of English juries to the death penalty is reflected in 1 L. Radzinowicz, History of English Criminal Law and Its Administration (1948), which recites numerous jury verdicts finding the value of goods taken as one pence less than the "death amount." In an intriguing reversion to that time, the current New Jersey statute explicitly provides that the amount of the value of the goods taken shall be fixed by the trier of fact; no guidance is provided by the statute. See N.J. Stat. Ann. 2c:20-2(b)(4).

16. This problem is not unique to theft, of course. If a drug pusher sells ten bags of 1 gram each to a single customer, has he sold 10 grams, or committed ten sales of 1 gram each, assuming that there is a punishment difference?

CHAPTER 11

Solicitation

OVERVIEW

Some people always want someone else to do the dirty work. As with many things in life, this is also true with crime. Some people would rather get others to commit a crime rather than do it themselves.

Solicitation punishes anyone who deliberately encourages someone else to commit a crime. Though in most cases the solicitor will be the one who first thinks of committing a crime, he doesn't have to be. A person is also guilty of solicitation if he encourages someone who has already decided to commit a crime.

In theory, the ability to punish solicitors is a useful law enforcement device. As with attempt, police can prevent the commission of a more serious crime by arresting the initiator as soon as he has acted with the necessary mens rea to commit a crime. Unlike attempt, however, proximity to the ultimate harm intended is irrelevant. Thus, it makes no difference whether the effort to persuade has been successful or whether the person solicited ever begins to commit the desired crime. Even criminal encouragement doomed to fail from the outset (such as offering money to an undercover police officer to kill someone) will establish solicitation.

Solicitation adheres to the basic principle of the criminal law requiring a person to act. Solicitation permits the arrest of people who have shown themselves to be dangerous because they have *acted* with the purpose to cause the commission of a crime. True, the criminal law does not punish for thoughts alone, but solicitors have *spoken* words or engaged in other conduct designed to implement their criminal intent.

Because it can reach so far back in time and space from the crime solicited and because it sets the threshold of crime without *any* concern

for prospects for its success, solicitation is the most *inchoate* of *inchoate* crimes. (Who said Latin was a dead language!) Perhaps setting this threshold so early can be justified by the fear that solicitation may give rise to cooperative criminal effort and its special dangers. (Indeed, solicitation has been thought of as an attempt to conspire.) In addition, a solicitor may be a more intelligent and more dangerous criminal because he works through others. However, one can also argue that mere encouragement without agreement by anyone else is not socially dangerous because the resisting will of an independent moral agent stands between the solicitor and the commission of the intended crime. Additionally, a solicitor may not be dangerous precisely because she has shown she is unwilling to commit the crime herself or at least alone. She may really be a reluctant lawbreaker. In any event, several purposes of the criminal law, including retribution, rehabilitation, and incapacitation, can be served by convicting solicitors.

Like attempt, solicitation is a relatively recent creation of the common law. It was developed during the nineteenth century and covered only solicitation to commit felonies or serious misdemeanors. Generally, solicitation was punished as a misdemeanor. Today, some states limit the crime of solicitation to serious felonies only. Others provide for degrees of solicitation, the various degrees depending on the seriousness of the crime solicited.

The Model Penal Code, however, does not limit the crimes that can be the object of solicitation. Rather, it is an offense to solicit *any* crime, but soliciting someone to commit a “violation” is *not* punishable. In addition, the MPC punishes solicitation as severely as the crime solicited except that the solicitation of a capital offense or first-degree felony is punished as a second-degree felony. (MPC §5.05(1).) This is consistent with the MPC’s primary focus on the dangerousness of an offender rather than on how close he actually comes to committing the intended crime.

There are several interesting wrinkles to solicitation, but they are best discussed later.

DEFINITION

The Common Law

The common law defined solicitation in general terms. The defendant must have acted with the specific intent that another person commit a crime and she must have enticed, advised, incited, ordered, or otherwise encouraged the person to commit a crime. It was not necessary for the person solicited to agree to commit the crime, let alone that the solicited crime be attempted or committed.

Because solicitation sets the threshold of criminality so early, some state statutes require corroboration of the testimony of the person claiming he was solicited. This evidentiary safeguard helps prevent convicting someone based on a misunderstanding or on a false accusation.

The Model Penal Code

Under §5.02 of the MPC, a person is guilty of solicitation if, "with the *purpose* of promoting or facilitating its commission he *commands, encourages* or *requests* another person to engage in *specific conduct* that would constitute such crime or an *attempt* to commit such crime or would establish his *complicity* in its commission or attempted commission" (emphasis added). The MPC definition has been influential in shaping state solicitation laws.

The MPC definition is similar to the common law but applies to the solicitation of any crime, not just felonies or serious misdemeanors. Also, unlike the common law, which only applied to the solicitation of another to act as a principal in the first degree (see Chapter 14), the MPC also includes any encouragement that would generate responsibility as an accomplice.

Thus, a typical common law case of solicitation might involve the solicitor asking a hired gunman to kill a particular victim. Here the defendant would be an accomplice (accessory in the second degree) and the gunman would be the principal in the first degree. Under the MPC, the defendant would also be guilty of solicitation. However, under the MPC, the defendant could also commit solicitation if he encouraged the

gunman to sell him a weapon with which the defendant himself could kill the victim. This would constitute solicitation under the MPC because the defendant has encouraged the gunman to become an accomplice.

Another Version of Solicitation

Some states have adopted a different definitional approach to solicitation. Under this approach, a defendant must not only encourage another to commit a crime; he must also offer him something of value. This requirement (somewhat similar to the requirement of consideration in contracts) ensures that the defendant is serious about his criminal purpose. It also identifies those cases in which there is an increased probability that the crime solicited will be committed because human nature responds more readily to money than it does to mere cheerleading.

THE MENS REA OF SOLICITATION

The Common Law

Like attempt, solicitation is a specific intent crime. The defendant must *intend* that the individual solicited commit a crime. The defendant must be serious about encouraging another person to actually commit the solicited crime. If he is merely thinking out loud about the possibility or joking about it, he does not have the mens rea necessary to commit solicitation. As in attempt (see Chapter 12), the defendant must have specific intent as to the conduct, results, and circumstances, even if the crime solicited is a strict liability offense.

The Model Penal Code

Under the MPC, solicitation also requires the highest possible mens rea — purpose. MPC §5.02. Thus, the defendant must desire to encourage all conduct and result elements of the crime solicited and must know or believe that all circumstance elements will be satisfied. (MPC §2.02(2)(a)(ii).) The defendant must also fulfill any additional mens rea elements of the solicited crime.

THE ACTUS REUS OF SOLICITATION

The Common Law

Through words or other conduct the defendant must entice, advise, incite, order, or otherwise encourage another person to commit a felony or serious misdemeanor. Speaking is the most common form of actus reus for this crime, but it could also take other forms, such as simply being present and applauding or cheering.

If the defendant's "encouraging words" did not, in fact, reach the individual he hoped to encourage, in some jurisdictions he could only be convicted of *attempted* solicitation (pushing the threshold of criminality back even farther).

The Model Penal Code

The defendant must command, encourage, or request another to (a) commit a crime, (b) attempt to commit a crime, or (c) become an accomplice in the commission or attempted commission of a crime. MPC §5.02(1). As mentioned earlier, the MPC specifically does not require the person solicited to act as a principal. The MPC also punishes as solicitation criminal encouragement that does not actually reach the person solicited, provided it was designed to be communicated. (MPC §5.02(2).)

THE RELATIONSHIP BETWEEN SOLICITATION AND CONSPIRACY

Solicitation is defined solely by the actor's intent and conduct. The response of the person solicited is irrelevant to the crime. In this sense, solicitation is similar to an "offer" in contracts. Whether an offer has been made does not depend on whether there has been an acceptance.

But what if the person solicited does respond to the act of solicitation and agrees to commit the crime solicited? Then, both individuals have entered into a *conspiracy*. (See Chapter 13.) Just as an acceptance to an offer forms a contract, so does acceptance of a solicitation form a conspiracy. (A person, however, cannot be convicted of both solicitation and conspiracy because the solicitation merges into conspiracy.)

RESPONSIBILITY FOR CRIME SOLICITED

Under the general principles of accessorial liability, a solicitor will be responsible for any solicited crime that is committed or attempted by the person he solicited. The common law would treat the solicitor as an accessory before the fact. Under modern principles he would be considered an accomplice. (See Chapter 14.)

In states where the statutory definition of solicitation does not cover certain crimes, a defendant who solicits another person to commit one of these crimes might be charged with an attempt. (Keep in mind that the defendant has not committed solicitation because the solicitation statute does not include the crime he solicited.) It is not clear, however, whether mere solicitation can constitute an attempt; some courts[1] (and the MPC)[2] hold that it cannot, while others hold that it can.[3] In any event, a defendant cannot be punished both for solicitation and attempt based on the same conduct.

SOLICITATION AND IMMUNITY FOR CRIME

SOLICITED

Generally speaking, the prosecutor cannot use solicitation to convict someone who could not be convicted of the crime solicited. In other words, if a person could not be charged had they personally done the conduct they were soliciting, they cannot be charged with solicitation. Thus, a customer who seeks the services of a prostitute cannot be convicted of *soliciting* prostitution if the prostitution statute only punishes the prostitute's behavior. The law assumes that the legislature did not intend to punish the customer's conduct. To permit the customer's conviction under a general solicitation statute would undermine the public policy clearly reflected in the prostitution statute.

However, there are cases that require an exception to this general policy. For example, at common law a husband could not rape his wife. (See Chapter 9.) If, however, he encouraged another person to rape his wife, the husband could be convicted of solicitation even though he could not have committed rape as a principal in the first degree.

SOLICITATION AND INNOCENT AGENTS

Sometimes a defendant may trick an innocent agent into committing a crime. For example, a daughter might substitute poison for the medicine her mother is supposed to take and ask a home caregiver who is ignorant of the switch to administer the fatal "medicine." This is not a case of solicitation because the defendant does not intend that another person knowingly commit a crime. Instead, she is using an innocent agent (i.e., someone who, through no fault of her own, is unaware of the nature of her conduct and who does not intend to commit a crime) as the means to commit murder.

A defendant who activates an innocent agent has committed an *attempt* rather than *solicitation* because she has done her "last act," which was designed to commit the crime. If the innocent agent actually does what the defendant wants her to do, then the defendant is guilty of the crime as a *principal*. (See Chapter 14.)

IMPOSSIBILITY

The Common Law

Legal Impossibility

Common law, true legal impossibility is a defense to a charge of solicitation. A person does not commit solicitation by encouraging another to do something that is not a crime. Thus, an individual, who erroneously believes that it is a crime to dispense birth control information on public school property and encourages another person to engage in that conduct, has not committed solicitation because she has not encouraged another person to do anything that is a crime. (See our discussion of legal impossibility for attempt in Chapter 12. The same rules apply here.)

Factual Impossibility

Factual impossibility will seldom occur in cases involving solicitation because the threshold of criminality is set so early that the offense is complete once the defendant has purposefully encouraged another to commit a crime. The law is usually not concerned with how the crime was to be committed or whether it could be committed successfully.

Occasionally in real life (and more frequently in criminal law exams), however, the solicitor is very particular about how he wants the crime committed. And, it turns out, due to facts or conditions unknown to the solicitor, the crime cannot be committed.

The Model Penal Code

As we shall see with attempt (in Chapter 12), the MPC looks unkindly on impossibility. The MPC would not convict the defendant only in cases of true legal impossibility — that is, where there is no law prohibiting the conduct solicited. In that situation, the prosecutor would not be able to prove that the defendant encouraged another person to commit any particular crime. She could only prove that the defendant

had shown a willingness to break the law but not a particular law.

In cases of factual impossibility, the MPC simply assesses the defendant's responsibility based on what he thought the facts were. Recall that the MPC is more concerned with the dangerous attitude of the offender and the need to prevent future crime than actually seeing how close an offender comes to causing harm.

ABANDONMENT

It is unclear whether the common law permitted a change of heart on the solicitor's part to avoid criminal responsibility.[4] At the very least, the solicitor would probably have to communicate his change of heart to the person solicited and perhaps even ensure that the crime was not committed. On the other hand, the common law did not permit the defense of abandonment (renunciation) to an attempt charge, so it might not favor using abandonment as a defense to solicitation.

The MPC expressly provides for the affirmative defense of abandonment to a charge of solicitation. MPC §5.02(3). There are two requirements. First, as in conspiracy (see Chapter 13), the defendant must either persuade the person solicited not to commit the crime or else prevent its commission. Second, his renunciation must be "*complete* and *voluntary*." As in attempt, renunciation must be due to a sincere change of heart rather than a discovery that the offense is more difficult to commit than anticipated or that detection is more likely. These are the same requirements for renunciation of an attempt, except that, because another person is involved, the defendant must take steps to prevent that person from committing the offense, thereby stopping what the defendant has put in motion.

From a policy perspective, permitting the defense of renunciation may encourage criminals to break off their planned criminal activity, thereby preventing harm to both the victim and society. The defendant may also not be as dangerous as initially thought if he is willing to change his mind for the right reasons. Several states have adopted the defense of voluntary renunciation by statute.[5]

SOLICITATION AND LAW ENFORCEMENT

The police often catch criminals by providing them with the opportunity to commit crimes, particularly “victimless crimes” such as drugs, prostitution, and gambling. Thus, undercover officers may solicit prostitutes or try to buy or sell drugs. Much of what law enforcement officers do would be criminal solicitation if done by ordinary citizens. Usually, statutes specifically authorize police officers to engage in conduct that would otherwise constitute solicitation in the interests of detecting criminal activity and arresting criminals. Even in the absence of such a statute, the officers could argue justification for their conduct. (See Chapters 15 and 16.)

Such police activity, however, is not without controversy. Some argue that the police should detect crime, not manufacture it. As we shall see later, defendants often raise the defense of entrapment when caught by this type of police activity. (See Chapter 17.)

PUNISHMENT

The Model Penal Code frowns on cumulative punishment of essentially the same conduct. Thus, though a solicitor will be liable as an accomplice for the crimes committed by the person solicited (assuming the person solicited commits these crimes), the solicitor cannot be punished both for solicitation and (1) the crime solicited; (2) an attempt by the person solicited; and (3) conspiracy with the person solicited to commit that offense. (MPC §§1.07(1)(a), 1.07(4)(b), and 5.05(3).) Solicitation is a lesser included offense to the crime solicited. (MPC §1.07.) Moreover, a person can be convicted of only one Article 5 offense — attempt, solicitation, *or* conspiracy — for conduct designed to culminate in the commission of the *same* offense.

Examples

1. It’s the final game of the World Series, with bases loaded in the bottom of the ninth inning, two outs, and the Los Angeles Dodgers

leading the Chicago Cubs 3-2. The last Cubs batter is up, and the count is three balls and two strikes. The Dodger pitcher glares at the batter, goes into his windup, and throws a pitch that to most observers is clearly a ball. But the umpire raises his right hand, calls, "Strike 3, you're out," and the Dodgers win the series. A livid Cubs fan yells at the top of his voice: "Kill the umpire!" Can he be charged with solicitation?

2. In the motion picture *Becket,* Henry II, upset with Thomas à Becket's opposition to his expansion of royal jurisdiction, cries out in a drunken stupor: "Will no one rid me of this man?" Subsequently, one of the listeners in fact kills Becket. Did Henry solicit the murder of Thomas à Becket under the common law or the MPC?

3. Liz, a nondrinker, joins Jen, Stephanie, and Megan on the patio of a bar and grill for happy hour. The others each have a couple of drinks. Sipping only water, Liz says: "It would be so easy to 'dine and ditch' — this place is packed." Jen replies: "I have no problem with you all taking off, but I will quietly leave what I owe on the table." After Jen does that, they all get up and casually stroll out to the sidewalk and leave without paying. Can Liz or Jen be charged with any crime?

4. Professor Zoey, an academic in New Jersey, angry at Professor Nerd in Illinois for some unforgivable academic put-down, contacted Mad Max the mad bomber on the Internet, asking him to send one of his infamous fatal explosive devices to Dr. Nerd. Unknown to Professor Zoey, Mad Max had already been arrested and sent to prison for mailing such a device to someone else. Only the police read Professor Zoey's message. Can Professor Zoey be charged with any crime?

5. Amy desperately wanted the job of her boss, Rebecca. Her only hope was getting Rebecca fired. Amy asked Sam, a seriously mentally ill individual who did not know the difference between right and wrong, to injure Rebecca so that Rebecca could no longer work, and her position would need to be filled (hopefully by Amy). Sam listened to Amy, then got on a bus and left town. Can Amy be

convicted of any offense?

6. Fred was drinking at the Spar Tavern with José. José leaned over to Fred and said, "I've taken enough trash talk from Wilson, who is standing over there at the bar. I'm going right over there now and hit him upside his head and teach him not to 'dis' me anymore." Fred replied, "That's a great idea. I think Wilson deserves it. Go ahead and unload on him!" José got up, went over to Wilson, and taking another look at just how big Wilson really was, decided not to punch him after all. Has Fred committed any crime?

7. Angry because her red Tesla was stolen recently and because it was not insured against theft, Harriet asked Ozzie to steal the red Tesla she saw every day being charged in the Safeway parking lot far across town. Rather than steal that car, Ozzie, who had already been charged with several car thefts, struck a deal with the police and told them about Harriet. Harriet was arrested. Upon further investigation, it turned out that, unknown to her, the car she wanted Ozzie to steal was actually Harriet's own previously stolen red Tesla. Can Harriet be charged with any crime?

8. Yvonne works in a fashionable dress shop in a suburban shopping mall. She craves a great dress in the window but knows she will probably be caught if she takes it without paying for it. So Yvonne asked her good friend Yolanda to shoplift it for her and told her how to do it without getting caught. Yolanda agreed to snatch the dress during the busy Saturday afternoon shopping period.

   Thursday evening Yvonne changed her mind out of true remorse. She called Yolanda to tell her that she did not want Yolanda to go through with the shoplifting plan. Yolanda was not home, however, so Yvonne left a voicemail message to this effect on Yolanda's phone. Unfortunately, Yolanda never checks her voicemails and was arrested while trying to steal the dress that Saturday. Would you charge Yvonne?

9. Billy, a struggling college student, decided to sell marijuana over the weekend to make enough money to pay the rest of his tuition due Monday. Lisa, Billy's best friend, knew that Billy had been stressed about money and wanted to take his mind off of his

problems. Lisa told Billy about a party happening Saturday night. At first, Billy was hesitant about going to the party because he knew he needed to sell the marijuana over the weekend. Lisa encouraged Billy to go by telling him, “There will be a lot of people there having fun and letting loose. It will do everyone some good to have some drinks and maybe even smoke some weed.” Billy realized that this would be an excellent setting for him to sell marijuana. Lisa was right; there were lots of people drinking and smoking at the party. In fact, Billy was able to make enough to pay his tuition and have a little left over for his textbooks. Could Lisa be charged with solicitation? Would your answer change if Lisa knew that Billy had been planning on selling marijuana over the weekend?

Explanations

1. If the Cubs fan actually intended to encourage someone else to kill the umpire, then he could be convicted of solicitation — even if no one actually acted on his encouragement. In some states he would be punished just as severely as the individual who actually did kill the umpire. Under the MPC, solicitation of a capital offense or a felony in the first degree would be punished as a felony in the second degree. In the context of American sports, however, it is extremely unlikely that any jury (especially a Chicago jury!) would conclude that the defendant actually spoke those words with the intent of encouraging someone to kill the umpire. (For a discussion of the fan’s liability if someone actually does kill the umpire as a result of the shout, see Chapter 14.)

2. Because solicitation was not fully developed until the nineteenth century, Henry could not be convicted of solicitation. (Sorry, but we wanted to make sure that you were also paying attention to the history!)

   However, under both late common law and the MPC, the analysis would essentially be the same. Did Henry act with the necessary mens rea for solicitation? Did he speak with the *specific intent* or *purpose* of encouraging someone to murder Becket? If he did, then at that moment he committed solicitation even if none of

his listeners accepted the challenge. Upon commission of the murder, Henry would also become an accessory before the fact under common law or an accomplice under the MPC and would be criminally responsible for murder along with the person solicited. (This assumes that there would be a sheriff foolish enough to arrest and charge Henry!)

3. Liz's statement may have been only an observation made without the aim of encouraging her friends to commit theft. However, since the group acted on her statement and Liz raised no objection, a jury could conclude that her words were said with the *purpose* of encouraging her friends to commit this crime even though Liz, herself, owed nothing and did not commit theft. Jen may argue that she paid her portion of the bill and that this demonstrates she did not approve of such conduct. Furthermore, Jen will argue that Liz came up with the idea and that Liz and Stephanie had already formed their intent to commit the crime. But a jury could find that Jen's words were spoken with the intent to reinforce Liz's, Megan's, and Stephanie's decision to leave the bar without paying. The prosecution's case against Liz seems stronger than against Jen.

4. Under the common law, Professor Zoey has committed attempted solicitation. In states that only require the solicitor to try to encourage someone else to commit a crime by communications designed to reach that person, Professor Zoey has committed solicitation.

   Under the MPC, Professor Zoey has committed solicitation because his communication was sent with the purpose of encouraging Mad Max to send his fatal explosive device to Dr. Nerd, and it was designed to reach Max. Professor Zoey would be punished just as severely as the crime he solicited (probably arson or murder), even though he did not come close to causing either of these serious harms and even though an intervening moral agent (okay, it was only Mad Max) with free will would have had to choose to commit a crime. The MPC is concerned with individuals who have demonstrated their dangerous attitude, if not their skill. This is also one of the few times when the criminal law *does* impose responsibility for conduct beyond the last responsible

human being.

Professor Zoey might try to argue factual impossibility because Max never received his message and, in any event, was otherwise indisposed. This would fail under both the common law and the MPC because Professor Zoey's responsibility would be assessed based on the facts as he *believed* them to be.

5. Amy deliberately encouraged Sam to commit a serious assault. However, because Sam is legally insane (see Chapter 17), he is not a responsible agent and could not be convicted of the offense solicited (had he committed it). Because Amy has used an "innocent agent," she is guilty of attempted assault under the common law. In effect she has committed her "last act."

   Under the MPC, Amy has probably committed solicitation. The MPC focuses on the defendant's attitude rather than on the legal responsibility of the person solicited.

6. When Fred spoke these words with the purpose of reinforcing José's resolve to commit the assault, Fred solicited José to commit an assault on Wilson under both the common law and the MPC. This is true even though José had already formed the intent to commit the assault and even though José did not, in fact, commit the solicited crime. A person can commit solicitation even if he does not come up with the idea initially and even if the person solicited changes his mind and never commits the crime.

7. Under both the common law and the MPC, Harriet could probably be convicted of solicitation in this case because she encouraged another to engage in conduct with the intent of having him commit a crime. The crime is complete as of that moment. How it was to be done is not the concern under solicitation.

   Harriet might raise the defense of legal impossibility, claiming she could not solicit anyone to steal *her own* property. However, this is really a case of factual impossibility because there is a law against stealing cars. Thus, Harriet's criminal responsibility is determined by the facts as she *believed* them to be.

8. The common law probably did not provide the defense of abandonment so Yvonne has committed the crime of solicitation

even though she changed her mind for the right reasons.

The MPC does authorize the affirmative defense of renunciation, provided that the defendant's decision is voluntary and complete and provided that the defendant either persuades the person solicited not to commit the crime or otherwise prevents the commission of the crime. Unfortunately, Yvonne did neither and therefore could be convicted of solicitation. Unlike an attempt to persuade that can establish solicitation, an attempt to "unpersuade" is not effective in establishing renunciation. Yvonne could have taken other measures such as telling the store owner, but she did not (undoubtedly because she knew she would be fired).

When Yolanda agreed to steal the dress and Yvonne told Yolanda how to accomplish the theft, Yvonne and Yolanda also committed conspiracy. (See Chapter 13.) When Yolanda attempted to commit the theft of the dress, Yvonne was also responsible for that crime as an accessory before the fact under common law and as an accomplice under the MPC. However, the MPC prevents cumulative punishment for solicitation, conspiracy, and attempt based on essentially the same conduct.

9. As seen in Example 6, a person can commit solicitation even if they do not originally come up with the idea. However, Lisa still needed to have the requisite mens rea for solicitation. Did Lisa speak with the *specific intent* or *purpose* of encouraging Billy to sell marijuana at the party? Regardless of whether Lisa knew of Billy's plan to sell marijuana over the weekend, Lisa's statements were not made with the intent or purpose for encouraging Billy to sell marijuana at the party. Lisa simply encouraged Billy to go to the party to take his mind off of his money troubles. Because Lisa did not have the requisite mens rea, she cannot be charged with solicitation.

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1. *Gervin v. State*, 212 Tenn. 653, 371 S.W.2d 449 (1963).
2. Model Penal Code and Commentaries, Comment to §5.02 at 369 (1985).
3. *Ashford v. Commonwealth*, 626 S.E.2d 464 (Va. App. 2006); *United States v. May*, 625 F.2d 186 (8th Cir. 1980).
4. Evidently, no appellate court has ruled on this question. W. La Fave, Criminal Law 575 (4th ed. 2003).
5. W. La Fave, Criminal Law 575 (4th ed. 2003).

CHAPTER 12

Attempt

OVERVIEW

Not every criminal succeeds at crime. Some try their best but fail; others change their mind and stop short of their initial goal. Some are even caught before they can complete their crime. *Attempt* punishes offenders who intend to commit a crime (referred to here as the "target" crime) and act to implement that intent, but do not achieve their goal.

Attempt is an important law enforcement tool. Police can prevent crime by arresting an offender before he actually commits his target crime. (This is why attempt is sometimes called an *inchoate* or uncompleted crime.) Attempt also enables the criminal justice system to punish individuals who have acted on their criminal intentions and are dangerous.

Attempt is a crime of recent origin in the common law. Initially, it was usually a misdemeanor. Today, the seriousness of an attempt and its punishment generally depend on the seriousness of the crime attempted. Attempt often carries a lighter penalty than the target crime because the offender has done less harm than a successful criminal. However, except for capital offenses and felonies of the first degree, the Model Penal Code punishes attempt just as severely as the crime attempted because it considers an unsuccessful criminal just as dangerous as a successful one.

If an offender successfully completes the target offense, he cannot also be convicted of an attempt. Attempt is a lesser included offense of the crime attempted and will merge if the prosecution proves the completed offense.

DEFINITION

In general, attempt punishes a defendant because he intended to commit a particular crime and took a significant step to commit it. Most jurisdictions have a single attempt statute phrased in general language that is used to prosecute all attempt crimes. (Otherwise, the legislature would have to enact a separate attempt provision for each substantive crime, creating a much larger and more cumbersome criminal law.) Because this single statutory definition of attempt must be used for so many target crimes, legislatures usually use very broad and abstract language. As a result, many state statutes do not define attempt very carefully, and often courts must interpret these laws to provide a more useful legal definition.

Some state laws make what would ordinarily be considered an attempt into a completed offense. For example, burglary is a form of inchoate crime because it punishes conduct that is preliminary to the commission of the real criminal goal. Thus, a typical burglary statute proscribes "*entering a building* with intent to commit a crime against a person or property therein." Many states push the threshold of criminality back even farther. They prohibit the mere possession of burglar tools, even though the defendant has not used the tools to enter a building, let alone commit a crime against people or property inside. Other statutes define assault as "an attempted battery." Thus, trying to punch someone and missing may be punished as a completed assault rather than an attempted battery.

The Mens Rea of Attempt

The mental state is the intent to commit the target crime. Because attempt does not require successful completion of a crime, the mens rea of attempt is usually more demanding than the mens rea of the crime attempted.

The Actus Reus of Attempt

Criminals often think about committing a crime. They may even take some preparatory steps that will make it easier to commit a crime sometime in the future. Finally, they may actually implement their criminal purpose and begin to commit a crime.

The criminal law does not punish for thoughts alone. (See Chapter 3.) When, however, does a person cross the dividing line between thinking and preparation on the one side, and actually committing an attempt on the other? The definition of the actus reus of attempt draws the line between noncriminal and criminal behavior. Drawing this line early may prevent more crimes and catch more dangerous people, but it may also increase the risk of convicting people who would change their mind. The common law generally drew this line quite late; the MPC draws it much earlier.

THE COMMON LAW

Mens Rea

The defendant must have the same state of mind required for conviction of the target offense. Because attempt is a specific intent crime at common law, the defendant must also *intend*

1. to *do the act*
2. to *accomplish the result*
3. *under the same circumstances*

that would be required for conviction of the target offense.

Intend the Act

This specific intent requirement means that a person cannot commit an attempt recklessly or negligently. He must, at the very least, intend the act. Some cases suggest, however, that it is possible to attempt a crime that only requires an act done with recklessness or even negligence. Thus, a person who knows that his car brakes do not work might commit

attempted reckless driving if he gets into his parked car and starts it, intending to drive it on the streets. However, because he does not actually drive the car, he cannot be convicted of reckless driving.

Intend the Result

To be convicted of attempting a crime that has a result element, the defendant must intend the result. A defendant who drives his car so dangerously that he kills someone may be convicted of murder or vehicular homicide because his risk-creating behavior has resulted in death. If, however, the same defendant struck the victim while driving in the same reckless way but did not kill him, he cannot be convicted of attempted murder or attempted vehicular homicide because he did not intend the death.

Intend the Circumstances

Likewise, the defendant must know the circumstances of the target offense — even if strict liability applies. Thus, an adult, who had intercourse with a juvenile under the age of 16 erroneously believing she was 18, could be convicted of statutory rape. If, however, the same adult were arrested moments before having intercourse with this juvenile, he could not be convicted of attempted statutory rape because he did not *intend* the juvenile to be under 16.

Actus Reus

Common law definitions of actus reus varied, but generally they required behavior that provided strong evidence of a criminal intent and that came quite close to completing the target offense.

Last Act

The "last act" test is very favorable to the defendant. He must have taken the very last step within his power to commit the target offense.[1] Only

after the actor had taken the last step and events were out of his control could the law punish him for attempt. This approach preserves a maximum opportunity for the actor to change his mind (often called *locus penitentiae* or "opportunity to repent"), while also requiring very strong evidence of criminal intent. A professional killer who shoots at his victim intending to kill him has committed the last act. Whether he succeeds is now out of his control.

When the "last act" has occurred, the attempt is considered a "complete attempt."[2] This means that the actor completed all steps required for the crime to take place, but, for whatever reason, the result did not happen. Completed attempts are easier to identify than "incomplete attempts." The following tests analyze incomplete attempts and draw lines between incomplete attempts and mere preparation.

The Equivocality Test

Some courts and commentators have argued that the actus reus of attempt should *by itself* unquestionably show that the actor is trying to commit a crime.[3] Otherwise, the defendant's behavior is merely "equivocal" — that is, it is consistent with *either* innocent *or* criminal purpose. This can also be referred to as the *res ipsa loquitur* test — Latin for "the thing speaks for itself."[4] This test is also quite favorable to defendants. Under this approach the prosecutor may not use any other evidence, such as a confession, a diary, or other statements, to demonstrate that the actor was implementing a criminal design. (This has sometimes been called the "manifest criminality" approach.[5]) Thus, someone who lights a pipe with a match and then drops the match in a haystack in a barn may be simply careless or trying to set the barn on fire. Without additional evidence, it is not clear if he was trying to commit a crime. The equivocality test can be very difficult for the prosecution to satisfy.

Supporters argue that this test maximizes the sphere of liberty in which an individual is free from government interference. Critics claim it damages effective law enforcement and permits dangerous individuals to remain at large because the police can only arrest the actor at the last possible moment because virtually no preparatory act is unequivocal.

Proximity Test

Still other courts used a more flexible definition of actus reus known as the "proximity test." It did not require the defendant to take the last step or to do an unequivocal act before an attempt had been committed. Instead, it allowed the jury to weigh several factors, including the seriousness of the offense, community resentment, and closeness in space and time to completing the crime.[6] This test provided flexibility but also created uncertainty about when an attempt occurred. Some courts required the actor to get physically close to the intended victim or to set in motion a chain of events that created a high probability that the crime would be completed. Other courts have permitted conviction on behavior more remote from the result.

Probable Desistance

Some courts have used the "probable desistance" test. Only an act that would normally be sufficient to result in the commission of a crime "but for" the intervention of some outside person or event is sufficient for the actus reus of attempt.[7] This definition considers whether an ordinary, law-abiding person would probably have changed his mind and broken off from the criminal course of conduct. A terrorist who checked a bag armed with a sophisticated explosive device designed to explode when an airplane reaches 30,000 feet has probably satisfied this test. Although he could still change his mind after checking the bag and warn the authorities, it is unlikely, given the preparation required and his motivation, that he would reconsider.

This test has been criticized because it encourages speculation. How should a jury decide if most law-abiding people would have had a twinge of conscience and stopped? More to the point, a law-abiding citizen does not commit crimes!

In sum, the common law generally required the defendant to engage in behavior that provided strong evidence of his criminal intention and also came close to the commission of the target offense before his conduct satisfied the actus reus requirement of attempt.

THE MODEL PENAL CODE

Definition

The Model Penal Code definition of attempt is, in sharp contrast to the common law, very specific but also very long and complex. (MPC §5.01.) In general terms, a person commits an attempt under the MPC if, acting with the same state of mind otherwise required for commission of the target offense, he *purposely* does an *act* and *purposely* causes (or believes he will cause) the *result* under the same *circumstances* required by the target offense and he takes a *substantial step* to commit the crime. A "substantial step" is conduct that is "strongly corroborative of [a defendant's] criminal purpose."

Mens Rea

The MPC takes the following approach to the mens rea (i.e., culpability) required for attempt:

Conduct

The MPC requires that the defendant must *purposely* engage in all elements of conduct made criminal by the crime attempted. (§5.01(1)(a).)

Result

The MPC expands the mens rea of attempt slightly beyond the common law approach where causing a particular result is an element of the crime attempted. The MPC permits conviction for attempt if the defendant acted with the purpose or *belief* that his act would cause a particular result. (§5.01.1(1)(b).)

Circumstance

The MPC approach to circumstance is different than that of the common law. Unlike the common law, which required that the defendant *know* the circumstances of the target offense, the MPC provides that, for these elements, the mens rea of the target offense controls. Thus, whatever mens rea toward circumstances is required by the target crime will also be required for an attempt under the MPC. Though the language of the MPC is not as clear as it could be on this point, the commentaries state that the drafters intended this approach.

The statutory rape example given above for the common law would have a different result under the MPC. An adult who intended to have intercourse with a 16-year-old female, erroneously believing she was 18, could be prosecuted for committing attempted statutory rape if arrested just before the act because age is a strict liability circumstance element of the target offense.

Actus Reus

The MPC requires that the actor take a *substantial step* before she can be convicted of an attempt. A "substantial step" must be "*strongly corroborative* of the actor's criminal purpose." (MPC §5.01(2).) The MPC emphasizes the dangerousness of the offender based on her criminal determination rather than on how close she is to committing the target offense.

The MPC lists several types of behavior that are *legally sufficient* to prove a substantial step.[8] These include searching for the victim, reconnoitering the crime scene, unlawfully entering a building where the defendant contemplates committing the crime, possessing tools or instruments necessary for committing the crime near the crime scene, or soliciting an innocent agent to do an element of the crime. Unlike the common law, the MPC definition focuses on what the defendant has done rather than what remains to be done. The prosecution also can use evidence other than the substantial step to prove mens rea, including confessions, diaries, and other proof relevant to the actor's state of mind.

In contrast to the common law, the MPC does not require much of an actus reus before a defendant may be convicted of an attempt. Thus,

it sets the line between preparation and attempt quite early and expands the authority of the police to nip crime in the bud.

The MPC definition of a "substantial step" has been very influential, and many states have adopted it. Even when the federal or state statutes have not defined the actus reus requirement for attempt, courts often use the MPC approach to interpret the attempt statute in their jurisdiction.[9]

SUMMARY

Mens Rea

Analyze the defendant's mens rea using the following steps:

1. Did she act with the same mens rea required by the crime attempted?
2. *Common law*: Did she also *intend* to commit the *act* and to cause the *result* and intend the same *circumstances* as required by the crime attempted?
3. *MPC*: Did she have
   a. the purpose to do all the *conduct* elements of the target offense?
   b. the purpose to cause the *result* (or believe she would cause the result) of the target offense?
   c. the same mens rea toward the circumstance elements as required by the target offense?

Actus Reus

Analyze the defendant's actus reus using the following steps:

1. *Common law*: Did the defendant's act satisfy the applicable test:
   a. *last act* — did the defendant do everything that he could do and is the result now beyond his control?
   b. *"equivocality test"* — would reasonable people, observing only the defendant's conduct, necessarily conclude that he was trying to commit a crime?

   c. *“proximity test”* — in light of the seriousness of the offense and the scope of possible harm, did the defendant come close in space and time to completing the offense?
   d. *“probable desistance”* — did the defendant’s conduct start a chain of causation sufficient to result in the commission of the completed offense unless another person or event would prevent it? Would a law-abiding person likely have changed his mind?

2. *MPC*: Did the defendant’s behavior *strongly corroborate* his criminal purpose? If he searched for his victim, familiarized himself with the crime scene, unlawfully entered a building where he thought he might commit the crime, had special tools essential for committing the crime, or solicited an innocent agent to commit the crime, a jury *could* (but is not required to) find him guilty of an attempt.

ABANDONMENT

The Common Law

The common law did not allow the defense of abandonment. Once a defendant had crossed the line dividing preparation from implementation and had committed an attempt, he could not go back. Of course, if the actus reus test used requires the defendant to be so close to completion before an attempt has occurred, there will probably be no appreciable time left in which to abandon. If, for example, the defendant is guilty of an attempt only after he has pulled the trigger (the last act in his control), he has only a nanosecond to abandon and shout a warning to the victim.

Some states, however, allow a defendant to prove that, though he actually committed an attempt, he subsequently *abandoned* his criminal purpose. The defense is available only if the defendant changed his mind through genuine remorse and not because the risk of arrest or difficulty of committing the crime was greater than anticipated. Though arguably permitting the acquittal of someone who has demonstrated a willingness

to engage in criminal conduct, the defense may encourage criminals to change their mind and not complete the crime, saving both the victim and society from more serious harm. Generally, abandonment is an affirmative defense that the defendant must establish by a preponderance of the evidence.

The Model Penal Code

Under the concept of "renunciation," the MPC permits the defendant to introduce evidence that he "abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." (MPC §5.01(4).) Thus, the defendant must give up his criminal goal or prevent its successful commission. The use of renunciation is strictly limited.

First, the defense is available only when the target offense has a *result* (§5.01(2)) or *circumstance* (§5.01(3)) as a material element. It is not available when *conduct* is the only material element of the target offense because, once the defendant has completed the criminal conduct, the harm has been done and there is nothing for him to abandon. Only outside forces have prevented successful completion of the target offense.

Second, it must be *voluntary*. The defendant must *not* have changed his mind because it was *more difficult* to commit the crime than he originally anticipated.

Third, it must be *complete*. Basically, the defendant must not have decided to wait for a better time or opportunity.

The Code's adoption of an abandonment claim is almost surely the quid pro quo for moving the time frame of attempt back earlier than the common law tests allowed. Thus, if the defendant intends to rob a bank in one month and reconnoiters it today, he could be convicted of an attempt under the Code (but not under the common law). If we want the defendant to abandon his intent between now and next month, we must provide him with some inducement for doing so. The Code's provision does so.

See Table 12.1 for a summary of the law of attempt.

IMPOSSIBILITY: LEGAL, FACTUAL, AND INHERENT

Despite their best efforts and for reasons beyond their control, criminals sometimes do not commit the crime they set out to commit because — it turns out — it is *impossible* to commit the crime. What, if anything, should the criminal law do in such cases? Consider these examples. An individual smuggles a prescription drug into the country thinking it is against the law, but there is no criminal law forbidding the importation of this particular drug. A pickpocket tries to pick someone's pocket, but there is nothing in the victim's pocket. A hunter shoots at a stuffed deer out of hunting season. In *some* cases, the criminal law uses *attempt* to punish the offender. In other cases, using the doctrine of *impossibility*, the criminal law does not punish the actor.[10]

The Common Law

At common law, there were two kinds of impossibility: factual and legal. Legal impossibility was a defense; factual impossibility was not. This means a law student must know the difference. Unfortunately, impossibility is a very complex and confusing area.

Legal Impossibility

Consider a defendant who engages in conduct (such as smuggling a new abortion pill into the United States), thinking it is a crime when, in fact, there is no law making it a crime. This is a case of true legal impossibility under the common law, and the defendant could not be convicted of an attempt. Though the defendant has shown himself willing to break *the* law, he has not broken any *particular* law. Thus, he could not have the mens rea required to attempt a particular offense.

As we saw earlier in the mistake of law section, a belief that conduct is not against the law usually does not excuse behavior if it is a crime. (See Chapter 5.) In legal impossibility, a belief that conduct *is* against the law does not make the conduct criminal if there is no law prohibiting

that conduct.

Factual Impossibility

Factual impossibility occurs when the defendant, despite his intentions, could not complete his intended crime because of facts or conditions unknown to him or beyond his control. Thus, a defendant can be convicted of attempt even though it was factually impossible for him to accomplish his goal.

Consider a defendant who, in violation of a specific statute, tries to sell foreign abortion pills to an undercover police officer and is arrested in a sting operation. After the pills are tested, it turns out that, although the defendant *thought* he was selling the foreign abortion pills, he had been duped by his supplier and had *actually sold* sugar pills. This would be a case of *factual* impossibility. Because of facts unknown to the defendant (the pills were sugar), he did not succeed in selling foreign abortion pills. However, he could be convicted of an *attempt* to sell the proscribed pills.

12.1 The Material Elements of Attempt

ATTEMPT — COMMON LAW

Thinking MENS REA	**Preparing**			**Doing ACTUS REUS**		
1. Same mens rea as target offense ± 2. Intent to i) do the same act ii) accomplish same result iii) know the same circumstances as target crime	**C R I M I N A L**	**“Proximity Test”** (close in space and time *or* set forces in motion with high probability of completion)	**“Probable Desistance”** (law-abiding person would have broken off)	**“Unequivocal Act”** (clearly manifests criminal purpose)	**“Last Act”** (beyond’s *D*’s control)	**Abandonment Not Permitted**

ATTEMPT — MPC

CULPABILITY SUBSTANTIAL STEP			
1. Same culpability as target crime	**T H R**	1 . “Strongly corroborates” criminal	**Abandonment Permitted If** 1. Volutary

± 2. Purposefully engages in conduct ± 3. Purposefully causes result *or* believes result will ensure ± 4. Same culpability toward circumstances as target offense	**E** **S** **H** **O** **L** **D**	purpose	renunciation and 2. Complete renunciation

Analysis

Unfortunately, it is not always easy to tell whether a case is one of legal or factual impossibility, and sometimes courts reach different results in similar cases.

People v. Jaffe[11] is a well-known example of a court's confusion and reluctance to convict someone for trying to commit a crime although, through no fault of his own, he did not succeed. The police, running a "sting" operation, had sold the defendant goods that had at one time been stolen but had since been recovered. The defendant *believed* he was purchasing stolen property. Charged with buying or receiving "any stolen property *knowing* the same to have been stolen" (emphasis added), the defendant was convicted of an *attempt* to commit that crime.

New York's highest court reversed the conviction. It concluded that the defendant could not *know* the property he possessed was stolen if, in fact, it was *no longer* stolen. The court essentially said that the defendant could not *know* something that was not true (even though he *believed* it to be true). Because the defendant could not be prosecuted for *knowingly* "buying or receiving stolen property," the court held that the defense of *legal* impossibility prevented his conviction for *attempted* buying or receiving property knowing it was stolen.

This case and the reasoning supporting its conclusion have been much criticized. The majority characterized this as a case of *legal* rather than *factual* impossibility because the defendant was mistaken about the legal status of the property; that is, it was no longer stolen. To convict

the defendant of the target offense, the prosecution would have to establish that the property was stolen. Thus, this "legal fact" (see Chapter 5) is a circumstance element of the target crime, and the court should have characterized this as a case of factual impossibility.

The confusion generated by the doctrine of impossibility has been made worse by some commentators and some court opinions that determine what an actor *intended* by what he *did*. Consider a defendant who shoots at a human silhouette behind a window shade intending to kill the person he thinks is standing there. It turns out that there is only a mannequin placed there by the police to create the illusion of a human body. Some commentators (and even some courts) conclude that what the defendant *did* in fact — shoot at a mannequin rather than at a human — is what he *intended* to do. This is a very unusual interpretation of what "intent" means in the criminal law. It equates mens rea with actus reus (he intended what he did) rather than trying to determine what mental activity was occurring in the actor's mind when he performed the actus reus.

The current trend in the criminal law is to focus on what the defendant *thought* he was doing rather than on what it turns out he actually did. If there is no law making what the defendant intended to accomplish a crime, then it will be a case of legal impossibility. Otherwise, most cases of this sort will involve factual impossibility, which is not a defense to attempt. The only question remaining then is whether the defendant's conduct satisfies the actus reus requirement of attempt.

Inherent Impossibility

What, if anything, should be done with an individual who wants to kill her rival for a loved one's affections but uses means that are inherently unlikely to accomplish the intended result — say, sticking pins into a voodoo doll? Though the defendant clearly has a dangerous attitude and has acted to implement her criminal intent, she may seem to some so hopelessly inept as to be more worthy of pity than condemnation and imprisonment. Nonetheless, inherent impossibility was not a defense at common law. Such a defendant's best hope was the common law's demanding actus reus definitions. Many steps taken by a bungling

individual might not satisfy them.

The Model Penal Code

Legal Impossibility

The MPC does not explicitly provide a defense of legal impossibility. Instead, §5.01 requires the *prosecutor* to prove that there is a criminal statute punishing what the defendant intended to accomplish. Thus, a person who engages in behavior he *thinks* is a crime, but is not, cannot be convicted of an attempt. (Of course, the effect is the same as if the MPC *did* provide this defense!)

Factual Impossibility

Under the MPC, factual impossibility is not a defense to attempt. (§5.01.) A defendant is guilty of an attempt if he would have committed the target offense had the facts or conditions been as he *believed* them to be. Thus, in the *Jaffe* case, the defendant could have been convicted of an attempt to purchase or receive stolen property because he *believed* the property to be stolen, and he would have committed the target offense if his belief were true. Likewise, a defendant, who *believed* his victim to be alive and shot at him to kill, can be convicted of attempted murder even though the victim had already died.[12]

Inherent Impossibility

The MPC does not allow a defense of inherent impossibility. However, it does permit the court to dismiss a prosecution if the defendant's conduct was so "inherently unlikely to culminate in the commission of a crime that neither such conduct nor the actor presents a public danger." (§5.05(2).) Most such cases are probably disposed of by the prosecutor's exercise of discretion not to prosecute.

Thankfully, the MPC has simplified what had been a very confusing area of the law and the modern trend is to follow the MPC. Remember, however, that the doctrines of legal and factual impossibility occasionally bedevil prosecutors, defense lawyers, judges, and, yes, law

students (especially on criminal law exams!), even today.

Stalking

Legislatures sometimes criminally punish conduct that may appear harmless to most observers. Stalking is a contemporary example of this type of crime. It punishes an actor for repetitive behavior and/or for credible threats that cause the victim to reasonably fear serious bodily harm. Stalking may reach conduct that would not qualify as an attempt. Thus, it permits even earlier intervention by the criminal law. It is similar to "attempt" in stopping preliminary conduct from escalating into more serious violence against the target.

Supporters believe this new crime is necessary because many victims, especially women, are stalked by former spouses, friends, and even strangers who, too often, kill or seriously injure their victims. Fifteen percent of women and six percent of men are reportedly victims of stalking at some time in their lives.[13] In 2011, it was estimated that there could be as many as 7.5 million people stalked in the United States (per year? or people who have ever been stalked?).[14] Reportedly, 90 percent of all women killed by their husbands or boyfriends were stalked by them before the fatal attack.[15] Other remedies, such as prosecutions for attempt and civil protection orders, have proven ineffective in preventing behavior that creates significant fear and can lead to death or serious injury. Critics are concerned that these laws are too vague (see Chapter 1) or that they punish conduct that is constitutionally protected, including speech.

These statutes punish deliberate and repeated conduct involving visual or physical proximity to the victim (such as following or visually surveilling) or threats that would cause a reasonable person to fear for her safety. Today every state has a stalking law. Most statutes define stalking as the willful, malicious, and repeated following or harassing of another person. Some require the defendant to exhibit threatening behavior *intended* to place the victim in reasonable fear of her safety. This approach allows conviction even if the victim did not feel threatened. Others only require the prosecution to prove that the

defendant knew, or *should have known*, that his intentional course of conduct would cause fear of death or serious bodily injury in a reasonable person. This approach allows conviction for *negligence* as to result; that is, even if the defendant did *not intend* to cause such fear. Some stalking statutes exclude behavior that has a legitimate purpose or is constitutionally protected. More recently, these laws have been used to prosecute "cyberstalking," stalking, involving e-mail communications or web postings.

Stalking laws enable law enforcement to protect victims from ongoing intimidation. They also codify a specific "inchoate" offense in order to prevent a preliminary course of action from accelerating into more serious injury to the victim.[16]

Examples

1. Suzy, tired of her marriage, decided to kill her husband, Bob, and collect his life insurance. She purchased a .38 caliber pistol, took shooting lessons, and put the gun in the drawer next to her side of the bed. Pretending she heard a burglar late one evening, she induced Bob to go outside their house to investigate.
   a. Suzy shot Bob in the head, later telling the police she thought he was a burglar. Bob did not die but lived on in a vegetative state.
   b. Suzy loaded her .38 caliber pistol, sneaked out the back door, and, unknown to Bob, with finger on the trigger, aimed directly at his heart. She fired but the gun only made a loud noise. Unknown to Suzy, she had loaded the gun with blanks, thinking they were real bullets.
   c. Suzy loaded her .38 caliber pistol with real bullets, sneaked out the back door, and, unknown to Bob, with her finger on the trigger, aimed directly at his heart. Suddenly, Suzy became upset. She sneaked back inside without being detected, put her gun away, and awaited Bob's return.

2. Jim fired nine rounds from an assault-style semi-automatic rifle at the White House from a speeding car about 750 yards from the target — about the maximum effective range for this weapon. One bullet struck a bulletproof window in the first family's residential

quarters, cracking it and then falling to the ground outside. Another round was found on the lawn. Unknown to Jim, the president and his wife were out of town at the time. Jim has been charged with attempted assassination of the president. Can he be convicted?

3. Max wanted to collect fire insurance on an old tenement building he owns, which contains 25 apartments. Late one evening, he spilled gasoline in the basement and set a time-delayed fuse, which erupted into flame at 3:00 a.m. By some miracle most of the tenants escaped the resulting fire without serious harm; however, two tenants were horribly burned and almost died. He is charged with attempted murder.

4. Connor, a gang member, is selling drugs to a customer on his street corner. As Raphael, a rival gang member, saunters toward him, Connor uses a stolen gun to fire a warning shot over Raphael's head to scare him out of Connor's turf.
   a. Raphael is struck in the head by the bullet and almost dies.
   b. Raphael is struck in the head by the bullet and dies.
   c. What if Connor intends to kill Raphael, but the bullet only grazes Raphael and he dies anyway from a heart attack partially induced by "ecstasy," a street drug Raphael had just taken?

5a. Following a fight with Tong, a member of the Aces, a rival gang, Paulo, a member of the Spades, drove by the scene an hour later and fired a single shot at a group of six members of the Aces, shouting, "I'm going to kill one of you #*!#!" Fortunately, no one was injured.

5b. An hour after a fight with Tong, a member of the Aces, a rival gang, Paulo drove by the scene and threw a grenade at Tong, who was standing right next to six other members of his gang, shouting, "I'm going to kill you, Tong!" Fortunately, no one was killed even though the grenade exploded, injuring Tong and several other gang members.

6. During the course of a drug deal in New York City, Paula, thinking Reuben was trying to rip her off by selling her harmless powder as crack cocaine, shot at Reuben intending to kill him. Reuben almost died but eventually recovered. Unknown to Paula, Reuben was an

undercover state narcotics officer who was selling her real crack in a "sting" operation in order to then arrest her. In New York, first-degree murder includes acting "with intent to cause the death of another person, . . . caus[ing] the death of such person; and . . . the person was a police officer . . . killed in the course of performing his official duties." Is Paula guilty of attempted first-degree murder?

7a. Last week, Terrence, a law student about to graduate, told Dennis that he is going to "hack" into Sallie Mae's computer system and erase all of his own student loan records so he would not have to repay his humongous debt. That same day, Terrence visited websites describing basic hacking techniques (including how to penetrate computer security systems and erase files) and downloaded this information. Has Terrence committed an attempt?

7b. Yesterday, Terrence wrote a program that would penetrate Sallie Mae's website security system and obtained the remote access telephone number that would provide him entry into the site. Now?

7c. Earlier today, Terrence loaded the hacking program he had written into his computer and dialed the remote access number for Sallie Mae's website. He was met by an unexpected firewall. The system denied Terrence access to his files because he was not using a predesignated computer to access the site. The system posted: "Unauthorized attempt to access system. Please contact administrator" and listed an 800 number for assistance. Terrence quickly exited the system. Now?

8. At lunch in a bar, Joe, an undercover cop, inquired if Sam could sell him some cocaine. Sam said he would call his suppliers and made several telephone calls. Sam then told Joe he would have a pound of cocaine to sell him at the same bar at 6:00 p.m. that evening. He instructed Joe to return alone at that time with cash. Joe agreed and left the bar. While picking up cocaine from his supplier, Sam was told of a rumor that the FBI was in town with undercover agents trying to set up cocaine buys. Sam gave the cocaine back to his supplier and did not go back to the bar that evening. Sam was arrested three days later and charged with

attempted sale of drugs.

9. Noreen needed money for a down payment on a new house. She decided to collect insurance on her wedding ring, a family heirloom insured for $8,000 against theft. She drove to a distant city and sold the ring to a jeweler. Two days later she broke her window from the outside and ransacked her bedroom where she had previously kept the ring. She then called her insurance company and asked what steps she had to take to be paid for the theft of her ring under the policy. The company said it would pay her the $8,000 if she filed a police report and then submitted a claim. Noreen reported to the police that the ring had been stolen.
    a. A few days later, overwhelmed by guilt, she confessed to the police.
    b. The jeweler to whom she sold the ring called her and said he had received a police bulletin describing her ring as stolen property and that he intended to report it to the police. Noreen immediately notified the insurance company that she would not be submitting an insurance claim.

10. Julie, an explosives expert who is angry over Dave's decision to break off their relationship, sneaked over to Dave's house and wired his car so that it would explode when Dave started it the next morning. Later that evening, Dave died of a heart attack. Upon learning of Dave's sudden demise, Julie sneaked over to the car the next evening and removed the explosives.

11a. Chauncey knew that he had the Zika virus and that having unprotected sex exposed his partners to a significant risk of contracting Zika. He also knew that most people who have Zika can have babies who contract a disease that makes them unlikely to survive. Nonetheless, he continued to have extensive unprotected sex with various partners, lying about his condition. Chauncey has been charged with attempted murder after impregnating one of his partners.

11b. Chase, a convict who knew that he was HIV positive, spat at a prison guard, screaming: "Now you will get AIDS and die, just like me!" In fact, AIDS seldom develops in human saliva, and there is a

very low probability of transmitting AIDS by saliva. Fortunately, the guard has remained HIV free. Chase has been charged with attempted murder.

12. Trevor and Gloria, college freshmen, met briefly during Greek Week. When Trevor asked Gloria for a date, she firmly declined. Trevor then acquired her e-mail address:
    a. The love-struck Trevor sent Gloria three e-mails, professing his undying love. The first stated that he thought of her constantly and could not get her out of his mind. The second stated that he would do anything to have her. The final one stated that, as he watched her walking to class, he realized she was the only one for him. Gloria, fearful of Trevor's obsession with her and his secret observation, became very fearful of what he might do next. Nervous and apprehensive, Gloria became very jittery and constantly looked over her shoulder whenever she left her room. Has Trevor committed a stalking offense?
    b. When Gloria did not react favorably to his "nice" e-mails, Trevor became angry and decided to send some intimidating messages to Gloria as payback. Trevor sent her two anonymous e-mails. One contained lyrics from a contemporary rap song which were sexually explicit and graphically violent. The other contained lyrics about constantly watching a woman who was unaware of the surveillance. Gloria trashed them, thinking a quirky friend with deficient social skills had sent them to her as a joke.
    c. After receiving more e-mails, Gloria obtained a restraining order against Trevor ordering him to refrain from all contact with her. Karl, a mutual friend, told Trevor that Gloria was so upset that she had gone to her parents' house, a two-hour drive from campus. Trevor looked up her parents' address and drove to her parents' home with the intention of seriously frightening her. As he approached the house, he circled the block a couple of times and then drove away because he did not want to violate the order. Gloria did not see him. Attempted stalking? Abandonment?

13. Sebastian, 45, sent a follow request on Instagram to "Amanda," a

teenage girl he found in the search feature, in hopes that she would have sex with him. Amanda accepted Sebastian's follow request and told him she was 14 and wanted to have sex with an older man. Amanda was actually a female FBI agent, Barbara, who was on the prowl for people like Sebastian. After exchanging several direct messages, Sebastian and Amanda agreed to have sex at a motel near Amanda's home. Sebastian checked into the room, and Amanda called him from the lobby as planned. When Sebastian opened the door, he was immediately arrested and charged with attempted sexual assault of a minor.

14. Quentin loves Cuban cigars. He thinks their importation into the United States should not be a crime. He purchased several high-priced cigars in Colombia while on a business trip, thinking they were Cuban cigars, and hid them in a secret compartment in his suitcase. A customs inspector discovered the cigars at the airport in Miami.

    a. There is a law forbidding the importation of Cuban cigars, but, it turns out, these cigars are from Santo Domingo.
    b. These cigars are Cuban, but there is no criminal law forbidding their importation.
    c. There is a law forbidding the importation of Cuban cigars, but, unknown to Quentin, these cigars actually are 100 percent marijuana.

15. Judge Smith sentences John to 40 years for minor offenses. John plans to put a death hex on Judge Smith. John asks his brother, Lonny, to call Judge Smith's house keeper, Emma, to get some personal items of Judge Smith's, a hair brush and an old picture. Lonny agrees to assist John and contacts Emma. Lonny offers to pay Emma for the personal items of Judge Smith. Emma works with authorities in a sting operation to stop the voodoo murder.[17]

Explanations

1a. Suzy's purpose was to kill Bob. Because she acted with the purpose to achieve the result element of the target crime, causing the death of another human being, and did the last act necessary to

accomplish that result (or took a substantial step under the MPC), Suzy committed attempted murder even though she did not achieve the intended result.

1b. Suzy had the necessary mens rea to commit murder. She intended to kill another human being. She also acted on that criminal purpose by purchasing a gun, becoming proficient in its use, and luring her victim to a scene where she could establish a good cover story explaining the murder as an accident.

Under the common law, she took the last step; she actually pulled the trigger of what she thought was a loaded pistol while aiming it at Bob's heart. In addition, her behavior probably satisfies the equivocality test because her course of conduct seems consistent only with a planned murder. (However, because the jury cannot consider any evidence other than her conduct, it could conclude that her behavior was consistent with law-abiding conduct; i.e., she was looking for a burglar and was simply mistaken as to Bob's identity.) Under both the proximity test and probable desistance test, Suzy has committed the actus reus of attempt. She has come very close in time and space to causing the result (proximity test), and she did not break off her criminal course of conduct (probable desistance test).

Under the MPC, Suzy took a substantial step that was strongly corroborative of her criminal purpose. She obtained a gun, learned how to use it, lured the victim to the contemplated crime scene, aimed the gun at a vital part of Bob's body, and pulled the trigger.

Suzy might argue impossibility. However, this is simply a case of factual impossibility (unknown to Suzy, the shells were blanks, not bullets), not legal impossibility (there is a law against unlawfully killing another human being). Factual impossibility is no defense at common law. Under the MPC, had the facts been as Suzy believed them to be (i.e., the gun was loaded with bullets, not blanks), Suzy would have committed the target crime (assuming a good aim). Thus, she is guilty of an attempt. The MPC focuses on the defendant's attitude more than on how close she came to actually causing harm.

1c. The same general analysis for mens rea and actus reus used in

Example 1b applies here. However, Suzy has not taken the last step (there is still an opportunity to repent and she did), nor is it clear that her conduct satisfies the equivocality test (she could have been looking for a burglar). The prosecution would have a better chance under the proximity test (she stalked her victim and almost pulled the trigger) or probable desistance test (though Suzy did break off her criminal conduct and change her mind, most citizens would not have gone as far as she did). Because murder is a serious crime and most law-abiding citizens would not go through such an elaborate scheme, a jury could convict her under all of these tests except the last-step test. Note how the common law requires the defendant to come very close to actually committing the target offense and also requires strong evidence of criminal intentions.

The MPC, however, is more concerned with preventing harm and apprehending dangerous individuals; it is less concerned with waiting until the last possible moment to see if a defendant will actually commit the target offense.

Under the common law, there is no defense of abandonment, so Suzy cannot claim she has changed her mind. Under the MPC, Suzy can present evidence that she renounced her criminal scheme and did not have the firmness of criminal intention. She also might argue that her renunciation was complete and voluntary because she could easily have carried out the murder as planned. There were no unexpected facts making it more difficult. Suzy would argue that she was filled with remorse and should not be convicted. Her change of heart shows she is not really dangerous. This will be a jury question.

2. The prosecution would claim that Jim intentionally aimed and fired a high-powered rifle at the White House. One round struck a window in the residential area of the White House. Though stopped by bulletproof glass, these facts clearly demonstrate that Jim intended to fire lethal rounds into a place where the president lives. Surely, Jim intended the natural and probable consequences of his action — killing the President. The jury may infer this intent based on the defendant's conduct. Since Jim intended to accomplish this result, he has the *mens rea* required by the common law for an attempted murder of the President. Jim also committed the "last

act” under his control to achieve this result; there was no longer an opportunity to desist. This easily satisfies the actus reus or conduct element of the crime. Though bulletproof glass prevented the bullet from entering the residential quarters and the intended victim was not physically present, Jim cannot argue factual impossibility. It is not recognized as a defense at common law.

Under the MPC, the prosecution can prove that Jim purposely fired several high-powered rounds at the president’s living quarters. The prosecution must also prove that the defendant acted with the purpose or *belief* that his act would cause the proscribed result — the president’s death. Jim fired at the White House *believing* he would kill him. Why else would he use such a powerful weapon and fire so many rounds? Jim also committed a substantial step that strongly corroborates this criminal purpose. He did more than simply possess a deadly weapon near the White House — legally sufficient to prove a substantial step under the MPC. He actually shot the weapon at his intended target.

Defense counsel would note that there is no evidence of intent other than Jim’s discharge of the weapon at great distance in the general direction of the White House from a speeding car. Though conceding that his client has committed some crime, perhaps unlawful discharge of a weapon, there is insufficient evidence that he intended to kill the president. If anything, his incompetent and inept plan for the shooting indicates a clear absence of this goal. Jim’s act was equivocal as to result. At most, Jim committed a reckless act that created a substantial risk that someone might be struck by a bullet from his weapon and could die. But under the common law, attempt requires the prosecution to prove that the defendant intended to achieve that result.

Under the MPC, the prosecution must prove that the defendant acted with the purpose or belief that his act would cause this result. Surely Jim did not believe he could kill the president from such a long distance from a speeding car. Nor does his conduct establish that he acted with the criminal purpose or belief as to this result. Though conceding that inherent impossibility is not recognized as a defense under the MPC, the long range, shooting from a speeding car with its inevitable inaccuracy, and the known security of the

building, all indicate that Jim did not intend to kill anyone. Rather, this was bizarre behavior that is a less serious crime.

3. Max did not attempt murder even though he acted recklessly with extreme indifference to human life. His purpose was to destroy the building, not to kill people.

   Under the common law, he did not act with the specific intent as to result — that is, he did not intend to take human life. Thus, he cannot be convicted of attempted murder.

   Under the MPC, Max also cannot be convicted of attempted murder because he did not act with the purpose of taking human life. (This explanation assumes that Max did not *believe* that people would die. Under the MPC, such a belief would satisfy the mens rea for result required for an attempt.)

   If a human being had died in the fire, Max could have been convicted of murder under either of two theories: intentional risk creation or felony murder. (See Chapter 8.) However, to convict someone of attempted murder, most jurisdictions and the MPC require that the defendant have acted with the purpose or intent of achieving the result element — that is, taking human life. Even if Max had knowledge that his conduct created a high probability that someone would be killed, he did not commit attempted murder.

   Contrary to this clear majority rule, a few jurisdictions have held that a defendant can be convicted of "attempted reckless manslaughter"[18] or "attempted extreme indifference to life murder"[19] even if he did not intend to kill. This minority approach eliminates the traditional requirement for attempt that the defendant must act with the purpose of causing the result element of the target offense. It is sufficient if he intentionally or purposefully does an act either recklessly or with extreme indifference to human life. The rationale is that, when the defendant does an intentional act knowing that it may come very close to killing an innocent victim, he is both blameworthy and dangerous; consequently, attempt liability is appropriate. The facts of this example demonstrate why courts might be persuaded to adopt this approach.

4a. Connor did not commit attempted murder. Even though Raphael almost died as a result of Connor's intentional act, Connor did not

act with the *purpose* of killing him. His purpose was to cause his rival to leave Connor's "territory." Thus, under both the common law and the MPC, Connor did not commit attempted murder. Of course, we have posited that Connor's mental state is known. Without such evidence, however, a jury is free to conclude that Connor "intended" the result that he almost caused and to convict him of attempted murder.

4b. Because Connor proximately caused the death of another human being who was not a co-felon during the commission of a felony (the drug sale), Connor could be convicted of felony murder even though he did not intend to cause Raphael's death. Unlike attempt, which focuses on the actor's mental state or attitude toward causing a particular result, the felony murder rule imposes homicidal responsibility based primarily on the harm the defendant proximately causes during the commission of a serious crime. (See Chapter 8.)

4c. This is a close one and could go either way. The jury might decide that "ecstasy," the drug voluntarily ingested by Raphael, proximately caused his death and that it was an independent intervening cause. (See Chapter 7.) If so, then Connor can be convicted only of *attempted* murder because, even though his purpose was to kill Raphael, he did not cause that result. While the fright caused by Connor's warning shot may have contributed somewhat to Raphael's death, his death was caused primarily by his own voluntary conduct. Thus, the felony murder rule would probably not snare Connor. The moral? Don't forget to analyze *both* mens rea and causation on those tricky law school exams!

5a. The prosecutor would argue that Paulo is guilty of a single count of attempted premeditated murder because, as his words clearly show, he acted with the purpose of killing at least one member of the rival gang and took both the "last step" (under common law) and a "substantial step" (under the MPC) to accomplish that result by discharging a deadly weapon at a group of people. Attempt does not require the government to prove which specific individual Paulo wanted to kill, but only that he intended to kill *someone*.

The defendant would argue that attempt is a specific intent

crime, requiring the prosecution to prove that he intended to kill a *specific* human being. Paulo clearly did not have a specific target or victim in mind when he shot at the group. At most, Paulo engaged in very dangerous conduct that created a significant risk of death, but, in fact, no one died. Thus, he may have committed the crime of reckless endangerment or even assault with a deadly weapon, but not attempted murder.

The government would probably succeed in obtaining a conviction of attempted murder. Paulo did not care which individual he killed, but he certainly purposed the death of at least *one* of the persons in the group and tried to achieve that result. Thus, he has satisfied the mens rea and actus reus of attempt.

5b. The prosecutor would argue that Paulo is guilty of seven counts of attempted premeditated murder; one count for each member of the group. She would point out that Paulo clearly admitted that he intended to kill Tong; thus, there is no disputing his mens rea or culpability as to that victim. Surely, throwing a grenade that exploded in close proximity to the specifically targeted victim (Tong) satisfies all actus reus tests. She would further argue that a jury could readily infer that Paulo intended to kill the other members of the gang (despite the absence of words manifesting that intent) because he used a weapon that could readily kill *everyone* in the immediate vicinity of the intended victim (called the "kill zone" by some courts).

The defense would argue that Paulo only intended to kill Tong. Thus, he did not act with the premeditated objective of killing the other gang members. Thus, he can only be convicted of a single count of attempted premeditated murder and, perhaps, six counts of reckless endangerment or assault with a deadly weapon.

California would allow convictions under the prosecutor's theories in both of these examples. *People v. Stone,* 46 Cal. 4th 131, 205 P.3d 272 (2009).

6. This is a tough one! Paula clearly intended to cause Reuben's death and took a substantial step (and the last step) toward accomplishing her goal. Thus, she can surely be convicted of at least attempted second-degree murder.

But must the prosecution prove that Paula also intended to kill a police officer in the course of performing his official duties? The prosecution probably could not prove this because Paula would not have knowingly bought drugs from a police officer, nor do any facts indicate that Paula knew Reuben was an undercover police officer.

Under common law, Paula must know all circumstances of the target crime. Because she did not intend to kill a police officer while he was performing his duties, she could not be convicted of attempted first-degree murder even if this circumstance is a strict liability element in the target offense.

Under the MPC, however, the mens rea toward circumstances of the target offense determines her guilt. If the circumstance that Reuben was a police officer performing his official duties is a strict liability element, then Paula would be guilty of attempted first-degree murder. (Under the MPC, however, it will be a material element.) If, on the other hand, the mens rea of “purpose” or “knowledge” also applies to this circumstance, then she would not be.

7a. Terrence clearly has the mens rea to commit several crimes, including contemporary crimes that prohibit computer hacking and the destruction of computer information, as well as traditional crimes like fraud and theft (by not repaying his student loans). His criminal intention can be established by his statement to Dennis and by his gathering information on hacking techniques.

The more difficult question is whether Terrence is simply in the “preparation” phase or has actually put his plan into “action” by engaging in conduct sufficient to make him guilty of attempt. Under the common law, Terrence has surely not yet taken the “last step” since he would have to do much more to accomplish his goal. And his behavior so far (without looking at any other evidence like his remark to Dennis) does not plainly demonstrate that he is going to commit a crime. Thus, it does not satisfy the “equivocality” test.

Even under the proximity test, Terrence has probably not committed an attempt because he has not come close in space or time to actually committing the unauthorized computer entry (let alone destruction of computer information). Under the probable

desistance test, he still can change his mind since there are still actions he must take to accomplish his goal. Thus, Terrence has not committed an attempt.

Under the MPC, has Terrence taken a "substantial" step? Probably not. His actions appear to be only preparation, acquiring the information necessary to commit the crime at some future time.

7b. Terrence's mens rea is the same as in Example 7a. Under the common law, he has probably not satisfied the following tests: last step, equivocality, or probable desistance. However, the facts are stronger for the prosecution than in Example 7a. Terrence would argue that even though he has assembled the "tools and instruments" necessary for committing the crimes on his computer and the computer would be used to carry them out, this location may not be sufficiently "near" the crime scene. However, the prosecutor might argue that Terrence custom-designed his "hacking" program to commit these crimes and that the program has no lawful use. Thus, under the MPC, he has committed a "substantial step." Ultimately, the jury must determine if this conduct "strongly corroborates a criminal purpose."

7c. Terrence has committed an attempt! He had the necessary mens rea. His actus reus in trying to enter a secure computer site has satisfied all of the common law tests except the "last step" and, perhaps, the equivocality test. Terrence's action would clearly constitute a "substantial step" under the MPC because it confirms his criminal purpose. He used a hacking program, a custom-designed criminal instrument, and went (in cyberspace) to the scene of the contemplated crime, a secure computer system, by dialing the remote access number and trying to gain entry.

Under the MPC, Terrence might raise the defense of renunciation, arguing that he decided not to commit the offense after all. However, Terrence changed his mind about committing the crime only because he was having difficulty in succeeding and because the chances of being detected had become much higher. He was probably postponing the crime until he could determine how to breach the firewall. Thus, his renunciation is not voluntary and complete. Poor Terrence: criminal punishment and student loans!

8. Sam has the mens rea necessary for conviction of the target offense because he has the purpose of selling drugs to Joe. Under the common law, Sam has not taken the last step (though Sam has actually located and bought the drugs, he still must return to the bar to complete the sale). It is also not clear that he has satisfied the proximity test; he is not close in space or time to bringing the drugs to the bar where the sale to Joe would take place. However, his conduct probably satisfies the probable desistance test and, arguably, even the equivocality test, because locating and buying illegal drugs are not consistent with innocent behavior. Thus, under some common law tests, Sam has committed an attempt. Under others, he has not and his conduct is still only preparation.

   Under the MPC, Sam has probably taken a substantial step and has committed an attempt. He actually located a supplier and arranged to pick up and pay for the drugs that he would resell to Joe. This demonstrates that Sam is firm about committing the crime.[20]

   Sam might argue, however, that he never came close to actually selling the drugs to Joe. In addition, Sam might argue that, even if he did commit an attempt, he subsequently renounced his plans. The first defense is essentially a denial that he committed the necessary actus reus; it would probably not succeed under some tests. The second defense does not satisfy the elements of renunciation because the only reason Sam decided not to complete the crime is the rumor that Joe might be an undercover officer. Sam has not changed his mind for the right reasons and is simply waiting for a better opportunity.

9a. Noreen has probably not committed attempted fraud (though she may be convicted of filing a false police report). Although she intended to file a false claim of theft, she only engaged in preparatory conduct.

   Under the common law, she has not taken the last step; she must still submit the claim to the insurance company. Nor is she proximately close to committing fraud. She has ample opportunity to change her mind and has not yet set in motion a chain of events that would lead to her being paid by the insurance company for the "loss" of her ring.

Even under the MPC, it is unlikely she has taken a substantial step. Because she needed to actually file the claim before she would collect any money, she could still change her mind and, in fact, she did. Even if she has attempted under the Code, she has abandoned her plan.

9b. Just as in Example 9a, Noreen has not committed an attempt. True, she changed her mind only because the chances of succeeding were almost zero. However, her actions would still probably be considered preparation rather than implementation under the analysis in Example 9a.

10. Julie has committed attempted murder. She purposefully wired Dave's car in order to kill him.

Under the common law, she took the last step (though it could be argued that events were not yet beyond her control since she, in fact, did disarm the bomb). Her behavior may also have satisfied the equivocality test because planting a car bomb manifests criminal intent. Under the proximity test, a jury could well find her guilty because she has come close in time and space to committing the target crime, and this is a very serious offense likely to arouse strong community resentment. Though she did change her mind, it was not for the same reasons that would motivate a law-abiding person.

Under the MPC, Julie has surely taken a substantial step; planting a car bomb so it would explode when someone started the engine is strongly corroborative of a criminal purpose to kill.

Can Julie raise the defense of impossibility because she could not possibly have killed Dave, who had died during the night? This is not a case of legal impossibility. If the facts had been as Julie thought they were, Dave would have been alive and her plan to kill him would be a crime. Thus, Julie can be convicted of attempted murder.

Julie cannot raise the defense of renunciation. Even though she unwired the car so that no one else would be killed and she probably would not try to kill anyone else, she did not change her mind for the right reasons as required by the MPC. So sorry, Julie!

11a. Chauncey has engaged in conduct that poses a serious risk that he

will infect one or more of his partners with Zika, which can lead to Zika in an unborn child and in due course to death. The prosecutor could argue that by deliberately engaging in this very high-risk behavior, Chauncey intended to kill his partner's unborn child. But the only evidence of mens rea here is the conduct that creates risk. Without better evidence that Chauncey acted with the purpose of killing his partner's unborn child rather than with extreme indifference to the possibility of infection and death of a future child, the prosecutor will probably fail to prove attempted murder. One court has upheld multiple convictions for attempted murder for HIV cases, which are slightly different, on the finding that a jury could conclude beyond a reasonable doubt that the defendant intended to kill his victims or cause them serious bodily injury.[21] Thus, conduct that creates a serious risk of death can support an inference that the actor *intended* that result.

11b. Chase has engaged in conduct that poses a much lower risk of infecting the guard with HIV, which can lead to AIDS and death. Yet, there is much better evidence (his own words) that Chase acted with the purpose of killing the guard. Thus, the prosecutor has a stronger case for proving the mental state or culpability required for attempted murder. Note how attempt focuses more on the actor's intentions than on his proximity to succeeding in his goal.

The defense could argue Chase's attempt to infect the guard with HIV by spitting on the guard is so inherently unlikely to result in AIDS and death that the court should dismiss the case. Keep in mind, however, the MPC does not recognize inherent impossibility as a defense.

12a. Even though Trevor's three e-mails were willful, they were not malicious and probably not harassing. In addition, Trevor did not intend to place Gloria in fear. Rather, it could be argued his purpose was to convey his heartfelt emotions. Nonetheless, Gloria became fearful for her physical safety because of the obsessive tone of these unwelcome e-mails. If the state stalking statute defines stalking as repeated behavior *intended* to cause fear of death or serious physical harm, then Trevor did not commit a stalking

offense. His intention was not to create such fear; rather, it was to express his feelings for Gloria. If, however, the state law defines stalking as intentional conduct that the individual *should have known* places a reasonable person in fear of death or serious bodily injury, then Trevor (despite his nonthreatening intentions), has committed a stalking offense if Gloria's fearful reactions of serious bodily injury were reasonable.

12b. Gloria is not fearful for her physical safety, but Trevor intended to intimidate and harass her and to put her in fear of serious physical harm. Thus, he would clearly be guilty of stalking under a statute that focused on the culpability or attitude of the actor — repeated threatening behavior *intended* to put the victim in fear. However, he might not be guilty under a law that focused on the harm done — intentional conduct the actor knew or *should have known* would cause fear of serious physical harm in a reasonable person — because Gloria was not frightened and, arguably, neither would a reasonable person. If the statute required *both* that the actor intended his conduct to cause fear of serious physical safety and that it did cause such fear, Trevor could not be convicted of stalking.

12c. Trevor seemingly had the mens rea to commit a stalking offense. He located her parents' address and drove to her parents' home with the intent to frighten Gloria. Can he be convicted of attempted stalking? Under the common law, Trevor did not take the last step since he did not actually try to contact Gloria; moreover, he changed his mind about intimidating Gloria. But, under the equivocality and proximity tests, he might be convicted of attempted stalking. Likewise, under the MPC, Trevor could be convicted of attempted stalking. He took a substantial step that strongly corroborated his criminal purpose. He located his victim and drove two hours to come into close proximity to her. Has he renounced his criminal purpose? This is a close case because he broke off his course of conduct to avoid violating the court order, not because of a sincere change of heart. What do you think? Notice how moving back the threshold of criminality in a codified offense such as stalking may allow an "attempt" to occur even

earlier.

13. Sebastian would argue that it was impossible for the prosecution to prove he *could* have committed sexual assault of a minor. "Amanda" was not underage; thus, it was *legally* impossible for him to attempt this crime.

    The prosecution would counter that, if the facts were as Sebastian believed them to be — if Amanda were 14 — he could have committed this crime. Thus, this is a case of *factual* impossibility: Sebastian intended to have sex with an underage girl. Thus, Sebastian is guilty of attempt.

    The age of his sexual partner is a "circumstance" element of the crime; thus, this a case of *factual* impossibility. Most jurisdictions would agree with the prosecutor and convict Sebastian of attempt. Only if a court took the approach in the *Jaffe* case and construed Sebastian's intention to be what actually happened in the real world, rather than what he expected to happen, would Sebastian have a chance of acquittal under the doctrine of legal impossibility.

    The MPC would also convict Sebastian. It does not allow the defense of impossibility. Here, Sebastian believed that Amanda was 14, and he would have committed a crime if she were that age. Thus, he attempted to sexually assault a minor. Notice once again that the MPC focuses primarily on the actor's attitudes rather than on whether he came close to causing harm.

14a. Quentin clearly had the mens rea to commit an attempt, and he took a substantial step to implement that attempt (hiding the cigars in a secret compartment and not declaring them at customs). His actions also satisfy all of the common law tests. Unknown to Quentin, the cigars were not Cuban and could lawfully be imported into the United States.

    Under the common law, this is a case of factual impossibility, not legal impossibility. There is a law forbidding importation of Cuban cigars into the United States. Quentin intended to engage in conduct that would violate that law, and he took significant action to implement that intent. Though these cigars are not Cuban, Quentin thought they were. Thus, most courts would conclude that Quentin had the purpose to import Cuban cigars and would not

allow the defense. However, a minority of courts might conclude that Quentin intended to do what, in fact, he did — import Santo Domingan cigars. This analysis misapprehends the meaning of intent and also equates mens rea with actus rea.

The MPC would also convict Quentin of attempt. It provides that the mens rea toward circumstances required by the target offense will be the mens rea required for an attempt. In this case, Quentin has acted with the purpose of importing Cuban cigars. Because this is the highest culpability, it will satisfy whatever mens rea is required by the target offense.

14b. This is a case of true legal impossibility under the common law. There is no statute forbidding the importation of Cuban cigars into the United States. Quentin has shown he is willing to commit a crime and has acted on that willingness, but what he tried to do is not criminal. A belief that one is breaking the law, even when coupled with action to implement that belief, cannot generate criminal responsibility.

Quentin could not be convicted under the MPC either, because there is no statute punishing the importation of Cuban cigars.

14c. Quentin can be convicted of attempted importation of Cuban cigars. The analysis of mens rea and actus reus is the same as in Example 14a. This would be a case of factual impossibility under the common law and it would not be a defense. Under the MPC, Quentin is also guilty of an attempt because he acted with the same mens rea toward circumstances as required by the target offense.

Whether Quentin can be convicted of possession and/or importation of marijuana depends on whether the applicable statute requires the defendant to know that the substance he possesses or imports is marijuana or whether it is a strict liability element. If it is not a strict liability element, Quentin could raise the defense of mistake of fact under the common law. Under the MPC, he could present evidence of his belief to negate the culpability element of the offense. If it is a strict liability element, Quentin is in real trouble!

15. John had the mens rea required under common law. He intended to carry out a death hex to cause the death of Judge Smith. John has

not yet committed the “last act” of his offense, because the authorities stepped in. The prosecution would have a better chance of convicting John under the probable desistance test. John showed no indication of ceasing his attempt to put a death hex on Judge Smith, and if Emma had not alerted the authorities, John likely would have continued in his efforts.

Under the MPC, John also satisfied the mens rea requirement. It is likely John also satisfied the actus reus requirement. John solicited his brother to help with the crime by instructing Lonny to obtain specific objects needed for the death hex from Judge Smith’s housekeeper. He was in the process of obtaining the “tools” he needed to complete the voodoo and kill the Judge. These activities strongly corroborate John’s purpose.

The defense could argue impossibility. On one hand, this could be a case of legal impossibility because there is no law against voodoo. However, because John *thought* he was going to accomplish the murder of Judge Smith, which is a crime, it may be a case of factual impossibility. Finally, the defense could contend that killing the judge by way of a voodoo death hex is so inherently unlikely to result in the death of Judge Smith that the court should dismiss the case. Are John and Lonny subject to conspiracy liability as well?

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1. *R. v. Eagleton*, 169 E.R. 826 (1855).

2. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies, 335-336 (New York: Wolters Kluwer, 4th ed., 2017).

3. *The King v. Barker*, [1924] N.Z.L.R. 865. See also Wis. Stat. Ann. 939.32(3) (West 2006).

4. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies, 336 (New York: Wolters Kluwer, 4th ed., 2017).

5. G. Fletcher, Rethinking Criminal Law (1978).

6. *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N.E. 55 (1901); *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927).

7. *Comer v. Bloomeld*, 55 Crim. App. 305 (1971) (Eng.).

8. This means that a jury *could* find that the defendant took a substantial step based only on this evidence.

9. *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977); *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987).

10. One might argue with both logic and irony that *every* attempt is a case of impossibility because — for whatever reason — the defendant did not succeed. The concept of impossibility is built into attempt. Many commentators argue that impossibility is of little practical significance in the criminal law. However, other scholars and even some criminal law students find the doctrine a fascinating opportunity to explore the doctrinal logic and policy choices of the criminal law. See

Symposium, 5 J. Contemp. Legal Issues 1-398 (1994).
11. 185 N.Y. 497, 78 N.E. 169 (1906).
12. *People v. Dlugash*, 41 N.Y.2d 725, 363 N.E.2d 1155 (1977).
13. http://victimsofcrime.org/our-programs/stalking-resource-center/stalking-information/stalking-statistics (last visited January 26, 2018).
14. Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011.
15. Antistalking Proposals: Hearing on Combating [sic] Stalking and Family Violence Before the Senate Comm. on the Judiciary, 103d Cong., 1st Sess. 3 (1993) (Statement of Sen. Joseph R. Biden, Chairman) at 10. (Statement of Sen. William S. Cohen). Not all stalking is romantically motivated. Some stalkers are persecutory [This seems a troublesome distinction — all stalking is persecutory]; that is, they feel their targets have harmed them, either physically or financially. Revenge is their primary motivation. Ronnie B. Harmon et al., Sex and Violence in a Forensic Population of Obsessional Harassers, 4 Psych., Pub. Pol'y & L. 236 (1998).
16. Kathleen G. McAnaney et al., From Imprudence to Crime: Anti-Stalking Law, 68 Notre Dame L. Rev. 819 (1993).
17. This is a real case! See Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies, 362 (New York:Wolters Kluwer, 4th ed., 2017).
18. *People v. Thomas*, 729 P.2d 972 (Colo. 1986).
19. *People v. Castro*, 657 P.2d 932 (Colo. 1983).
20. *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974).
21. *State v. Hinkhouse*, 139 Or. App. 446, 912 P.2d 921 (1996).

CHAPTER 13

Conspiracy

OVERVIEW

Sometimes you can get things done more efficiently by working with others. Criminals have found this form of organization works for them too.

Conspiracy punishes individuals who agree to commit a crime (often called the "target" or "object" crime). Conspiracy, then, responds to the special dangers created by *group criminality:* division of labor, expanded scope of potential harm, mutual encouragement, and greater likelihood the agreed-upon crime — or even future crimes not yet determined or contemplated — will be committed.

Conspiracy is an *inchoate* or unfinished crime because it permits the police to arrest those who have agreed to commit a crime long before they actually carry out their agreement. In fact, conspiracy sets the threshold of criminality much earlier than does attempt.

The early common law did not have a separate crime of conspiracy. It first appeared in a narrow statutory form in the early part of the fourteenth century. By the end of the eighteenth century, it had become a common law misdemeanor. Today, every state and the federal government have a conspiracy statute. As both criminal activity and criminal organizations have become more complex and sophisticated in modern society, conspiracy has become a more important law enforcement tool. Federal prosecutors in particular rely on conspiracy to prosecute crimes (such as drug smuggling, transportation of illegal aliens, and more recently terrorism) that require planning and complex coordination of many individuals or groups.

Conspiracy is a powerful weapon for prosecutors. It allows them to take advantage of special procedural and evidentiary rules that increase

their prospects for obtaining convictions. Moreover, in many jurisdictions, defendants can be punished *both* for conspiracy and for crimes committed in furtherance of the conspiracy. This threat of increased punishment gives prosecutors tremendous leverage in obtaining plea bargains from defendants charged with conspiracy.[1]

Critics complain that the definition of conspiracy is too vague. Historically, there was a great deal of merit to this criticism because common law definitions were very broad. However, law reforms during the second half of the nineteenth century have provided narrower and clearer definitions for this crime.[2]

Because the essence of conspiracy is criminal agreement, many definitions of the crime only require an agreement to commit a crime. Critics maintain that contemporary conspiracy definitions set the threshold of crime too early, essentially punishing thoughts rather than conduct. Supporters retort that the early threshold of criminality set by conspiracy is necessary to meet the special dangers posed by collective criminal action.

DEFINITION

At common law and until recently in many states, conspiracy was defined as an agreement of two or more individuals to commit a criminal or unlawful act or a lawful act by unlawful means.[3] No conduct other than the agreement itself was required. (Remember that words alone are a type of conduct that can satisfy the actus reus requirement for a crime. See Chapter 3.) Today many (but not all) statutory definitions of conspiracy do require that at least one conspirator take an *overt act* in furtherance of the conspiracy before the crime is committed.[4] Some states require that one conspirator take a “substantial act” in furtherance of the conspiracy, pushing the threshold of criminality much closer to the target offense. The Model Penal Code requires an overt act *unless* the object crimes are serious felonies.[5]

The Common Law

The common law and early statutory definitions of conspiracy did not limit the object of the agreement to *crimes*. Rather, they included any act that was *unlawful* or *against public policy* or even *lawful* acts committed by *unlawful means.* These open-ended definitions created uncertainty in the criminal law. Criminal responsibility could attach for agreeing to do something with another (such as charging usurious rates of interest[6] or agreeing to bargain for wages as a group[7]) that, if done alone, would not be a crime. In short, common law conspiracy permits conviction for acts that are not expressly made criminal, creating serious risk of ex post facto punishment.

Thus, in the English case *Shaw v. Director of Public Prosecutions*,[8] the defendant's conviction for "conspiracy to corrupt public morals" for agreeing with others to publish a directory for prostitutes was upheld by the House of Lords even though prostitution was not a crime. A statute containing such a broad definitional term would probably be found unconstitutional in the United States as void for vagueness. (See Chapter 1.)

The Model Penal Code

The Model Penal Code, troubled by the expansive definition of conspiracy provided by the common law and by many early-twentieth-century American state statutes, requires that the object of the agreement must be a *crime* for conspiracy to be committed. Most states, though not necessarily using the specific language of the MPC, have followed its policy choice and require that the object of the agreement be a crime.

But beware! Some states still define conspiracy in the old-fashioned sweeping manner. California, for example, defines conspiracy as an agreement of two or more people "[t]o commit any act injurious to the public health, to public morals. . . ." Cal. Penal Code § 182(a)(5).

PUNISHMENT AND GRADING

The Common Law

At common law, conspiracy, like attempt, merged into the completed substantive offense. Consequently, conspirators could not be punished both for conspiracy and the target offense.

Today, however, in most jurisdictions conspiracy is a *separate* substantive offense. Unlike solicitation and attempt, conspiracy does not merge with the object crimes. The rationale supporting this antimerger rule is straightforward. Conspiracy criminalizes the act of agreeing to commit a crime and beginning to actually implement that agreement; the target offense punishes the separate behavior of actually committing the offense agreed upon. Thus, generally speaking, conspirators can be (1) convicted of *both* the crime of conspiracy and of target crimes actually committed in furtherance of the conspiracy, and (2) sentenced to consecutive (rather than concurrent) sentences for *both* conspiracy and the target offense.[9]

Conspiracy once was commonly punished with a fixed term without regard to the seriousness of the crime the conspirators planned to commit. Today, however, most jurisdictions either set the punishment at some term less than the object crime or follow the MPC.

The Model Penal Code

The Model Penal Code sets the punishment for conspiracy at the same grade and degree as the most serious object crime, except that a conspiracy to commit a capital offense or a felony of the first degree is punished as a felony of the second degree. MPC §5.05(1). The MPC considers a criminal group to be especially dangerous. Consequently, the deterrent impact of punishment must be harsh to be effective.[10] Critics of this approach argue that, if the conspirators have been arrested *before* they have accomplished their criminal goal, they should be punished *less severely* because they have not done as much harm.

The MPC does not permit conviction for both conspiracy and the target crime except in rare cases. Thus, in effect, conspiracy does merge into the target crime under the MPC. MPC §1.07(1)(b). It takes the view

that, once a criminal group has committed the object crime, the group's dangerousness should be measured by the same punishment as provided for the object offense. However, a defendant may be convicted of as many target offenses as are committed in furtherance of the conspiracy whether as perpetrator or accomplice.

In unusual situations, however, the MPC does permit punishment for both conspiracy and target offenses. If the conspiracy had a goal of committing unspecified future crimes, the MPC permits the government to convict and punish its members for both the conspiracy and any object crimes committed or attempted. MPC §1.07(1)(b). (Note, however, that the MPC does not permit conviction for both conspiracy and an attempt to commit the target crime. MPC §5.05(3).)

THE SPECIAL ADVANTAGES OF CONSPIRACY FOR PROSECUTORS

Conspiracy affords prosecutors a number of significant advantages in trying criminal cases. Some of the more important ones are discussed below.

Choice of Venue

The Sixth Amendment to the Constitution provides that an accused has the right to trial "by an impartial jury of the state and district wherein the crime shall have been committed." This important constitutional protection requires the prosecutor to file charges and to try the case where the crime was committed.

The crime of conspiracy, however, is deemed to have been committed in any jurisdiction (or in the federal system in any district) in which any member of the conspiracy committed an act in furtherance of the conspiracy — even an act that was not itself a crime. This rule gives prosecutors, particularly federal prosecutors who often are dealing with conspiracies that they allege span several states, a tremendous tactical advantage. Frequently, there will be more than one such venue where an

act connected to the crime has allegedly been committed and where, consequently, the case can be tried.

Joint Trials

Because all members of the conspiracy are considered to have committed the same crime, co-conspirators may be tried together in a single trial. This is far more efficient than having to select a new jury and have a new trial for each defendant. However, joint trials can create serious problems, including "guilt by association." As Justice Jackson said in *Krulewitch v. United States:* "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."[11]

Use of Hearsay Evidence

Hearsay evidence is a statement made by someone who is not actually testifying but is repeated by a testifying witness and offered as stating the truth. Subject to a number of exceptions (many of which you will puzzle over in a course on evidence), the use of "hearsay" to prove something is generally prohibited because the person who made the original statement was not under oath when he made it and cannot be cross-examined in the courtroom. Thus, the truthfulness of the person who actually made the statement cannot be tested adequately.

Under the law of conspiracy, however, each co-conspirator is deemed to have authorized other members of the conspiracy to act and speak on her behalf. Thus, statements that co-conspirators make in furtherance of the conspiracy can be admitted later at trial to prove the defendant entered into a conspiracy. This is an exception to the hearsay rule.

The logical dilemma posed by this rule is clear: Evidence that is admissible only *if* a conspiracy exists will be admitted to prove that a

conspiracy exists! This is a classic case of "bootstrapping."

Should courts first require the prosecutor to use nonhearsay evidence to prove beyond a reasonable doubt that a conspiracy exists before admitting hearsay testimony under the conspiracy exception? This approach, though preserving the logical premise that hearsay is admissible only if there *is* a conspiracy, might seriously hamper prosecutors' effective use of conspiracy. It can also disrupt the presentation of evidence in a coherent chronological sequence.

The Supreme Court resolved this question for the federal courts in *Bourjaily v. United States.*[12] The Court decided that the use of the co-conspirator hearsay exception is a question of evidence to be decided by a judge under the Federal Rules of Evidence. A hearsay statement by a co-conspirator is admissible if the prosecutor, using both nonhearsay evidence *and* hearsay evidence, first proves to the judge's satisfaction by a preponderance of the evidence that a conspiracy exists. The jury may then use the hearsay evidence in determining whether a conspiracy existed. Thus, the jury will usually hear the hearsay evidence before its admissibility is determined. If the judge concludes that the prosecutor has not proven the existence of a conspiracy, the jury will be instructed to disregard this evidence. (This may be like asking the jury not to look at the elephants sitting quietly in the corner!) Otherwise, jurors may use the hearsay statement in reaching their verdict.

Responsibility for Crimes Committed by Co-Conspirators

The Common Law

Under the "*Pinkerton* rule" (so-called because it was confirmed by the Supreme Court in *Pinkerton v. United States*[13]), each co-conspirator is responsible for

1. any *reasonably foreseeable* crime committed by a co-conspirator
2. in furtherance of the conspiracy.

This rule is an extremely powerful tool in prosecutors' hands.

First, it essentially establishes vicarious liability for every member of a conspiracy for all foreseeable crimes without requiring the government to establish accessorial liability. (See Chapter 14.) The prosecutor does not have to prove that the defendant *intended* to aid and abet or otherwise facilitate or encourage the commission of these crimes; she only has to prove that they were *foreseeable*. Under the *Pinkerton* rule, each conspirator, by entering into the conspiratorial agreement, authorizes other members of the conspiracy to act as his agent to commit crimes necessary to implement their criminal objective. In turn, each conspirator is responsible for these crimes. The *Pinkerton* rule works like a kind of automatic "cash register" that rings up added punishment for each member of a conspiracy even when, as in the *Pinkerton* case itself, the defendant probably did not know of many of the crimes committed by his co-conspirator and certainly could not have assisted him because the defendant was in prison!

Second, the *Pinkerton* rule establishes vicarious liability based on *negligence*, which is the lowest level of culpability. The prosecutor does not have to prove that the defendant knew or recklessly disregarded the fact that his co-conspirator might commit specific crimes in furtherance of the conspiracy. She need only prove that the crimes were *reasonably foreseeable* — that is, that the defendant *should* have anticipated their possible commission. Under the *Pinkerton* rule, a conspirator may be convicted on a lower degree of culpability, negligence, than that often required to convict the person who commits the object offense. (See Chapter 4.)

Supporters argue that this rule is necessary so that the masterminds who organize and control sophisticated criminal conspiracies are held responsible for crimes committed by their foot soldiers. Without it, these "generals" would usually be insulated from any criminal responsibility for these target crimes. Critics of the rule assert that guilt is personal under our criminal justice system. Imposing punishment for substantive crimes in which the defendant did not participate or assist in some way runs contrary to that fundamental premise.

The *Pinkerton* doctrine can sweep broadly, making members of a conspiracy responsible for serious crimes "not within the originally intended scope of the conspiracy." An example is *United States v.*

Alvarez.[14] Here the court affirmed the murder conviction of several members of a drug conspiracy for the death of a federal undercover agent after a proposed drug sale erupted into a gun fight in which the defendants were not personally involved. The court held that, though the murder "was not within the originally intended scope of the conspiracy," it was reasonably foreseeable by the defendants because the deal involved a large volume of drugs with a high value. Relying on this fact, the court concluded that the defendants "*must* have been aware of the *likelihood* that (1) at least some of their number would be carrying weapons, and (2) that deadly force would be used, if necessary, to protect the conspirators' interests" (emphasis added). Moreover, each of the defendants played a significant part in the transaction, such as acting as a lookout; introducing the principals and being present during some of the negotiations; or letting the participants use a motel room and translating during some of the negotiations.

The *Pinkerton* rule imposes criminal responsibility on co-conspirators for contingent crimes to which they did not agree but which, under the circumstances, might well be necessary. Thus, the specific terms of the agreement do not set the limit for each member's criminal responsibility. The *Pinkerton* rule, however, is not retroactive. A person who joins a conspiracy is not responsible for crimes *already* committed by co-conspirators.

The Model Penal Code

The MPC rejects the *Pinkerton* rule because the scope of vicarious responsibility theoretically possible under this rule is too broad. Consequently, a co-conspirator must satisfy the MPC elements for accessorial liability (set forth in §2.06), which are more narrow than the common law (see Chapter 14). This means that conspiracy by itself is not a basis for establishing complicity for all reasonably foreseeable substantive offenses committed in furtherance of the conspiracy. Instead, the MPC asks "whether the defendant *solicited* commission of the particular offense or *aided*, or *agreed* or *attempted* to *aid*, in its commission" (emphasis added).[15] A number of states, including New York, follow the MPC in rejecting the *Pinkerton* rule.[16]

DURATION

How long does a conspiracy last? By its very nature, conspiracy is an ongoing offense; that is, the parties agree to commit a crime, and then usually they must take steps over a period of time to accomplish their criminal objective. The statute of limitations does not begin to run until the conspiracy terminates.

The Common Law

A conspiracy usually terminates when all of its objectives have been achieved or when all of its members have abandoned all of its objectives.

Extending the Life of a Conspiracy

Prosecutors have been resourceful in trying to extend the life of a conspiracy beyond the accomplishment of its criminal objectives, usually to make full use of the special prosecutorial advantages we discussed earlier. (See pages 377-379, supra.) In *Krulewitch v. United States*,[17] for example, the government argued that conspirators always agree, at least implicitly, to conceal their conspiracy even after they have accomplished its objectives. Relying on the conspiracy hearsay exception, the prosecutors sought to introduce against one conspirator the statement of another conspirator made several months *after* the target offense of the conspiracy had been completed.

The Supreme Court held that such testimony was inadmissible because the conspiracy in this case had terminated once the object crime had been committed. Subsequent case law permits the government to use hearsay testimony made after the normal end of a conspiracy only if it can prove an *express* agreement to conceal the conspiracy or if it can show that ongoing concealment was essential to the conspiracy's success. This type of proof is usually very difficult.[18]

The Model Penal Code

The Model Penal Code considers conspiracy to be a "continuing" crime, beginning when the conspiracy is formed (see the Overview to this chapter) and ending when its criminal objective has been committed or when the agreement has been abandoned by the defendant and those with whom he has conspired. MPC §5.03(7)(a). (Remember, however, that a conspiracy can be charged and prosecuted *immediately* once an agreement and, under some conspiracy statutes, an overt act have been committed. See pages 374-375, supra.) The MPC also presumes abandonment if no conspirator does an overt act in furtherance of the conspiracy during the applicable statute of limitations.

A conspiracy is terminated for an individual defendant if he abandons the conspiracy by advising his co-conspirators of his abandonment or informing law enforcement of the conspiracy's existence and his participation in it. MPC §5.03(7)(c). (See pages 399-400, infra, for a more complete discussion of this topic.)

Consequences of Termination

As we saw earlier (see pages 377-379, supra), conspiracy affords prosecutors enormous evidentiary, procedural, and substantive advantages, including choice of venue, joint trials, hearsay exceptions, and responsibility for substantive offenses. How fully prosecutors can exploit these advantages and avoid other legal constraints, such as the statute of limitations, depends in part on how long the conspiracy exists.

THE MENS REA OF CONSPIRACY

The Common Law

Conspiracy is a "specific intent" crime at common law. First, the defendant must *intend* to agree with someone else. Merely approving of

or seeking another's participation in a criminal purpose does not satisfy the mental state for conspiracy (though it may trigger criminal responsibility for solicitation (see Chapter 11) or as an accomplice (see Chapter 14)). Second, the defendant must *intend* to commit the offense that is the object of the conspiracy. Thus, the defendant must intend that the group, or at least one member of the group, will commit all elements of the crime agreed on (or, in jurisdictions that have the broader definition of conspiracy, all elements of the acts that are unlawful or against public policy).

Act and Result

Because conspiracy is a specific intent crime, it can require a *higher* mens rea than the crime the parties agree to commit. Recall Example 3 from the Attempt materials (see page 355). Change the facts slightly so that Max and Mollie agree to burn down the apartment building in order to collect the insurance, hoping that no one will be injured. If Mollie subsequently sets the time-delayed fuse *and* causes a fire that both destroys the building and causes the death of a tenant, both Max and Mollie could be found guilty of conspiracy to commit arson and guilty of murder under either extreme risk creation or felony murder. Neither, however, is guilty of conspiracy to commit murder because, when they agreed, they did not have the specific intent to cause the death of another human being. Thus, the mens rea requirement for conspiracy can be higher than the mens rea of the crime that is committed as a result of the agreement. If, however, both Max and Mollie had agreed to kill an occupant of the building by setting fire to it, they could be convicted of conspiring to commit murder.

Circumstances

Another interesting question is whether the specific intent requirement of conspiracy includes the circumstance elements of the target crime. Put differently, must the government prove that the defendants intended the circumstance elements of the target crime or must it only prove the same mens rea toward a circumstance element for conspiracy as that required for conviction of the target offense?

This question was raised in *United States v. Feola.*[19] In that case, several defendants agreed to sell heroin to prospective purchasers. Being overly ambitious (and perhaps a little lazy), they planned to pass off powdered sugar (no kidding!) as heroin, hoping to "rip off" the purchasers. If the purchasers discovered that the "heroin" was fake, the defendants had agreed to simply take their money by armed force.

Unfortunately for the defendants and unknown to them, their naive "buyers" were actually undercover federal narcotics officers. During the course of this bungled sale, one of the defendants assaulted one of the buyers without knowing he was a federal officer. Subsequently, all the defendants were charged with and convicted of both assault on a federal officer and of *conspiring* to assault a federal officer while engaged in the performance of his official duties.

The Second Circuit reversed the conspiracy convictions, holding that, although the substantive offense did not require intent as to the victim's status as a federal law officer, the federal conspiracy statute did.[20] The court held that the government must prove that the conspirators *intended* to assault a person they knew was a federal officer while engaged in the performance of his official duties because conspiracy is a specific intent offense. Failure to require such proof would expand the terms of their original agreement beyond those agreed to by the conspirators. Because the defendants did not know that their victims were federal officers, they could not intend to assault them while they were performing their official duties.

The Supreme Court reversed and affirmed the conspiracy convictions, holding that the federal conspiracy statute only requires the prosecutor to establish the same mens rea toward this circumstance element (i.e., the victim was a federal officer performing his official duties) as that required for conviction of the substantive crime.[21] By disregarding the generally accepted understanding that conspiracy is a "specific intent" crime, this case establishes that the federal conspiracy statute does not require any higher proof toward a circumstance element of the agreed-upon crime than that required for conviction of that crime.

The Model Penal Code

The MPC is not as precise on the mens rea or culpability elements as one might expect. Section 5.03 states only that the agreement must have been made “with the purpose of promoting or facilitating” the commission of a crime.

Conduct and Result

However, the Commentaries to §5.03 state that the MPC requires *purpose* as to the conduct and result elements to establish conspiracy *regardless* of what the substantive crime requires. Thus, if the target offense is the sale of narcotics, the defendant must act with the purpose of promoting or facilitating the sale of narcotics. Likewise, the Commentaries state that if the target offense is defined in terms of a prohibited result (such as homicide, which requires the death of a human being), the MPC requires that the defendant must act with the purpose of promoting or facilitating that result.

However, consider the following case. Suppose that a defendant conspires to sell what he thinks is heroin but is actually crack cocaine. The sale of heroin is punishable by a five-year sentence, and the sale of crack cocaine is punishable by a ten-year sentence. Conspiracy is punishable by a term one-half as long as the target offense of the conspiracy. If the defendant is arrested and convicted of conspiracy, what is his sentence?

Under *Feola*, whether the defendant could be punished for conspiring to sell crack cocaine would depend on whether the substantive offense required him to act with the purpose of selling crack cocaine. Obviously, he could not have this purpose on these facts because he thought he was selling heroin.

According to the MPC Commentaries, however, the prosecution would have to prove that the defendant acted with the purpose of conspiring to sell crack cocaine regardless of what the target offense required. This approach in effect requires the prosecution to prove “specific intent” for conspiracy even though it might not be required for the target offense.

Circumstances

Section 5.03 is also silent concerning what culpability toward circumstances is required. The Commentaries add that the conspiracy provision “does not attempt to solve the problem by explicit formulation.”[22] Rather, the MPC concluded that the matter was best resolved by the courts.

If “purpose” toward circumstances is required to convict for conspiracy, then under §2.02(2)(a)(ii), knowledge or belief that the circumstance exists is sufficient. This is so because §2.02(2)(a)(ii), the general culpability provision in the MPC, provides that “purposely” with respect to circumstances is satisfied if the defendant “is aware of the existence of such circumstances or he believes or hopes they exist.”

Purpose or Knowledge When Providing Goods and Services

A special mens rea problem occurs when one of the alleged parties to the conspiracy provides goods and services, such as a telephone answering service for prostitutes or ingredients for the manufacture of illegal goods. Can the supplier be convicted of conspiracy solely because he *knows* his goods or services are being used for a criminal goal? Or must the prosecutor prove that the defendant provided the goods or services with the *purpose* to advance the criminal object? Cases reach contrary conclusions, but the majority rule appears to be that purpose is required for a conspiracy conviction.

Case Law

In *People v. Lauria*[23] the government charged the owner of a telephone answering service and three prostitutes with conspiracy to commit prostitution. Lauria, the owner of the answering service, readily admitted that he knew some of his customers used his answering service for prostitution. However, he denied that he intended to further their criminal business. The court held that the government must prove intent; mere knowledge was insufficient. The court went on to explain that a jury may infer intent from knowledge, especially where the defendant

has a “stake in the venture.” A stake in the venture, in turn, may be established by showing that (1) the defendant charged excessive prices; (2) there is no legitimate use for the goods or services (e.g., selling gambling equipment in a state that does not allow gambling); or (3) the volume of defendant’s business with the buyer is grossly disproportionate to any legitimate demand for his goods or services or constitutes a substantial percentage of the defendant’s business.[24]

In *People v. Roy*, a companion case with facts very similar to *Lauria*, the court upheld liability because there was evidence the answering service operator actively participated in the prostitution business by arranging the sharing of customers by two prostitutes who used the service. The court concluded that this constituted “promotion of a criminal enterprise.”[25]

Requiring *purpose* rather than *knowledge* maximizes the freedom of businesses to pursue their individual economic gain rather than imposing a more demanding duty on them to prevent their products or services from being used to commit crime. It is also consistent with the criminal law’s general policy to not look beyond the last responsible moral agent. The purchaser of the goods and services must still decide whether she will use them to commit a crime.

On the other hand, some courts consider knowledge that another will use the provider’s goods or services to commit a crime sufficient to impose criminal liability for conspiracy, especially when a serious crime, such as a felony, is involved. Even the *Lauria* court, in dictum, indicated it might hold that knowledge rather than purpose is sufficient to convict of conspiracy when a serious crime such as kidnapping or the distribution of heroin is involved.[26] Critics respond that this rule is too burdensome on businesses and that, in most cases, the purchaser will simply obtain the goods or services from someone else who will not know of their intended use. Others argue that causation — simply being a link in a chain of events that enables someone to commit a serious crime — is not the gravamen of conspiracy. Rather, conspiracy requires a purposeful union of wills with the intent to accomplish a crime.

The Model Penal Code

The Model Penal Code requires that a provider of goods or services

must have “the *purpose* of promoting or facilitating” the commission of the crime. Mere knowledge that his services or goods are being used by another to commit a crime will not satisfy this culpability requirement. MPC §5.03.[27]

Note: Whether a person who provides goods or services to someone he knows will use them to commit a crime can be convicted as an accomplice or for criminal facilitation under the MPC raises the same general issue! See Chapter 14.

THE ACTUS REUS OF CONSPIRACY

Agreement

The Common Law

The actus reus of conspiracy at common law was an *agreement* between *two or more parties* to commit a criminal or an unlawful act or a lawful act by unlawful means. Historically, an “overt act” in furtherance of the conspiracy was *not* required. However, it is important to remember that modern common law jurisdictions typically require an overt act.

Though a conspiracy may involve an express agreement, perhaps verbal or written, in which the parties explicitly communicate their accord, it can also be indirect. What is required is a shared determination to accomplish a goal that is punishable by the applicable conspiracy statute. The parties do not have to know all of its details, but they do have to know its basic purpose.

A person can become a party to a conspiracy without knowing the exact identity of all of its members or without having direct dealings with them. One can also join a conspiracy *after* its initial formation. However, the late-arriver, though guilty of conspiracy, is not responsible for substantive offenses committed by her co-conspirators in furtherance of the conspiracy *before* she joined. Thus, the *Pinkerton* rule is not retroactive.[28] (See pages 379-381, supra.)

The difficult question is not *what* must be proven — an agreement — but *how* it can be proven. Parties to a conspiracy might well discuss

their plans in some detail and orally agree to the important points. Typically, however, when three people decide to rob a bank, they usually do not sign a “Bank Robbery Contract” and have it notarized — perhaps because they can’t write or, more likely, because they fear such incriminating evidence may come back to haunt them at trial. Thus, prosecutors are unlikely to obtain a written document that embodies the terms of the agreement or its signatories. Unless one of the conspirators later turns state’s evidence and becomes a witness for the prosecution or, better yet, law enforcement has the good fortune of obtaining a warrant and placing an electronic recording device where the parties entered into their agreement, it is usually difficult for the prosecution to present direct evidence of the agreement.

The law accommodates this difficulty by letting prosecutors use indirect evidence to prove the existence of a conspiracy. This evidence often consists of aiding and abetting or coordinated action by the parties from which the jury is asked to *infer* a *prior* agreement. The logic of such evidence is that group conduct is usually the result of a previous agreement. Neither aiding and abetting nor concerted action, however, necessarily establishes a prior agreement because one can assist another in committing a crime without such an agreement. (See *State v. Tally*, page 390, infra.) Moreover, proving an earlier agreement from a later criminal act runs the risk of collapsing the substantive offense into the prior criminal agreement.

Permitting proof of an agreement by circumstantial evidence, though necessary, requires careful implementation so that it does not seriously weaken the due process protection afforded criminal defendants. As one commentator has cautioned: “[I]n their zeal to emphasize that the agreement need not be proved directly, the courts sometimes neglect to say that it need be proved at all.”[29] Ensuring that the prosecution establishes the agreement by sufficient probative evidence is especially important because the “conspiracy doctrine comes closest to making a state of mind the occasion for preventive action against those who threaten society but who have come nowhere near carrying out the threat.”[30]

In some cases, the evidence of agreement is quite minimal. For example, in *United States v. Alvarez*,[31] government undercover agents agreed to purchase from two conspirators marijuana to be flown into

Florida from South America. Speaking in Spanish near the proposed off-loading site, the agents asked the two about Alvarez, the person driving their truck. They replied that he would be at the site when the marijuana would be off-loaded. One agent turned to Alvarez and asked if he would be at the site to help off-load. Alvarez nodded his head indicating "yes," smiled, and asked the DEA agent if he was going to be on the plane when it arrived to unload the marijuana. After some further conversation with the original two conspirators concerning the details of the plane's arrival and unloading, they and Alvarez were arrested and charged with conspiracy to import drugs into the United States.

A three-judge panel initially reversed Alvarez's conviction for conspiracy, holding that this evidence was insufficient to establish that the defendant had joined in an agreement to import drugs. The court noted that a defendant "does not join in a conspiracy merely by participating in a substantive offense, or by association with persons who are members of the conspiracy."[32] The court was concerned that Alvarez's expressed willingness to assist in the commission of the conspiracy's target offense was also used to establish that he had previously joined the agreement to commit that offense.

Subsequently, an en banc decision[33] of the Fifth Circuit reversed the panel decision and affirmed the conviction. It noted that a conspirator can join a conspiracy after its initial inception. Moreover, Alvarez knew criminal activity was planned and that a conspiracy had been formed to import drugs and unload them at this site. There was also direct evidence that Alvarez planned to help unload the drugs; a jury could infer from this fact that he must have agreed at an earlier time to help unload. Alternatively, in assuring the others that he would help unload, a jury could find that Alvarez was doing an act to further the conspiracy. Consequently, there was sufficient evidence from which a jury could find that Alvarez had intentionally joined the conspiracy.

The Model Penal Code

The Model Penal Code takes the same basic approach as the common law; agreement is the core concept of conspiracy. The MPC provides a more thorough definition to include two types of agreement: (1) the defendant or another co-conspirator will commit, attempt to commit, or

solicit a crime, or (2) the defendant agrees with another to aid him in the planning or commission of a crime, an attempt to commit it, or its solicitation. Under the MPC, a person is guilty of conspiracy if he agrees (a) with other persons that any one of them will commit, attempt, or solicit a crime, or (b) to be an accessory to the crime by facilitating its commission. MPC §5.03(1)(a)(b). Note, however, that aid *without agreement* does not constitute conspiracy under the MPC.

In *State v. Tally*,[34] the defendant tried to aid murderers by preventing the delivery of a warning telegram to the victim. He would not be guilty of committing conspiracy under the MPC because there was no agreement or concert of action between Tally and the others. Tally could be convicted of aiding and abetting but not conspiracy. Otherwise, anyone who aided and abetted could be convicted of conspiracy and subjected to the broad vicarious liability and additional punishment for conspiracy. Most states have adopted this approach.

Overt Act

In General

Unlike the common law, which required only an agreement for the actus reus of conspiracy, most modern statutes also require that *one member* of the conspiracy commit an *overt act* in furtherance of the conspiracy for the crime to be committed.[35] The overt act demonstrates that the conspiracy has gone beyond the purely "mental state" and has reached the implementation stage. However, the overt act can be an act that, by itself, would be lawful and innocent such as renting a van or buying a ladder. It does not have to be an act that would come anywhere near satisfying the actus reus of attempt, such as an "unequivocal act" or a "substantial step." A few states do require that at least one member of the conspiracy must take a "substantial step" in furtherance of the conspiracy.[36] This usually has the same meaning as it does in attempt — an act that "strongly corroborates the actor's criminal purpose." (See Chapter 12.)

The Model Penal Code

The Model Penal Code only requires that the defendant or any other party to the conspiracy must commit an overt act if the substantive offense is relatively minor — that is, a felony of the third degree or a misdemeanor. If the substantive offense is serious, a felony of the first or second degree, no overt act in furtherance of the conspiracy is required. MPC §5.03(5). When a serious crime is the object of the agreement, the MPC essentially adopts the common law actus reus requirement that the act of agreeing is itself the actus reus of conspiracy. The MPC concludes that the act of agreeing is "concrete and unambiguous." Thus, there is much less danger of incorrectly interpreting innocent or equivocal behavior as criminal conduct. Also, the act of combining wills makes it more likely, both psychologically and practically, that the target offense will be committed.[37]

THE SCOPE OF THE AGREEMENT OR HOW MANY CONSPIRACIES?

Perhaps the two most perplexing questions to be resolved in conspiracy cases are (1) how many conspiracies are there? and (2) who is a party to which conspiracy? The answers to these two questions are extremely important because they determine a number of other significant legal issues, including choice of venue, propriety of a joint trial, admissibility of hearsay testimony, satisfaction of the overt act requirement, and liability for any substantive offense committed in furtherance of the conspiracy.

However, setting forth the black letter law is much easier than applying it, as the case law makes clear. The law of conspiracy permits the fact finder to convict only those individuals who have entered into the same agreement. Yet, as we saw earlier, there is seldom tidy evidence available clearly establishing who those parties are. To the contrary, there is often a large cast of characters involved in committing a number of similar crimes. Often, individual members of the cast deal directly with some characters but not with others. Unfortunately, the

case law has developed some rather primitive analytic approaches to ascertaining who is a member of a particular conspiracy.

Single Agreement with Multiple Criminal Objectives

One agreement establishes one conspiracy, even though there may be several criminal objectives of that agreement.[38] Thus, if *A*, *B*, and *C* agree to rob one bank each day for the next five days, there is only one conspiracy — even though the conspirators have agreed to commit five robberies. If there are multiple agreements, however, then there are multiple conspiracies even if each has only a single criminal objective. So if *A*, *B*, and *C* agree to rob a bank and do so and then, elated with their success, agree to rob another bank, there are two conspiracies.

Single or Multiple Agreements?

The Wheel and Spokes Approach

In *Kotteakos v. United States*,[39] the government charged and convicted 32 defendants of participating in a *single* conspiracy with Simon Brown. The evidence showed that over a period of time, each of the defendants and Brown had fraudulently obtained loans to be insured by a federal agency. The defendants, on the other hand, claimed that each of them had formed a separate conspiracy with Brown but not with each other. Thus, there were a number of distinct conspiracies rather than one large one.[40]

Needless to say, all the defendants had a tremendous stake in how this question was resolved. Under the government's view, each of the 32 defendants could be punished under the *Pinkerton* rule for each of the fraudulent loans obtained by the others. Under the defendants' view, Brown could be found guilty on 32 separate counts of conspiracy, each with one co-conspirator.

The Supreme Court determined that, though these defendants committed similar crimes with the same individual, Brown, there was no connection or relationship between the defendants. The pattern of their

behavior looked like many spokes of a wheel with a common center (Brown) but without a common rim. Thus, the Court held that there were a number of conspiracies rather than a single conspiracy.

Therefore, committing the same type of crime with a common participant is not necessarily sufficient to establish a single agreement. In *Kotteakos*, there was no interdependence or even communication among the defendants; they did not depend on one another for their individual success. Nor was there any division of labor or other cooperation that facilitated a common goal.

Contrast *Kotteakos* with *Interstate Circuit, Inc. v. United States*.[41] A manager of Interstate, a chain of theaters, sent a letter to each of eight movie distributors (who together controlled 75 percent of the first-run film market in the country), with copies to the others, demanding that theaters charge a minimum price and not permit first-run movies to be shown on a double feature with another feature film as a condition of Interstate's continued showing of their movies. Subsequently, each distributor complied with Interstate's terms.

The trial court found that the distributors had agreed with one another and with Interstate to fix prices in violation of the Sherman Antitrust Act because each of the distributors knew that the others had received the letter and because concerted action of all was necessary for the price-fixing to be effective. The Supreme Court upheld the convictions, concluding: "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or *agreement* on the part of the conspirators" (emphasis added).[42]

This case comes perilously close to *dispensing* with the need to prove an agreement rather than letting the government use circumstantial evidence to establish an agreement. It also demonstrates how the loose definition of conspiracy often applied in antitrust cases poses the risk of being applied in more traditional criminal cases. Finally, the case establishes that co-conspirators can enter into a criminal agreement by concerted action alone if they have the necessary knowledge.

The Chain Approach

Blumenthal v. United States[43] involved a scheme whereby an unknown

owner sent shipments of liquor to Weiss and Goldsmith. In turn, Weiss and Goldsmith agreed with three other defendants (Feigenbaum, Blumenthal, and Abel) that these three would sell the liquor to various taverns at prices exceeding the ceiling set by law. There was no evidence that these three defendants knew of the unknown owner or of his part in the plan. Nonetheless, the Supreme Court affirmed the trial court's finding there was only one conspiracy including all six individuals.

The Court concluded the case was not like *Kotteakos*, saying:

> The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them [of responsibility] that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal [emphasis added].[44]

The Court analogized each of the defendants as links in a common chain, each essential to the ultimate task of selling the liquor at illegal prices. Where there is a common objective that, because of complexity, magnitude, or other factors, requires the attributes of collective criminal behavior, courts are more likely to find a single conspiracy rather than a number of conspiracies.

However, not all behavior that initially looks like the result of a single agreement will support that finding. In the Woody Allen movie *Take the Money and Run*, two groups of would-be bank robbers enter a bank at the same time, each trying to rob it. An observer seeing this scene might well conclude that, because all of the robbers enter the bank and start to rob it simultaneously, everyone is a party to the same agreement and, therefore, there is one conspiracy. However, the two groups soon start arguing with each other about who was there first and which one has the "right" to rob the bank. As unrealistic and farcical as this example is, this additional evidence establishes that there were two conspiracies at work here, each with a different membership.

Wheel and Chain Conspiracies

United States v. Bruno concerned a complicated drug-smuggling

operation involving four groups.[45] One group imported the drugs into the country and sold them to middlemen, who in turn distributed them to two groups of retailers, one in New York and one in Louisiana. The government charged them all with one conspiracy. The defendants claimed that there were at least three conspiracies: one between the importers and the middlemen; another between the middlemen and the New York retailers; and a third between the middlemen and the Louisiana retailers. Though there was no evidence of communication or cooperation between the two retail groups in New York and Louisiana or between these groups and the importers, the court affirmed the finding of a single conspiracy involving all four groups. It found that the importers knew that the middlemen must in turn sell to retailers and, conversely, the retailers must have known their distributor bought from an importer. Thus, everyone could be found to have embarked on a common venture whose success depended on the participation of all.

The Model Penal Code

In General

Under the Model Penal Code, the identity and scope of a conspiracy are determined by the combined operation of §5.03(1), (2), and (3). The MPC adopts a *unilateral* approach to conspiracy. It looks at each individual defendant and asks *with whom did she agree* to commit a *common criminal objective*. MPC §5.03(1). If the defendant knows that a person with whom she has conspired to commit a crime has also agreed with a third person to commit the *same* crime, then the defendant has agreed with both of them. MPC §5.03(2). Thus, the MPC determines the scope of a conspiracy for *each* defendant by asking with whom each defendant agreed to commit the same target offense. This approach, based on personal culpability and shared criminal objectives, can result in different conclusions for each defendant.

The MPC also provides that each person has entered into a single conspiracy even if there are multiple criminal objectives as long as the "crimes are the object of the same agreement or continuous conspiratorial relationship." MPC §5.03(3).

The Wheel and Chain Approach

The MPC would require a different analytic approach in the *Bruno* case and could produce a different result. In that case there were two distinct crimes: importing drugs and selling drugs. As to each defendant, the MPC asks whether and with whom did he conspire to commit *each* of these crimes? Only if *both* of these crimes were the object of the same agreement or conspiratorial relationship among *all* parties would there be a single conspiracy. As the Commentaries note, "it would be possible to find . . . that the smugglers conspired to commit the illegal sales of the retailers, but that the retailers did not conspire to commit the importing of the smugglers."[46]

When applying the MPC, look at each possible conspirator *individually*. Decide with whom she has agreed to commit a specific crime or crimes. This will determine what conspiracy charge may be brought against her.

Whatever the applicable law, you will find it very useful to actually outline the relationship of the various actors in analyzing both a real life situation and a criminal law exam question. Simply characterizing the group as a "wheel with (or without) a rim" or as a "chain" does not necessarily provide the correct answer, though this will help provide a picture of the actors and their roles. Instead, keep in mind this fundamental question: Who agreed to carry out the common criminal goal? This question, in turn, is often answered by a functional analysis of the group. Even if they did not know of each other's identity, did each know of the others' existence? Was each person useful in accomplishing a common goal? Did the success of the venture depend on each of them carrying out their task successfully? Was there communication and cooperation between or among the parties? Were the other characteristics of group criminality present: a division of labor, specialization, reinforcement of wills?

PARTIES TO A CONSPIRACY

The Common Law's Bilateral Approach

The common law required an agreement between two or more guilty persons. This approach has been called the “bilateral approach” to conspiracy. The logic of requiring at least two guilty parties for a conspiracy (sometimes called the “plurality” requirement) is inherent in the meaning of agreement. Usually, it takes two people to “agree.”

Thus, at common law, if a defendant agreed to commit a crime with a legally insane person or with an undercover police officer who did not intend to commit the substantive offense, there was no agreement between two or more guilty individuals, and, thus, no conspiracy. Though prosecutors have occasionally tried to convict the defendant of attempted conspiracy in such cases, most courts have not been very sympathetic. In their view, solicitation is the proper charge. (See Chapter 11.) The federal courts have adopted the bilateral approach to conspiracy.[47]

Contemporary statutes that adopt the bilateral approach will often use definitional terms like those used by California. Its statute begins with “If two or more persons conspire. . . .”[48] Be on the lookout for definitional terms that require at least two persons to agree or to conspire, because they often indicate the jurisdiction has adopted the bilateral approach.

The bilateral approach to conspiracy makes sense if conspiracy is viewed primarily as a charge that strikes at bona fide group criminal activity. If the defendant has agreed with an undercover police officer to commit a crime, there is no genuine criminal collaboration at work and the special dangers of a group are not present. (Indeed, in such a case, law enforcement is well positioned to ensure that the criminal objective is *never* going to be achieved.) However, the plurality requirement can be overly broad. A defendant who agrees with a mentally disabled individual to commit a crime has formed a genuine collaborative criminal effort. Though the mentally disabled individual might subsequently be found “not guilty by reason of insanity,” he could still contribute significant intelligence, effort, and encouragement to achieving the criminal objective of the agreement.

In jurisdictions that have adopted the bilateral approach, the prosecutor must prove that two or more persons have agreed to commit a crime. Under the common law rule requiring consistency in a verdict, if all but one of the charged conspirators are acquitted in the same trial,

the conviction of the remaining conspirator must be reversed. The rationale is that because the common law requires at least two guilty parties, if the jury verdict establishes that there was only one guilty party to the conspiracy—that conviction must be reversed. If, however, one of the alleged co-conspirators has fled the jurisdiction and cannot be brought to trial, the prosecutor can still convict the remaining co-conspirator, provided he proves there was an agreement between two or more persons to commit a crime.

The bilateral approach can be criticized when considering conspiracy as an *inchoate* crime. Police cannot intervene early and convict someone of conspiracy unless there are two or more culpable individuals. This is true even though an individual has clearly demonstrated her dangerousness and might subsequently find a truly willing and able partner in crime. Instead, the police can arrest her for solicitation, which has a relatively light punishment (see Chapter 11). Or, they can wait until the defendant has moved much closer to the target offense and actually committed an attempt. The bilateral approach thus seems to conflict with the inchoate *rationale* of conspiracy — to prevent crime at its earliest stages.

The Model Penal Code's Unilateral Approach

The Model Penal Code departs from the bilateral approach of the common law. Instead, it permits conviction of any person who "agrees" with another person to commit a crime. MPC §5.03(1)(a) and (b). Thus, the MPC would convict a defendant who has agreed to commit a crime with someone who could not be convicted, such as a diplomat or a legally insane individual, or with someone who has no real intention to commit a crime, such as an undercover police officer. In this sense, the MPC imposes responsibility on a defendant who *believes* he has agreed with another person to commit a crime. A defendant who agreed with another to commit a murder could be convicted of conspiracy to commit murder even if the evidence showed that his co-conspirator never intended to participate in the murder but merely feigned agreement while cooperating with the police.[49]

Under the inchoate or unfinished crime part of conspiracy's rationale, the MPC assesses each individual's culpability based on his individual mental state and conduct. Its definition of conspiracy does not require an agreement between at least two guilty parties. MPC §5.03(1). Consequently, the MPC does not require the same "answer" for each party; indeed, it accepts that its analytic approach may generate a different result for each party, depending on his individual culpability and conduct.

Section 5.04(1)(b) explicitly states that it is no defense that the person with whom the defendant conspired is irresponsible or has immunity from conviction. Under the MPC, the result is the same in the case of a co-conspirator who does not really intend to commit the crime, such as an undercover police officer. The MPC is not concerned with whether a truly criminal group forms or whether it has a good chance of succeeding. Rather, it is concerned with convicting a culpable individual who has provided "unequivocal evidence of a firm purpose to commit a crime."[50]

Critics of the MPC argue that its unilateral approach (1) departs without justification from the well-settled law of conspiracy and its group crime rationale, which requires actual collaborative effort; (2) invites police to "manufacture" crime by encouraging police agents to enter into unilateral conspiracies; and (3) is unnecessary because solicitation and attempt are adequate to protect the public from the perceived dangerousness of a unilateral conspirator, at least when an undercover police agent is the only other party.[51]

Some commentators support the MPC's unilateral approach. By way of a contracts analogy, they argue that a mental reservation by one party to an express acceptance of an offer (such as an undercover police officer would surely have in agreeing to commit a crime) should not prevent a judge or jury from finding an "agreement." Rather, the court *should* find that there is an agreement in such cases, and then decide whether the police agent has a valid defense to the charge, such as statutory privilege or necessity, or whether the defendant has a defense of entrapment (see Chapter 17). Making police officers run the risk of being found to be co-conspirators if they do not have a valid defense or of having entrapped the defendant might make them think more carefully about their proper role in detecting crime.

ABANDONMENT

The Common Law

The common law does not allow the defense of abandonment to conspiracy. The crime of conspiracy is complete with the agreement and no subsequent act can exonerate the actors. As in attempt, once the actors have crossed the threshold of criminality, they cannot go back.

The Model Penal Code

The Model Penal Code does allow this defense to conspiracy and calls it "renunciation." It is a limited affirmative defense and there are two stringent requirements: (1) the defendant must have "thwarted the success of the conspiracy," *and* (2) the abandonment must be "complete and voluntary." MPC §5.03(6). (Remember that under the MPC, the defendant has the burden of producing evidence to support an affirmative defense, but the prosecution has the burden of persuasion. MPC §1.12.) Ordinarily, informing law enforcement officials in a timely manner is considered sufficient; simply withdrawing from the conspiracy is not. However, if such notice fails to thwart the success of the conspiracy because it is too late or because the police simply fail, then the defense of renunciation will not prevail. It will, however, start the running of the statute of limitations under §5.03(7)(c) for that defendant.[52]

Also, as in attempt (see Chapter 12), the defendant must have made his decision for the "right" reasons. It is ineffective if he changed his mind because the chances of detection became greater or he wanted to wait for a more opportune time or place.

The MPC permits this defense because (a) effective renunciation demonstrates a lack of firm criminal determination and thus of dangerousness, and (b) the law should create incentives for individuals to call off their criminal plans.

Most recent state criminal law revisions have followed the MPC in creating the defense of renunciation. A majority of those states that have

adopted the renunciation defense place the burden of proving it on the defendant.

WITHDRAWAL

The Common Law

This defense is available to co-conspirators in a number of jurisdictions.[53] Giving reasonably adequate notice to *all* co-conspirators that one no longer intends to take part in the criminal plan in time for the other conspirators to abandon the conspiracy is usually sufficient to establish withdrawal. This defense permits a conspirator to avoid criminal responsibility for *future* crimes. Unlike the MPC defense of renunciation, the common law defense of withdrawal does not "undo" the offense of conspiracy or the withdrawing conspirator's responsibility for any substantive crimes *already* committed. However, withdrawal does start the running of the statute of limitations and limits the admissibility of co-conspirator statements and actions occurring after withdrawal.

The Model Penal Code

The MPC also provides this defense. MPC §5.03(7)(c). To be effective, the actor must either advise his co-conspirators that he is no longer involved or inform law enforcement of the conspiracy and his involvement in it.[54]

For a comparison of conspiracy under the common law and the MPC, see Table 13.1.

13.1 **Comparison of Conspiracy Under the Common Law and the Model Penal Code**

Common Law	**Model Penal Code**
Rationale: Inchoate crime and group liability	*Rationale*: Treated *solely* as inchoate crime
"Unlawful act" may be object of conspiracy	Only a "crime" may be object of conspiracy
No overt act required historically (modern common law jurisdictions typically require an overt act)	Overt act required except for first- and second-degree felonies
Does *not* merge with target offense	Merges with target offense unless criminal objectives go beyond particular offenses
Specific intent required for all *material* elements	"Purpose" required for *conduct* and *result* elements; unclear if "purpose" required for *circumstance* elements
Pinkerton rule adopted	*Pinkerton* rule rejected; accomplice liability required
Bilateral requirement that *both* conspirators *must* agree	Agreement can be unilateral
No renunciation (no abandonment)	Renunciation permitted
Withdrawal permitted	Withdrawal permitted

IMPOSSIBILITY

Impossibility in conspiracy cases does not occur very often. However, just in case a clever law professor thinks it should occur on your exam, here is an explanation!

Legal Impossibility

If the parties agree to commit an act they *believe* is a crime or is covered by the applicable conspiracy statute but is not, they cannot be convicted of conspiracy. Just as in attempt (see Chapter 12), the actors' belief that they are breaking the law cannot generate criminal responsibility when there is no law proscribing their conduct. Though the group has shown themselves willing to break *the* law, they have not managed to plan behavior that breaks a *specific* law. The principle of legality limits the power of the state to punish in such cases.

Moreover, the group does not pose any special danger to socially protected interests, though it may be argued that the group may eventually shift its aim to conduct covered by the law of conspiracy, and corrective action is appropriate. However, this is a general problem in cases of legal impossibility and probably should be dealt with on a uniform and consistent basis rather than being adjusted on a crime-specific basis.

Factual Impossibility

Factual impossibility in an attempt case is where the defendant tried to implement her criminal mens rea but, for some reason beyond her control, could not. In conspiracy, however, the crime is completed at the moment there is an agreement or, in some jurisdictions, when any member of the conspiracy commits an overt act in furtherance of the conspiracy. Thus, it is still possible that the substantive offense could be committed.

Consider this case. *A* and *B* agree to kill *C* while *C* sleeps, and *A* buys a gun in furtherance of that agreement. Two days later, unknown to *A* and *B*, *C* dies in his sleep of a heart attack several hours before *B* shoots to kill *C* as he apparently sleeps. *A* and *B* can be convicted of *conspiracy to murder C* even though (a) in some jurisdictions shooting at *C* would be considered a case of *legal impossibility* and, therefore, *B* would not be guilty of attempted murder; (b) under the MPC and in those jurisdictions that consider this *factual impossibility*, *B* would only

be guilty of *attempted murder* because he *thought C* was still alive. *A* and *B* cannot use the impossibility of accomplishing the goal of their conspiracy as a defense to the charge of conspiracy to commit murder. Both have demonstrated their dangerousness by entering into an agreement and acting on it. Even if *C* died right after *A* and *B* committed the crime of conspiracy, and *A* and *B* took no further acts because they learned of *C*'s death, *A* and *B* could be convicted of conspiracy to murder *C*.

The only tricky case arises when parties agree to commit a crime in a particular way and, on those facts, the substantive offense could not be accomplished. Suppose Jody and Jenny agree to steal the red Tesla in the Safeway parking lot but are then arrested. Can they be convicted of conspiracy when the car they agreed to steal was actually Jody's car? This is the strongest case for a claim of impossibility. However, the trend today, particularly under the MPC, is to assess the actors' culpability based on the facts as they believed them to be. In all probability, both Jody and Jenny would be convicted of conspiracy to commit theft.

WHARTON'S RULE

The Common Law

Some crimes logically require the participation of two individuals. Common law crimes such as adultery or dueling, for example, require two participants, as do some contemporary crimes. For example, the sale of drugs requires both a seller and a buyer. When the substantive offense requires concert of action between two people to accomplish a common criminal goal, it necessarily requires agreement. Wharton's rule (named after a legal scholar who analyzed this problem) says that conspiracy cannot be used to criminalize the agreement that is a logically required component of the substantive offense.

The rule, generally accepted by most courts, prevents the use of conspiracy to pile up more punishment on conduct that is already punished by the substantive offense. Moreover, when only the two

necessary parties are involved, there is no additional threat posed by this particular group that is not already anticipated and punished by the substantive offense.

On the other hand, the rule defeats the use of conspiracy to punish conduct that has not yet resulted in the commission of the target crime. Consequently, only attempt may be used. Attempt requires the parties to come closer to committing the offense than does the crime of conspiracy. By eliminating the availability of conspiracy when two parties are logically required for commission of the target offense, Wharton's rule decreases the usefulness of conspiracy as a preventive measure to reach inchoate or unfinished crimes.

There are exceptions to this rule. The "third party" exception provides that conspiracy may be used when *more* than the two parties logically required to commit the target offense are involved. The rationale is that the addition of a third (or more) person does, in fact, enhance the dangers of group criminal activity. This type of line drawing can be criticized as highly formalistic and perhaps even unrealistic. However, it does provide a "bright line" for courts and prosecutors and may also serve as a deterrent to keep the size of criminal groups to the number of individuals necessarily required to commit the substantive offense.

In *Iannelli v. United States*,[55] the Supreme Court treated Wharton's rule as a presumption to be applied by courts in the absence of contrary legislative intent. When legislative intent does indicate that conspiracy may also be charged in addition to the substantive offense, Wharton's rule does not bar its use.[56]

Some courts also hold that Wharton's rule is inapplicable when the substantive offense requires the participation of two culpable parties but does not specify any punishment for one of them.[57] For example, Wharton's rule would not preclude a charge of conspiracy to sell intoxicating liquor when the law punished only the seller but not the buyer.[58]

The Model Penal Code

The MPC rejects Wharton's rule. Instead, it provides that a person who could not be convicted of the substantive offense or as an accomplice to the substantive offense may not be convicted of conspiracy to commit that offense. MPC §5.04(2). Under the MPC's unilateral approach to conspiracy, immunity for one defendant under this section does not prevent conviction of another co-conspirator.

IMMUNITY FOR SUBSTANTIVE OFFENSE

The Common Law

Another common law rule, based on inferred legislative intent, prevents the prosecutor from using conspiracy to punish the conduct of an individual whose participation in the substantive offense is logically required but whose behavior is not made criminal by that offense. In *Gebardi v. United States*,[59] the Supreme Court reversed a woman's conviction for conspiracy to violate the Mann Act. This statute prohibited the transportation of a woman across state lines for immoral purposes. However, it punished only the individual who transported the woman; it did not punish *her* conduct. To permit the use of conspiracy to punish the agreement of the woman who is necessarily included in the proscribed act but whom the legislature decided not to punish would undermine the public policy of the statute.

The Model Penal Code

The Model Penal Code states that, unless otherwise provided in a criminal statute, a person cannot be convicted of conspiracy if she could not be guilty of the substantive offense either (a) under the definition of the substantive offense, or (b) as an accomplice to its commission under the MPC's definition of accomplice. MPC §5.04(2) (incorporating by reference MPC §2.06(5) and 2.06(6)(a)). Under the MPC's accomplice section, an individual cannot be convicted as an accomplice if she is the

victim of the conduct or if her participation is "inevitably incident to its commission." The *Gebardi* case would come out the same way under the MPC for the woman, but not for the man. Remember the MPC adopts a unilateral approach to conspiracy. It does not require two guilty parties. The prostitute's conduct is "inevitably incident" to a violation of the Mann Act. Similarly, in a statutory rape case, the prosecutor cannot use conspiracy to convict the underage participant, because the substantive offense considers her to be the "victim" protected by the statute. To permit a conspiracy conviction in such cases would undermine the legislature's intent and the public policy of the specific criminal law.

Examples

1a. Heather and Penelope are having lunch at the Brass Rail, a posh watering hole for the upscale and trendy. Bemoaning the high price of the cocaine they consume in rather large quantities and the resulting crimp in their lifestyle, Heather turns to Penelope and says: "Why don't we sell the stuff ourselves? That way we can make enough money to buy and use as much as we want and have enough money left over to indulge ourselves." Penelope, sipping her champagne slowly, finally says: "That is a great idea. Let's do it! I know where we can get crack cocaine in volume and on credit. I will call my friend tomorrow and make the arrangements. We are on our way to coke independence!" Heather and Penelope then lift their glasses to toast their arrangement, saying in unison: "To our new business!"

1b. The next day, Penelope calls Rachel, her cocaine supplier, on the telephone to arrange for the purchase of a large amount of cocaine on credit, but Rachel does not answer.

1c. It turns out Heather is an undercover police officer who, after telling her superior officers, arrests Penelope. Penelope utters the immortal words: "Et tu, Heather?"

1d. Heather is *not* a police informant. Two days later, Penelope reaches Rachel, her supplier, and tells Rachel: "My friend and I want to purchase a large amount of cocaine on credit in order to sell it at

retail."

Rachel, having earned her undergraduate degree in economics at a famous midwestern urban school, is always looking to expand her market share. She decides this is a great idea and tells Penelope she will furnish Penelope with two kilos on credit and that Penelope can get another two kilos from her under the same terms after Penelope has paid for the first two kilos. The next day, Rachel delivers the cocaine to Penelope's apartment after telling Penelope how much she owes and when she expects both Penelope and "her friend" to repay her.

Over the next two weeks Penelope sells most of the cocaine in five separate sales while Heather is away on vacation. Unfortunately for Penelope, the last sale she makes is to Pat, an undercover police officer. Pat tries to arrest Penelope, who pulls a gun and shoots and wounds Pat. Other officers arrive almost immediately and subdue and arrest Penelope.

Heather, Penelope, and Rachel are all arrested. The prosecutor charges all three of them with a single conspiracy, four counts of selling drugs, one count of an attempted sale, and one count of assaulting a police officer while in performance of her duties. Heather and Rachel's lawyers object.

How many conspiracies are there and who are parties?

What charges can be brought as a result of Penelope's shooting Pat, the federal undercover police officer?

1e. In prosecuting Heather, Penelope, and Rachel for conspiracy, the prosecution seeks to introduce the statement of Penelope to Rachel ("My friend and I want to purchase a large amount of cocaine on credit in order to sell it at retail") to establish that Heather was a member of the conspiracy. Assuming for the moment that Rachel is prepared to testify as to what Penelope told her, is this statement admissible to establish that Penelope and Heather had entered into a conspiracy to purchase and sell drugs?

2. Susan, Kelly, and Cathy have smuggled cocaine into Florida from various Caribbean islands using the same modus operandi: They charter a small plane at rates well above market, use different disguises during each trip, fly at night, fly low to avoid detection,

and depart from destinations known to be drug sources.

Recently, they chartered a small plane owned and piloted by Norm to fly them to the islands and then to fly them back to Florida. Although they did not explicitly tell Norm that they were using these trips to transport drugs into the United States, they told Norm all the other details of their previous trips. In addition, they paid Norm $3,000 more than his normal fee and used obvious disguises for each trip. On the fifth flight, Norm and the ladies were arrested in Florida and charged with a conspiracy to smuggle drugs into the USA.

a. Can Norm be convicted of conspiring with Susan, Kelly, and Cathy to illegally transport cocaine into the United States?
b. If so, can Norm be convicted on the smuggling counts for the trips the ladies made prior to his involvement?

3a. Jay is being held in an old rural county jail. Late one afternoon, Rhonda, his girlfriend, visits Jay and tells him that she and Joe, his best friend, are going to bust him out that night. (Rhonda does not tell him they do not intend to leave any witnesses.) Jay says: "Great! I knew I could count on both of you." At about 3:00 a.m. the next morning, Rhonda and Joe ring the jail's night bell and are admitted by Doug, the night jailer. While Joe distracts the guards, Rhonda walks up behind Doug and kills him. Unfortunately, Rhonda and Joe cannot find the keys to Jay's cell, so they flee. The next day they are both apprehended. Is Jay responsible for the murder of Doug?

3b. Same facts, except as Joe and Rhonda enter the jail, Jay sees Rhonda pointing a gun at Doug's head. Jay screams to her: "Put the gun down. Don't shoot him!" Rhonda ignores Jay and kills Doug.

4. José was arrested after flying into JFK International Airport in New York on a flight from Afghanistan. The U.S. Attorney charged him with conspiracy to commit terrorism, including future acts of murder and kidnapping people in a foreign country and planting explosive devices in the United States. At trial, the prosecutor introduced a signed application form José filled out to attend a training camp run by Al Qaeda in Afghanistan. Can José be convicted of conspiracy to commit terrorism on this evidence?

What if the prosecutor could also show that José actually completed the training camp?

5. Stan told Gary, a federal undercover narcotics agent, that Stan's friend, Stella, occasionally drives to Mexico, purchases heroin, and smuggles it into California where she resells it. He also told Gary that he thought Stella would probably drive with Gary to Mexico where they could pick up heroin and bring it back to California for resale at a hefty profit. Gary contacted Stella and they decided to drive to Mexico together, buy the heroin, and bring it back to California. They were stopped while driving back across the border. Can Stan *and* Stella be convicted of conspiracy to transport heroin into the United States?

6. Al Falfa, a retail seller of farm chemicals, sold several large batches of ammonium nitrate, a fertilizer generally known to be a key ingredient in homemade terrorist bombs, to Jed, a young man in his 20s with very short hair and dressed in an army surplus camouflage uniform. Al Falfa knew Jed did not own a farm but did own a very small house with a small yard. He also knew that Jed belonged to a militant "people's militia" that advocated extreme antigovernment views. After the first sale, Al Falfa said to Jed: "You know this is far too much to use on your lawn. If you use all of it, you'll surely kill it." Jed replied: "I am not going to use it on my lawn. As a former army explosives expert I know how to use this stuff in some unusual ways. It's not the lawn I'm going to kill. It's time we showed those government folks we mean business!" Jed loaded the fertilizer onto his large pick-up truck and left. Jed subsequently returned to make several more large purchases. Al Falfa, content with making more than half of his annual sales of this product to a single customer at his usual price, did not take any further action.

   One week later, a huge explosion destroyed the federal building in a nearby city killing over 20 children in an on-site day care center and over 50 federal workers. Jed was arrested shortly thereafter and experts have determined that he used the fertilizer that he purchased from Al Falfa to make the bomb. Can the government convict Al Falfa of entering into a conspiracy with Jed?

7. Tom and Dave run into Linda at a bar. They have a few drinks and then decide to walk to a different bar nearby. While they walk along, Tom suggests a short-cut through an alley. Linda and Dave agree. Once they are in the alley, Tom grabs Linda and rapes her. While Tom is raping Linda, Dave pulls a garbage can in front of them so that no one can see from the street what Tom is doing. Did Tom and Dave conspire to rape Linda?

8. Sherrie and Bill Green agreed with Dr. Feelgood to exchange stolen goods for amphetamines. The Greens would steal household goods and bring them to Dr. Feelgood, who would then write them a prescription for amphetamines. Eventually, the Greens and Dr. Feelgood were arrested and charged with conspiracy to unlawfully dispense controlled substances. Dr. Feelgood's lawyer argued that laypersons cannot conspire to illegally dispense prescription drugs because laypersons are not authorized to prescribe them. Is Dr. Feelgood's lawyer correct?

9. Lisa, Jane, and Mark learn that Lisa's elderly uncle keeps his life savings under his mattress. They agree to break into his home, kill him, and take the money. Lisa buys a gun and delivers it to Mark.
   a. Lisa, on the way to meet Mark and Jane at her uncle's home, is overcome by guilt and fond memories of her uncle. She decides she cannot go through with the plan. Instead, she catches a plane to San Francisco. Shortly thereafter, Mark and Jane break into the uncle's house, kill him, and steal his money.
   b. Lisa meets Mark and Jane at her uncle's house as planned. Overcome by guilt and fond memories of her uncle, she turns to Jane and Mark and says: "I can't go through with this. I want nothing more to do with this crazy idea." She then leaves Mark and Jane who, nonetheless, break into her uncle's house, kill him, and steal his money.
   c. Overcome by guilt and fond memories while on the way to meet Mark and Jane at her uncle's house, Lisa calls her uncle to warn him of the impending crimes. Unfortunately, his telephone is busy. Mark and Jane break into the uncle's house, kill him, and steal his money.
   d. Overcome by guilt and fond memories while on the way to meet

Mark and Jane at her uncle's house, Lisa calls the police and tells them of the planned crime. The police dispatch a patrol car, which arrives in time to arrest Mark and Jane before they can break into the uncle's house.

10a. Remember the facts of John and Lonny and their plan to hex Judge Smith in Chapter 12, Example 15, page 359. Analyze those facts to consider a potential conspiracy.

10b. Now suppose John is convicted by a jury of conspiracy, but not Lonny. Are there any implications?

10c. Consider now that John does not involve Lonny, but directly contacts Emma himself. Emma agrees to help John, but unknown to John, Emma is working with the police and does not intend to participate in the murder of Judge Smith. What result now?

11. Courtney learns she can make a small fortune dealing prescription drugs. Courtney's sister Anna works as a medical assistant at a doctor's office. Courtney asks Anna to steal a doctor's prescription pad so that Courtney can write forged prescriptions. Courtney promises Anna twenty percent of the profits made through this drug dealing venture if Anna succeeds in obtaining the prescription pads. Anna agrees to Courtney's plan and obtains a prescription pad. However, before turning the prescription pad over to Courtney, Anna decides she could keep all of the profits if she continues on alone. Anna never gives Courtney the prescription pad.

Explanations

1a. Heather and Penelope agreed to commit at least two crimes, (1) the purchase and (2) the subsequent sale of drugs. Under the common law and the MPC (because the substantive crimes that are the object of the agreement are serious felonies), Heather and Penelope committed one conspiracy once they entered into the criminal agreement (even though it had two target crimes). In many jurisdictions, however, one of the parties must commit an overt act in furtherance of the conspiracy in addition to the agreement before the elements of conspiracy are satisfied. In these jurisdictions,

Heather and Penelope have not committed conspiracy until one of them does an overt act to implement their agreement.

1b. Even in those jurisdictions that require an overt act, both Heather and Penelope can be convicted of conspiracy because Penelope acted to implement their criminal agreement by calling her supplier in an attempt to secure drugs on credit. Even though it is an innocent act that does not provide strong evidence of criminal intent and even though it did not move the conspiracy any further along the path of implementation, making the telephone call at least demonstrates that the conspiracy has moved beyond intention to action. The defendants will argue that, because Penelope did not actually talk to Rachel, the telephone call should not be considered an "overt act in furtherance of the conspiracy." This argument will probably not succeed. Unlike attempt, there is no requirement that the overt act come close to committing the target offense or even strongly corroborate the actors' criminal purpose. Thus, both Heather and Penelope can be convicted of conspiracy.

This particular example illustrates that the "overt act" requirement for conspiracy often does not provide very strong evidence establishing either firmness of criminal intention or significant implementation of the criminal plan.

1c. In this example, Heather does not have the mens rea necessary to commit conspiracy because she is a police officer. In those states that have retained the common law's bilateral theory of conspiracy, Penelope could not be convicted of conspiracy because the crime requires at least two culpable parties. Because Heather is a police officer, there is no true collaborative criminal enterprise at work and the special dangers of a criminal group are not present. The prosecutor might consider charging Penelope with solicitation; however, Heather, not Penelope, originated the criminal scheme. Thus, Penelope cannot be convicted of encouraging Heather to commit a crime. Nor will attempted conspiracy succeed; to permit this strategy to work would undercut the bilateral theory of conspiracy and its plurality requirement. Finally, Penelope cannot be convicted either of attempted possession or sale of cocaine. The bad news? Penelope has lost a good friend! The good news?

Penelope probably cannot be convicted of any crime.

Under the MPC, however, Penelope *could* be convicted of conspiracy. She did agree with Heather to commit a crime; under the unilateral theory of conspiracy adopted by the MPC, she is guilty of this crime. The MPC focuses on the culpability and conduct of each individual and her dangerousness. It does not require that a genuine criminal group be actually at work.

1d. *Number of conspiracies and parties.* Rachel, the supplier, will argue that she agreed to sell cocaine to Penelope and did so. Thus, in her view she can be convicted only of the sale, not of agreeing to sell. She will claim that Wharton's rule precludes her conviction when the participation of two parties is necessary to commit the crime (as in the sale of drugs that require a seller and a buyer). The government will respond that, even if Wharton's rule might normally apply, Rachel knew that there was a third party involved because Penelope told her about her friend. Thus, the *third-party exception* would defeat Wharton's rule, and Rachel can be convicted for both the prior criminal agreement and committing the crime that is the object of that agreement.

The government will also argue that this is a "chain" conspiracy. Though Rachel did not know who Penelope's friend was, she knew there was a friend who would help sell the cocaine and be jointly responsible for paying for it. Thus, she knew the essential elements of the scheme. Finally, the government will argue that Rachel had a "stake in Heather's and Penelope's venture" to sell crack cocaine because Rachel sold the drugs on credit and also entered into an ongoing business relationship, promising to sell additional drugs on the same favorable terms. Unless Heather and Penelope succeeded in selling the cocaine, Rachel might not get paid. The government will probably succeed in charging and proving a single conspiracy.

If it does, then Rachel is responsible under the *Pinkerton* rule for all of the retail sales Penelope made because they were foreseeable crimes. Heather is also responsible for these sales under the *Pinkerton* rule even though she was on vacation when Penelope made the sales and did not aid and abet those crimes. The *Pinkerton* rule effectively attributes criminal responsibility for foreseeable

crimes in furtherance of the conspiracy committed by other co-conspirators without requiring proof that would satisfy the elements of accomplice liability.

The MPC focuses on each individual and analyzes with whom each agreed and to what purpose. The government might still succeed in establishing that this is a single conspiracy with three parties. Heather did not know who Rachel was, but she did know that Penelope had a friend who would supply the cocaine on credit. Thus, Heather has arguably authorized Penelope to enter into an agreement with Rachel on her behalf. Likewise, Rachel knows that Penelope has a "friend" (though she does not know her identity) and that the friend will help Penelope sell the drugs and be responsible for paying for them.

Unlike the *Pinkerton* rule, however, both Rachel and Heather might not be responsible under the MPC for the five retail sales that Penelope made since the government will have a difficult time establishing the elements of accomplice liability (especially "purpose" rather than "knowledge") as required by the MPC.

The assault on Pat. Penelope is clearly guilty of assaulting Pat, an undercover police officer, while in the performance of her duties. The more difficult question is whether Heather and Rachel can be charged with this crime by virtue of being co-conspirators with Penelope. On these facts, neither Heather nor Rachel expressly agreed that Penelope should use deadly force if necessary to resist arrest. Nor is there any indication that Heather or Rachel knew, or should have known, that Penelope was armed or would use deadly force to resist arrest. The amount and value of the cocaine involved in the sale were not large. Neither Heather nor Rachel was present during the sale or played a major role in the attempted sale. Thus, it is unlikely that a jury would conclude that, under these circumstances, Heather or Rachel should have foreseen that Penelope would use deadly force to resist arrest.

1e. Under the conspiracy exception to the hearsay rule, a statement by one conspirator implicating another conspirator is admissible in federal courts, provided the prosecutor proves by a preponderance of the evidence (including the contested statement itself) that a conspiracy involving these individuals exist. If the judge so finds,

Penelope's statement to Rachel about her "friend" is admissible.

2. A jury could infer that, though Norm did not actually know he was transporting cocaine into the United States, he nonetheless knew he was participating with others in illegal drug smuggling and that he intended to join and participate in the conspiracy. Norm was paid more than his usual fee, made several trips at night while flying low to and from destinations known as sources for drugs, and knew his clients used various disguises. He also knew that they had done this before. A conspirator does not have to know all the details of a conspiracy as long as he knows its essentials and intends to participate in the conspiracy.

   Though Norm may have joined a conspiracy "in progress," so to speak, he is not liable for any substantive offense committed by his co-conspirators *prior* to his becoming a co-conspirator. The *Pinkerton* rule does not impose responsibility for foreseeable crimes committed before a co-conspirator joins the conspiracy.

3a. Rhonda and Joe obviously formed a conspiracy to break Jay out of jail and each of them is responsible for the murder committed by Rhonda because they had expressly agreed to kill all witnesses. Even under the MPC, Joe would be responsible for the guard's death because he aided Rhonda by distracting Doug.

   The prosecutor would argue that Jay joined the conspiracy the afternoon Rhonda visited him and outlined the general plan. But did Jay agree to kill the guard? Can he be held accountable for Doug's murder when he did not know of the planned killing and was a completely passive agent unable to control the behavior of either Rhonda or Joe?

   The prosecutor will argue that Jay is also responsible for these murders under the *Pinkerton* rule because it was reasonably foreseeable that deadly force might be necessary to accomplish the general plan. Consequently, Jay can be charged with Doug's murder. Under the MPC, the prosecutor must prove that Jay is an accessory to the murder because he solicited this *particular* crime, or aided, or agreed to aid, or attempted to aid in its commission. Without more evidence, this will be difficult — but not impossible — to prove.

3b. Under these facts, Jay might still be responsible for Doug's murder under the *Pinkerton* rule. Though he tried to prevent Doug's murder, the prosecutor could still try to establish that this crime was foreseeable and in furtherance of the conspiracy. Under the MPC, it will be very difficult to prove that Jay, who was confined to a cell, is responsible for the murder. Not only did he not assist or try to assist in any way; he actually tried to prevent the crime. Thus, he is not an accessory to Doug's murder.

4. The prosecutor would argue that the application form clearly establishes that José has intentionally joined a well-known terrorist group, Al Qaeda, which has as its only goal committing criminal acts of terrorism against citizens of the United States and other countries here and abroad. By signing this application, he has effectively become a member of an on-going conspiracy and, under well-settled case law, is responsible not only for the criminal act of conspiracy itself, but also for all reasonably foreseeable crimes committed by other co-conspirators in furtherance of the conspiracy after he became a member. Under a bilateral conspiracy approach, José has accepted an offer from Al Qaeda to join its ranks and participate in terrorist training. By signing the agreement he has not only signaled that he is joining this criminal conspiracy, but that he will become proficient in carrying out acts of terrorism. Any requirement of an additional act is easily satisfied by any of the daily acts of terrorism committed by other members of the Al Qaeda conspiracy, his co-conspirators. In either case, José can be convicted of conspiracy to commit terrorism and will be responsible for all foreseeable acts of terrorism committed by his partners in crime in the future, even those unknown to him . This responsibility attaches even if he is in custody unless he withdraws from the conspiracy.

Defense counsel would claim that, at worst, José simply indicated he might join the terrorist group at some time in the future. Under the common law, he has not agreed with another person or organization to commit a criminal act. Nor did he form a unilateral conspiracy since he had no present intention to join any criminal conspiracy. Certainly he did not commit any overt act in

furtherance of the conspiracy. The government is using flimsy evidence of possible future criminal conduct to impose expansive criminal responsibility on José.

Of course, presenting evidence that José participated in the terrorist training camp would strengthen the government's case immensely. The government would argue that defense counsel can no longer claim that José only indicated a possible willingness to join the conspiracy at some time in the future; he actually became an active member. The defense counsel would argue that mere preparation is not a criminal agreement, but that argument is very weak.

5. Without additional evidence, it would be difficult to prove that Stella and Stan had previously agreed to transport heroin into the United States. It seems more likely that Stan was simply telling Gary about Stella's past drug smuggling. This is particularly true since it was Gary who contacted Stella and made specific arrangements. Thus, it would be very difficult to convict Stan and Stella of conspiring together to transport heroin into the United States.

   Whether Stella can be convicted of conspiracy to transport heroin into the United States depends on whether the federal law embraces the unilateral or bilateral theory of conspiracy. The prevailing view is that it adopts the bilateral theory; thus, Stella cannot be convicted of conspiring with Gary, an undercover federal drug agent, who did not have the necessary mens rea to commit the object crime. Stella can be convicted of an attempt to transport heroin into the United States, but she cannot be convicted of conspiracy.

6. Most cases require the government to prove a provider of goods or services acted with the *purpose* of furthering the criminal objective; mere *knowledge* is not enough. The cases hold, however, that a vendor can be convicted of conspiracy if he has a "stake in the criminal venture." The first question is whether Al Falfa knew that Jed was going to use the fertilizer for a criminal purpose. This is a close question. Given events like the bombings of the World Trade Center in New York City and the Federal Building in Oklahoma

City, most sellers of this type of fertilizer probably know it can be used to make powerful homemade bombs. Assuming that Al Falfa did know that Jed would use the fertilizer to make a bomb, can the government prove purpose? Al Falfa sold more than half of his supply to this customer who did not appear to use it for its intended use. He also knew that Jed was a former army explosives expert and a member of a group whose political views were very extreme. However, he did not sell the product at an inflated price and it is possible that Jed did have some legitimate use for the purchase unknown to Al Falfa. It will be a jury question whether Al Falfa had a "stake in the venture" and acted with the purpose of furthering the criminal objective. The facts of this example may be less persuasive than the facts in Example 2 in establishing that a vendor of goods or services acted with the "purpose" of furthering the criminal objective and thereby entered into a conspiracy.

Should "knowledge" suffice, at least when the harm to be avoided is so serious? Some commentators argue that knowledge should suffice — at least in cases like this. They would use the criminal law to impose a duty on a seller of goods or services to take rather modest measures (such as not selling) in order to prevent such serious harm. Though some jurisdictions would convict if the seller of goods or services had *knowledge* of the purchaser's criminal objective (particularly if a serious crime is involved), the MPC requires the government to prove that Al Falfa acted with *purpose.*

7. Probably not. To find a conspiracy, there must be evidence of a prior agreement that reflects a shared criminal purpose. An agreement does not require an express act of communication; a jury may infer the existence of a prior agreement from concerted activity. Nonetheless, on these facts, it appears that Tom's rape of Linda was a spur of the moment decision, and that it was not the result of a prior agreement with Dave. Obviously, Tom can be convicted of rape. Because Dave has seemingly acted with the purpose of facilitating Tom's crime, Dave has aided and abetted the rape and can therefore be convicted and punished as an accomplice. It is likely that neither Tom nor Dave would be convicted and punished for the separate crime of conspiracy.

8. This argument is clever but will fail. This is a variation of a defense of “legal impossibility.” However, a person can be guilty of conspiring to commit a crime even if he could not commit the substantive crime himself. It is sufficient where persons knowingly participate in a conspiracy to have one conspirator who is capable of committing the offense do so. This is also not a case where an individual who is immune from conviction for committing the substantive offense is being convicted by the use of conspiracy.

9a. *The common law.* The common law does not recognize the defense of *abandonment.* Thus, Lisa is guilty of conspiracy. Just as in attempt, a defendant who crosses the “threshold of criminality” cannot go back under the common law.

However, the common law does permit a conspirator to *withdraw* from a conspiracy by clearly indicating to all of her co-conspirators that she is no longer associated with the conspiracy. This communication must be made in a manner that would inform a reasonable person of her intent to withdraw and must be made in time for all co-conspirators to abandon the conspiracy. Because Lisa merely did not show up at the intended crime scene, she did not meet the requirements for withdrawal. She can be convicted of conspiracy and, under the *Pinkerton* rule, of the target offenses because she did not communicate her withdrawal to all of her co-conspirators in a timely manner.

The Model Penal Code. The MPC does permit the defense of *renunciation.* To be effective, the defendant must have “thwarted the success of the conspiracy” and must have completely and voluntarily renounced the criminal purpose. Lisa has not satisfied either of these two elements. She did not inform her co-conspirators of her firm intention to renounce the conspiracy, nor has she tried to prevent the commission of the target crimes. Thus, she can be convicted of conspiracy.

Lisa has also not satisfied the MPC’s requirements for *withdrawal.* She neither advised her co-conspirators of her intention to abandon the conspiracy nor did she inform law enforcement authorities of the conspiracy or her involvement in it. MPC §5.03(7)(c). Thus, Lisa can also be convicted of the substantive offenses. She obtained the murder weapon with the

purpose of its being used in the crime. Consequently, she is an accomplice of the target offenses.

9b. *The common law.* Because the common law does not permit the defense of abandonment, the analysis here results in the same answer as in Example 9a. Lisa can be convicted of conspiracy even though she has communicated her intention not to participate any further in the criminal conduct.

However, the common law does permit a co-conspirator to withdraw from a conspiracy, thereby terminating her liability for any crimes committed by her co-conspirators after her withdrawal. Because she has conveyed to all of her co-conspirators her intention to withdraw from the conspiracy in time for them to abandon the target offenses, Lisa will not be responsible under the *Pinkerton* rule for the subsequent murder, burglary, and theft committed by Mark and Jane.

The Model Penal Code. Under the MPC, Lisa has successfully withdrawn from the conspiracy because she has advised all of her co-conspirators that she will have no further involvement in the criminal plan and leaves them. Thus, Lisa is not responsible for crimes committed *after* her withdrawal.

However, Lisa has not met the tough requirements for renunciation under the MPC. She has not thwarted the success of conspiracy as required by §5.03(6). Consequently, she may be convicted of conspiracy but not of the target offenses.

9c. *The common law.* Under the common law, Lisa cannot abandon the conspiracy; thus, she is guilty of conspiracy. In this hypothetical, Lisa has not communicated to her co-conspirators her firm intention to withdraw from the conspiracy. Thus, her vain attempt to thwart the target offense is of no benefit to her. She can also be convicted of the target offenses.

The Model Penal Code. Under the MPC, the result is the same. Lisa neither communicated her intention to withdraw nor thwarted the success of the conspiracy. Too little, too late!

9d. *The common law.* Again, under the common law, there is no defense of abandonment to conspiracy. Lisa can be convicted of conspiracy.

It is not clear that she has withdrawn under the common law because she did not communicate to her co-conspirators her firm intention to withdraw in a timely manner. Timely police intervention prevented Mark and Jane from committing the target offenses; however, depending on the facts, they may have attempted the substantive offenses. Lisa may be responsible for any attempt but not for the target offenses that were not committed.

The Model Penal Code. Under the MPC, Lisa has successfully thwarted the commission of the target offenses in a manner that reflects a complete and voluntary renunciation of criminal purpose. Thus, she may succeed in using the defense of renunciation, thus cutting off liability *both* for the conspiracy and for any attempts.

10a. Lonny agreed to help John in the murder of Judge Smith. Under the MPC, because murder is a serious crime (a first or second degree felony), the agreement is enough convict the brothers, and an overt act is not required. Even so, an overt act was made when Lonny contacted Emma and offered to pay for the judge's personal items. So whether the jurisdiction requires an overt act or not, both brothers can be convicted of conspiracy to commit murder.

10b. In the common law, there must be consistency among the verdicts of the defendants convicted of conspiracy, meaning at least two defendants must be convicted of a conspiracy to satisfy the bilateral agreement requirement. Because Lonny was not convicted, John's conviction must be reversed in a jurisdiction applying the common law or the bilateral approach. However, the MPC does not follow the bilateral approach. The MPC imposes liability on an individual who believes they have agreed with another person to commit a crime. So even if the jury finds Lonny not guilty on a charge of conspiracy, John could still be convicted for conspiracy.

10c. John could still be convicted of conspiracy under the MPC, even though there was never a bilateral agreement. John believed he agreed with Emma to commit the murder of the judge, and that is enough under the MPC. Under the common law, John could not be convicted due to the bilateral theory of conspiracy. For attempt analysis of this example see Example 16 in Chapter 12.

11. Even though Courtney cannot complete the crime of selling prescription drugs because Anna did not follow through, Courtney can still be charged with conspiracy. Courtney planned and agreed with Anna to commit this crime. The focus in a conspiracy analysis is the agreement, not whether both parties followed through as agreed, or whether the crime was completed.

    No defenses will be available to Courtney. Common law does not allow for the defense of abandonment. The MPC does allow a defense of renunciation, but Courtney has not renounced the crime. She did not voluntarily abandon her objectives; rather, Anna excluded Courtney from achieving her objective. Further, Courtney never withdrew from the crime. She intended to complete the crime, but again, Anna excluded Courtney from this venture. So the defense of withdrawal under both common law and the MPC will not be available to Courtney.

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1. Statistics indicate that conspiracy is one of the most commonly charged crimes in the federal system, though it appears not to be used frequently by state prosecutors. Marcus, Conspiracy: The Criminal Agreement in Theory and Practice, 65 Geo. L.J. 925, 947-948 (1977).

2. See Johnson, The Unnecessary Crime of Conspiracy, 61 Cal. L. Rev. 1137 (1973).

3. A husband and wife could not commit a conspiracy at common law because a married couple was considered to be one person under the law. This is no longer the law in most jurisdictions.

4. The general federal conspiracy statute, 18 U.S.C. 371, expressly requires proof of an overt act. But the Supreme Court held in *United States v. Shabani*, 513 U.S. 10 (1994), that 21 U.S.C. 846, the federal drug conspiracy statute, which is silent about an overt act, does not require one. The Court concluded that congressional silence concerning an overt act indicates that Congress intended to adopt the common law definition of conspiracy for drug conspiracies.

5. MPC §5.03(5).

6. *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W.2d 3, 89 A.L.R. 819 (1933).

7. *People v. Fisher*, 14 Wend. 2 (N.Y. 1835) (union members who organized to raise wages and refused to work until an employee working below union wages was discharged were found guilty of conspiracy against trade and commerce).

8. [1962] A.C. 220 (Eng.).

9. See *Callanan v. United States*, 364 U.S. 587 (1961) (upholding *consecutive* twelve-year sentences *each* for obstructing commerce by extortion and for conspiracy to commit the same offenses). There is some evidence, however, that defendants convicted of both conspiracy and the target offense are seldom punished for both. Marcus, supra n. 1, at 938.

10. Weschler, Jones & Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Colum. L. Rev. 957 (1961). The authors argue that, to the extent that sentencing should focus on the offender's antisocial disposition and the demonstrated need for correction, there is little difference in the required sentences depending on the accomplishment or failure of the plan. Thus, there is no reason to treat conspiracy differently than the completed target offense. However, once sentences reach a certain level, the effectiveness of deterrence declines, so lesser punishment for the most serious crimes (like first-degree crimes) is more economical.

11. 336 U.S. 440, 454 (1949).
12. 483 U.S. 171 (1987).
13. 328 U.S. 640 (1946).
14. 755 F.2d 830 (11th Cir. 1985).
15. Model Penal Code and Commentaries, Comment to §2.06(3), at 307 (1985). Under the MPC, the act of conspiracy may be used as *evidence* of solicitation or aiding and abetting, but it cannot establish vicarious responsibility as a *matter of law*. Id. at 309.
16. *People v. McGee*, 49 N.Y.2d 48, 399 N.E.2d 1177 (1979).
17. 336 U.S. 440 (1949).
18. See *State v. Rivenbark*, 311 Md. 147, 533 A.2d 271 (1987), and cases cited therein.
19. 420 U.S. 671 (1975).
20. *United States v. Alsondo*, 486 F.2d 1339 (2d Cir. 1973).
21. *United States v. Feola*, 420 U.S. 671 (1975). A good argument can be made that the federal status of the officers is not a circumstance element of the offense but only a jurisdictional element. See Chapter 4.
22. Model Penal Code and Commentaries, Comment to §5.03, at 413 (1985).
23. 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (Cal. Ct. App. 1967).
24. *Direct Sales Co. v. United States*, 319 U.S. 703 (1943).
25. 59 Cal. Rptr. 636, 641 (1967).
26. 251 Cal. App. 2d 471, 480, 59 Cal. Rptr. 628 (1967).
27. Model Penal Code and Commentaries, Comment to §5.03, at 404 (1985).
28. *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988).
29. Note, Developments in the Law — Criminal Conspiracy, 72 Harv. L. Rev. 920, 933 (1959).
30. Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 406 (1959).
31. 610 F.2d 1250 (5th Cir. 1980), conviction aff'd, 625 F.2d 1196 (1980) (en banc).
32. 610 F.2d at 1255.
33. An en banc opinion is one in which all sitting members of the Circuit Court of Appeals for the particular circuit participate. In the initial *Alvarez* decision, three judges participated.
34. 102 Ala. 25, 15 So. 722 (1894). See Chapter 14 for a more detailed account of this case.
35. Sometimes conspiracy statutes can vary within a jurisdiction. The general federal conspiracy statute, 18 U.S.C. 371, expressly requires an overt act. However, 21 U.S.C. 846, the federal drug conspiracy statute, does not. *United States v. Shabani*, 513 U.S. 10 (1994). See also *Whitfield v. United States*, 543 U.S. 209 (2005). If a federal statute is silent, no overt act element should be read into it. A settled principle of statutory construction is that, absent a contrary indication, Congress intended to adopt the common-law definition of statutory terms (in this case "conspiracy").
36. See, e.g., Wash. Rev. Code Ann. §9A.28.040 (West 2012).
37. Model Penal Code and Commentaries, Comment to §5.03, at 388 (1985).
38. *Braverman v. United States*, 317 U.S. 49 (1942).
39. 328 U.S. 750 (1946).
40. "As the Government puts it, the pattern was 'that of separate spokes meeting at a common center' though, we may add, without the rim of the wheel to enclose the spokes." Id. at 755.
41. 306 U.S. 208 (1939).
42. Id. at 227.
43. 332 U.S. 539 (1947).
44. Id. at 558.
45. 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939).
46. Model Penal Code and Commentaries, Comment to §5.03, at 427-428 (1985).
47. *United States v. Escobar de Bright*, 742 F.2d 1196 (9th Cir. 1984).
48. Cal. Penal Code tit. 7, ch. 8, §182(a) (West 2012).

49. *State v. St. Christopher*, 305 Minn. 226, 232 N.W.2d 798 (1975).
50. Model Penal Code and Commentaries, Comment to §5.04, at 400 (1985).
51. Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 DePaul L. Rev. 75 (1979).
52. Model Penal Code and Commentaries, Comment to §5.03, at 458 (1985). Contrary to the position taken by the MPC Commentaries, some states *will* permit the defense of renunciation if the actor has given timely notice but the police, nonetheless, fail to prevent the conspiracy from succeeding. Id. at 459. See, e.g., Ark. Code Ann. §5-3-405(2)(B) (Michie 1987); Haw. Rev. Stat. tit. 37, §705-530(3).
53. See, e.g., *Hyde v. United States*, 225 U.S. 347 (1912).
54. Federal courts also permit the defense of withdrawal. It is generally established if the defendant takes affirmative acts inconsistent with the conspiracy's goal and takes reasonable steps to communicate his abandonment to his co-conspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).
55. 420 U.S. 770 (1975).
56. Comment, An Analysis of Wharton's Rule, 71 Nw. U. L. Rev. 547 (1977).
57. *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981).
58. *Vannata v. United States*, 289 F. 424, 428 (2d Cir. 1923).
59. 287 U.S. 112 (1932).

CHAPTER 14

Complicity

OVERVIEW

A leading actor or actress often has a supporting cast who assist in one way or another in the leading player's performance. Likewise, criminals are often assisted by others in the commission of crime.

Complicity is a broad doctrine that imposes criminal responsibility on individuals for a crime committed by someone else, usually because these secondary actors have intentionally helped or encouraged the primary actor to commit the crime. Complicity can also impose responsibility based on other criminal law doctrines such as conspiracy.

In this chapter, we will focus on a form of complicity called *accessorial* or *accomplice* liability. In general, individuals who help another person to commit a crime are *accessories* or *accomplices* to that crime and are also responsible for its commission. Frequently, statutes and case law will use terms like "aid, abet, encourage, assist, advise, solicit, or procure" to describe the various kinds of conduct that can generate accomplice liability. (Note that complicity, including accomplice liability, is usually not a separate crime with its own punishment. It is simply one way of committing a crime.) Throughout this chapter, we will call individuals who help another to commit a crime through such activities "accomplices."

There are two ways of helping someone else commit a crime:

1. *Physical Aid.* The defendant can physically help another person commit a crime. For example, he might obtain the gun used by the primary actor in the bank robbery. Or he may be present at the crime and help with its commission, perhaps by acting as a lookout or by driving the getaway car.

2. *Psychological Aid.* The defendant can encourage or reinforce the primary actor's decision to commit a crime. For example, she may urge a fellow gang member to shoot a rival gang member who has shown her disrespect.

Note two interesting aspects of accomplice liability. First, it is a form of *group criminality*. It will necessarily involve at least two individuals: a primary actor (*P*) and a secondary actor, the accomplice (*A*), who is helping or encouraging *P*. Second, although the accomplice is held accountable because of his own voluntary act and mens rea, his guilt is based on the commission of a crime by *P*. Thus, *A*'s guilt is *derivative*: *A*'s liability is dependent on *P* committing a crime or a criminal act.[1] The accomplice will usually be guilty of the same crime committed by the primary actor. Conversely, if *P* does *not* commit a crime, the accomplice cannot be convicted at common law because of the absence of a "guilty principal." (As we shall see, the Model Penal Code does not require a guilty principal.)

Complicity can actually be a very expansive doctrine, making individuals responsible for crimes committed by others that they did not expressly aid or encourage. As we saw in Chapter 13, the *Pinkerton* rule in conspiracy makes every co-conspirator responsible for all reasonably foreseeable crimes committed by other members in furtherance of the conspiracy. This is a very broad type of complicity. It does not require any co-conspirator to aid or encourage the specific crime committed by a co-conspirator. Likewise, felony murder makes all members of the joint venture responsible for a murder committed by a joint venturer in furtherance of the felony even though they might not have helped commit the murder or encouraged another to commit it.

In this chapter, we will focus on the more narrow type of complicity that requires the individual to actually encourage or help with *P*'s crime.

THE RATIONALE OF ACCOMPLICE LIABILITY

As we saw in Chapter 7, the criminal law usually does not look beyond the last responsible human agent in determining causation.[2] Thus, the

person who pulls the trigger in a homicide is normally responsible for the crime of murder.

Should other individuals who helped with the crime, perhaps by providing the murder weapon or encouraging the shooter to kill the victim, also be held responsible for the murder? If so, why? After all, the shooter has free will; he could have decided *not* to pull the trigger. Moreover, *A* did not engage in the conduct that actually constituted the crime of homicide. Why hold him responsible for what someone else did?

Causation is not the basis of accomplice liability. Though *A* may influence *P* to act, the law assumes that *P*'s criminal act is volitional and not physically caused by *A*'s encouragement or assistance.[3] Indeed, *A* may have played a very minor role in helping *P* commit the crime, and *P* may have committed the crime even if *A* had not encouraged him. Thus, one may be found guilty as an accomplice even though his actions do not satisfy "but for" causation.

Accomplice liability differs from the law's general approach to human causation. Accomplice liability *does* look beyond the last responsible human agent and makes others also responsible for *P*'s criminal act. This extended reach of accomplice liability is justified because *A*, by her actions and her state of mind, has chosen to *adopt P*'s criminal act as her own. By encouraging or helping another commit a crime, she has extended her will to embrace the actions of another.[4] *P*'s criminal act is now also *her* criminal act. Moreover, in intentionally helping another to commit a crime, she has demonstrated by her own state of mind and by her own action that she is a socially dangerous individual.

In making *A* also responsible for the crime committed by *P*, accomplice liability might appear to contradict the general assumption in our criminal system that guilt must be personal. However, accomplice liability still requires proof of mens rea and a voluntary act for *A*. Thus, *A*'s guilt *is* personal.

Accomplice liability has been criticized on several grounds. First, it may extend the net of criminal responsibility too widely, punishing truly peripheral actors who did not play a significant role in causing harm. Second, it may punish a defendant more for her attitude than for the significance of her actions. Third, because the modern trend is to punish

accessories just as harshly as principals, punishment may not be proportional to the defendant's moral guilt. All accessories, including those who play very minor roles or whose help or encouragement may not have been needed, will be *punished the same* as those who commit the object offense. In short, standby actors can be treated as if they played leading roles.

DEFINITIONS

The Common Law

The common law used fairly precise terms to describe individuals who could be responsible for crimes committed by others.[5]

Principals and Accessories

Principal in the first degree (*P-1*) is the individual who (1) personally commits the crime or (2) uses an innocent agent to commit a crime. Thus, the professional killer who commits homicide by shooting and killing the victim is a *P-1*. An individual can also be guilty as a *P-1* if he uses an innocent agent to commit a crime.

Innocent agent is someone who (1) commits a criminal act but (2) lacks capacity to commit a crime or the mens rea for the crime and (3) is fooled or forced into committing the criminal act. An innocent agent is usually a person, but it can also be an animal or an inanimate object (such as a computer programmed to destroy files). A drug dealer who deceives a teenager into delivering drugs by telling him it is medicine has used an innocent agent to commit a crime. Or a dolphin trained to attach a magnetic explosive device to a boat that then explodes and kills the passengers would be an innocent agent. Both have committed a criminal act, but neither would be considered to have committed a crime.

The actus reus of the person delivering the drugs will be combined with the dealer's mens rea to impose liability on the dealer as *P-1* for the crime of delivering drugs. Likewise, the actus reus of the dolphin will be

combined with the mens rea of *P-1* to impose liability on *P-1* for murder. Similarly, someone who is forced by another at gunpoint to commit a crime is an innocent agent; the coercer is guilty as a *P-1*.

Note that when someone uses an innocent agent to commit a crime, the law considers him a principal in the first degree and not an accomplice. The act of an innocent agent is not considered the act of the agent but rather the principal's act.

Principal in the second degree (*P-2*) is the individual who intentionally helps or encourages *P-1* to commit the crime and is either present at the crime scene or constructively present (i.e., near enough to assist *P-1* if needed). *P-2* could be the lookout who alerts the shooter to the victim's imminent arrival or the driver of the getaway car.

Accessory before the fact (*A-BTF*) is someone who intentionally helps *P-1 beforehand*, perhaps by obtaining the murder weapon or by encouraging *P-1* to commit the murder, but is *not present* or *nearby* when *P-1* commits the crime.

Accessory after the fact (*A-ATF*) is someone who, though not part of the planning or commission of the crime committed by *P-1*, intentionally renders aid *after* the crime. For example, he may furnish plane tickets to help *P-1* escape or destroy evidence or hide the fruits of the crime. An *A-ATF* obstructs justice by making it more difficult to apprehend and convict the other parties to the crime. At common law, husbands and wives could not be *A-ATF*s. Because of the marital relationship, they were expected to aid each other and therefore had an excuse if they did.

Misprision of Felony

Individuals who, knowing that a felony had been committed, did not report it to authorities, could be convicted of misprision of felony at common law. A federal law enacted in 1908, 18 U.S.C. §4, makes misprision of a felony a crime. However, it has been interpreted to require active concealment. A person cannot be convicted for simply not reporting the crime.[6]

Only a few states recognize misprision of a felony, while a few states impose a general duty to report any known felony. Many states, however, impose a statutory duty on eyewitnesses to specified crimes to

report them.[7] And all states impose a duty on specified professionals (teachers or doctors, for example) to report suspected cases of child or sexual abuse.

Treason

All parties to treason were treated as principals.

Misdemeanors

All parties to a misdemeanor were treated as principals, though it was not a crime to be an *A-ATF* to a misdemeanor.

The Model Penal Code

Principals and Accessories Before the Fact

The MPC abandons the common law's definitions of principals and accessories. It considers *all* actors, except those involved *after* the commission of the crime, as equals. Thus, §2.06 spells out the responsibility of principals in the first and second degree as well as accessories before the fact. The MPC provides a separate crime to cover the conduct of accessories after the fact.[8]

Section 2.06(1) provides that a defendant is guilty of any offense "committed by his own conduct" — that is, by his own voluntary act and mens rea. An actor is also guilty of offenses "committed by the conduct of another for which he is legally accountable."

Under §2.06(2), an actor is "legally accountable" for the conduct of another when:

(a) *P* uses an "innocent agent" or "irresponsible person" (e.g., a legally insane agent[9]) to engage in the criminal conduct. For example, *P* could deceive or force someone else to steal property.

(b) The legislature has enacted a special law making one person liable for the conduct of another. For example, some jurisdictions have enacted vicarious liability statutes based on an employer-employee relationship. This MPC provision allows the legislature to enact broader

rules of responsibility for the conduct of another beyond that allowed in subsection (c).

(c) The actor is an *accomplice* of another. Accomplice liability is the basis for imposing criminal responsibility for the conduct of another in most cases.

Section 2.06(3) then spells out when someone is an accomplice:

(i) If the defendant *solicits* another to commit a crime, then the defendant is also responsible for the crime committed by the person solicited.[10]

(ii) If the person "aids or agrees or *attempts* to aid" another in planning or committing a crime, he is responsible for the crime committed by the other person. Note that this section makes an *attempt* to aid (but not an attempt to solicit under (i) above) just as culpable as successfully aiding. The MPC thus expands liability for accomplice liability beyond what the common law would impose.

(iii) If the person has a duty to prevent *P*'s crime but fails to act, then he is responsible for the crime committed by *P*.

Accessories After the Fact

The MPC does not use the common law term "accomplice after the fact." Section 242.3 (Hindering Apprehension or Prosecution) is the primary offense covering the conduct of those previously considered *A-ATF*s.

For a summary of terms and definitions used by both the common law and the MPC to describe accomplice liability, see Table 14.1.

14.1 Accomplice Liability

COMMON LAW		
T-1	**T-2**	**T-3**
Before Target Crime Accessory Before the Fact (A-BTF)	**During Target Crime Principal in First Degree (P-1)**	**After Target Crime Accessory After the Fact (A-ATF)**

1. Helps or encourages *P-1* to commit Target Crime *BUT* 2. Is not present at or near crime scene	1. Personally commits Target Crime *OR* 2. Uses Innocent Agent to commit Target Crime **Innocent Agent** 1. Commits criminal act; but 2. Lacks capacity or mens rea for crime; and 3. Is fooled or forced to commit criminal act **Principal in Second Degree (P-2)** 1. Helps or encourages *P-1* to commit Target Crime *AND* 2. Is at or near crime scene	1. Helps *P-1*, *P-2*, or *A-BTF after* Target Crime

MODEL PENAL CODE

T-1	T-2	T-3
Before Target Crime Principal	**During Target Crime Principal**	**After Target Crime**
1. Solicits another to commit a crime, which is then committed by person solicited	1. Personally commits Target Crime *OR*	1. Hinders apprehension or prosecution; see MPC §242.3

OR

2. Aids, agrees, or attempts to aid another in planning a crime who then commits the crime

OR

3. Having a legal duty to prevent the commission of the crime, fails to do so

2. Uses Innocent or Irresponsible Person

Principal

1. Aids, agrees, or attempts to aid another in committing a crime

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PROCEDURAL CONSEQUENCES OF CLASSIFICATION

The Common Law

Venue

At common law, *P-1* and *P-2* could only be tried in the jurisdiction where the crime was committed. *A-BTF* could only be tried in a jurisdiction where she provided assistance.

Pleadings and Proof

A defendant charged as a *P-1* could still be convicted even if the evidence established that she was actually a *P-2*. The converse was also true; a defendant charged as a *P-2* could be convicted if the evidence established that she was actually a *P-1*.

However, if a defendant was charged as either a *P-1* or *P-2*, but the evidence established that she was an *A-BTF* or vice versa, a variance between the pleading and the proof was not allowed, and the defendant could not be convicted.

The Requirement of a Guilty Principal

Even though an *A-BTF* and a *P-1* could be tried together, *A-BTF* could not be convicted unless *P-1* was convicted first. A formal finding of *P-1*'s guilt had to be made before the guilt of *A-BTF* could be considered. This stringent rule, designed in part to limit the death penalty, was applied even in those cases where *P-1* was guilty but could not be prosecuted for reasons unrelated to guilt or innocence — for example, because *P-1* enjoyed diplomatic immunity.

This approach was not followed in prosecutions of *P-1* and *P-2*. They could be prosecuted in any sequence and an acquittal of one did not affect the guilt of the other.

The Model Penal Code

The MPC, as well as most jurisdictions today, does not have the complex procedural rules that the common law had.

Venue

Section 1.03 (d) of the MPC provides that an accomplice can be prosecuted in the same place where *P* committed the offense or where the accomplice provided aid.

Pleadings and Proof

The MPC does not cover variance between the pleadings and proof. The generally applicable procedural rules would apply, and there are no special rules for each specific type of accomplice.

The Requirement of a Guilty Principal

Section 2.06(7) does not require the prior conviction of *P*. The evidence must only prove that an offense was committed by *P* and that *A* was an accomplice to that crime; what happened to *P* is simply not relevant to

A's guilt.

CONTEMPORARY LAW

Most jurisdictions treat *P-1, P-2,* and *A-BTF* by statute as "principals." Thus, they are all considered equally responsible for the crime committed by *P-1.* Only *A-ATF* is treated differently.

Principals and Accessories

Most states now call all parties who committed the crime or provided assistance either before or during its commission *principals.* (Note, however, that many courts and commentators still use the term "principal" to describe the primary actor (*P-1*) and "accomplice" or "accessory" to describe the supporting actors (*P-2* and *A-BTF*). These terms help clarify the respective roles the actors played in the crime, but they generally do not affect their legal responsibility.) We also will continue to use the terms "principal" (*P*) to describe the primary actor and "accomplice" (*A*) to describe the secondary or supporting actor.

Generally, the procedural consequences of the common law classifications have also been abolished. Thus, for example, an accomplice can be tried and convicted even though the primary actor has fled the jurisdiction or has died. Nonetheless, some states still retain the old common law definitions and some of the procedural consequences.

Accessories After the Fact

Most states now treat individuals who provide aid *after* the commission of a crime less harshly than those involved in its planning or commission. These after-the-fact helpers are usually convicted of a different crime, often called "rendering criminal assistance," "criminal facilitation," or some variation.

ELEMENTS OF ACCESSORIAL RESPONSIBILITY

Mens Rea

There are two kinds of mens rea generally required for accomplice responsibility.

The Mens Rea of the Crime Aided

The Common Law

A must act with at least the same mens rea or culpability required for conviction of the offense committed by *P*.[11] If the object offense requires a specific intent, *A* must act with that same intent. If the object crime requires only recklessness or negligence as to result, it is sufficient if *A* acts with the same mens rea toward result as is required by the object offense.

The Model Penal Code

The MPC would also require that *A* act with at least the same culpability or mens rea of the crime being aided.

The Mens Rea to Be an Accomplice: Purpose or Intent to Aid the Principal's Criminal Action

The Common Law

In addition, an accomplice must want to help someone else commit a crime.

Conduct. Most jurisdictions require the accomplice to act with the *purpose* or *intent* to encourage or assist in the conduct element of a crime. Suppose *A* yelled the following at *V*, who was about to be shot by *P*: "Take off your hat and die like a man." *P*, understanding these words as encouragement to kill *V*, shoots and kills *V*. Though *A*'s words may

have had the *effect* of encouraging *P* to shoot *V*, *A* would not be guilty under accomplice liability unless he spoke those words with the *intent* of encouraging *P* to engage in that conduct.[12] Likewise, unintentional assistance does not result in responsibility as an accomplice.

Requiring the highest level of mens rea or culpability for conduct makes sense because, as we saw, the actus reus of accomplice liability can be quite minimal; that is, one does not have to provide very much help or encouragement to become an accomplice. In this sense, accessorial liability may punish more for bad attitude than for bad behavior!

Recklessness or Negligence as to Result. Though cases are split, the general rule is that *A* must act with the same mens rea toward result as is required to convict *P* of the object crime. Consider *A* who aids *P* in the commission of stealing a car, perhaps standing lookout while *P* hot-wires the car, and then jumps into the car while *P*, the driver, speeds away. What if *P* hits and seriously injures a victim? If *P* may be convicted of the crime of vehicular assault based on proof of recklessness toward injuring another, then *A* also may be convicted of being an accomplice to that offense *if* the prosecution can show *A* also acted with recklessness toward this result.

Strict Liability. If *A* assists *P* in committing a strict liability offense, can *A* be convicted as an accomplice? In theory, the answer should be yes. After all, *A* acted with the purpose of aiding *P* engage in conduct that constituted the offense.

However, most courts find the reach of strict liability through the doctrine of complicity to be unfair. In *Johnson v. Youden*, [1950] 1 K.B. 544, the court affirmed the dismissal of an indictment against solicitors (English lawyers), charging them with aiding their client in selling a house at an unlawful price, which was a strict liability offense. The court concluded that *A* could not be convicted as an accomplice to a strict liability offense unless he "knows the facts that constitute an offense." Because the defendants did not know all of the facts, they could not be convicted.

The Model Penal Code

To be an accomplice, the actor must act with the "purpose of promoting or facilitating the commission of an offense." §2.06(3)(a). This rule needs careful analysis.

Conduct. The accomplice must have as her *purpose* that *P* will engage in the conduct elements of the object crime. Knowledge as to *P*'s conduct is an insufficient basis for responsibility under the MPC.

Circumstances. Though it is not clear from the language of the MPC itself, the Commentaries indicate that the drafters intended to let the courts decide whether purpose as to circumstances is required for conviction or simply the same *culpability or mens rea* toward circumstances as is required for the object crime.[13] Courts that demand *purpose* as to circumstances may require a *higher* culpability for the accomplice than might be required for *P*.

Result. The MPC requires the same culpability or mens rea toward result as would be required for conviction of *P* for the object offense. §2.06(4).

Knowledge That Another Intends to Commit a Crime

Some courts hold that furnishing assistance to someone that the defendant knows is intending to commit a crime is sufficient for accomplice responsibility, particularly if the object crime is very serious. Thus, in *United States v. Fountain,*[14] a prison inmate who furnished a knife to another inmate knowing it would be used to attack a guard was convicted of aiding and abetting murder. Judge Posner concluded that the use of the criminal law to deter individuals from helping others they *know* intend to commit *serious* crimes is justified. Nonetheless, many courts take the MPC approach and require purpose or intent rather than knowledge for accomplice responsibility.

Providers of Goods and Services

As we saw in conspiracy,[15] a troublesome question of mens rea arises when someone provides innocuous goods and services to another she

knows will use them to commit a crime. Can someone who provides large quantities of sugar at prices higher than usual to another she knows will use it to make illegal liquor be convicted as an accomplice?

The Common Law

Some earlier cases held that providing goods or services with knowledge that another intended to use them to commit a crime established accomplice liability.[16] However, most jurisdictions permit conviction only if the prosecutor can prove that the defendant acted with a *purpose* to aid.[17] The prosecutor has to demonstrate that the defendant had a "stake in the venture" — for example, the provider's success or profits depended on helping *P* successfully commit the object offense or the provider has a psychological involvement in *P*'s success. This analysis focuses both on the materiality of the aid provided to *P* as well as the profit the provider realizes. Many jurisdictions permit the jury to use the defendant's knowledge that *P* intends to commit a crime, together with other evidence such as excess volume or profits, to find that *A* acted with the requisite purpose.

The Model Penal Code

The Model Penal Code also requires the prosecution to prove that the actor had the "purpose of promoting or facilitating" the commission of the crime. §2.06(3).

Some commentators argue that those who supply legitimate goods and services in normal quantities and at market price have no duty to intervene to prevent the harm *P* intends to commit. In their view, the criminal law only requires each of us not to personally harm others. Absent a specific legal duty in civil law, we have no duty in the course of our everyday lives to prevent someone else from committing a harmful act.[18] This analysis turns on characterizing furnishing goods with knowledge as an "omission" rather than as a voluntary act. (See Chapter 3.)

Some states have responded to this difficult question by statutorily creating the less serious crime of criminal facilitation. These laws punish

someone who *knowingly* provides another with significant aid used to commit a serious crime. The punishment provided is usually less than that provided for the crime committed by *P*. Purpose to aid is still required to convict *D* as an accomplice. Under a criminal facilitation statute, the defendant in *Fountain*, supra, could only be found guilty of criminal facilitation rather than accomplice liability.

Liability for Unintended Crimes Committed by the Principal

The Common Law

In theory, the mens rea element of accomplice liability clearly suggests that an accomplice should only be held responsible for the *specific acts* of *P* that he intended to aid. This approach, used in early cases, would limit *A*'s responsibility to those crimes he had, through the mens rea of intent, adopted as his own acts. This limiting principle made sense because, as we just saw, accomplice liability is very broad and can be extended to very minor actors who may not even satisfy "but for" causation.

A number of recent cases, however, have expanded *A*'s liability beyond this limit to include those acts that *A* should have "reasonably foreseen" or that were a "natural and probable consequence" of the offense that *A* intended to aid. This approach is very similar to the rule in conspiracy that all co-conspirators are liable for all reasonably foreseeable crimes committed by other co-conspirators in furtherance of the conspiracy.[19]

Imposing liability on *A* for "reasonably foreseeable" crimes committed by *P* may make sense in cases where there is a high probability of an additional crime being committed. But how is such probability determined? *A* helps *P* enter a residence at night so *P* can steal jewelry. *P*, while inside, assaults the homeowner who has come to investigate the noise. Should *A* be held responsible for *P*'s assault? Both *A* and *P* were undoubtedly hoping there would be no assault. Thus, it is hard to conclude that *A* intended to assist or encouraged *P* to commit an assault. Is *P*'s assault "a natural and probable consequence" of committing a residential burglary in the evening? On what basis should a jury decide this issue?

More recently, courts have supported an even broader extension of accomplice liability to encompass those crimes committed by *P* that *A* has "naturally, probably and foreseeably put in motion."[20] This approach has been used to impose liability when *P* killed *V* rather than roughing him up to get information (as *A* expressly told him), thereby defeating *A*'s goal.[21] It has also been used even when *A* tried to stop *P* from killing someone because *V* was not their intended victim.[22]

Justifications for holding *A* responsible not only for the crime *A* intended to aid, but also for any other reasonably foreseeable crime committed by *P*, are based on *A*'s causal role in bringing about these crimes. However, this overlooks the fact that accomplice liability does not require that *A*'s assistance be very significant before liability attaches. Indeed, the MPC includes "attempts" at aiding as sufficient. Thus, even an unsuccessful role in causing another to commit a crime will trigger accomplice liability. This expansive approach to accomplice liability primarily punishes attitude rather than acts that cause harm.

Just as in conspiracy, then, some jurisdictions are imposing criminal responsibility on accomplices if *P* commits an unintended or unplanned crime, including one clearly not sought by *A*, provided that it was reasonably foreseeable.[23] This approach essentially makes the accomplice responsible for his *negligence* — that is, he *should* have foreseen that *P* may have committed crimes other than those *A* intended to aid. Convicting *A* on this low mens rea is ironic in that the prosecution may have to prove a higher degree of culpability to convict *P*. It also inflicts punishment that is disproportionate to *A*'s mental state.

Courts that enlarge accomplice liability based on foreseeability may be using a *causal* analysis to expand the mens rea of accessorial liability. Or, to put it differently, what *P does* is what *A should have been aware* might happen. There is also the risk that tort law's concept of reasonable foreseeability may be imported into the criminal law.

The Model Penal Code

The MPC does not permit responsibility to be imposed on *A* because of negligence toward unanticipated crimes committed by *P*. Thus, *A* cannot be convicted of crimes that were the "natural and probable consequence"

of the crime *A* did intend to assist. Instead, the MPC's culpability requirements for the conduct and result elements (discussed above) must be met.

Actus Reus

The actus reus element of accomplice responsibility includes a broad range of conduct. Descriptive words such as "aid, abet, counsel," and so on that are used in various statutes to describe the actus reus of accessorial liability can be broken down into the following general categories of conduct.

Actual Assistance

In general, there are two primary kinds of conduct that will satisfy this requirement: helping in a *physical* sense (providing the murder weapon, acting as lookout, or driving the getaway car) or assisting in a *psychological* sense by reinforcing the will of *P* (encouraging *P* to commit the crime either before or during its commission).

Usually, it will not be too difficult to establish this actus reus element. If *A* holds the victim while *P* punches him or steadies the ladder while *P* climbs in the second story of the home, there will be strong evidence of actus reus. So, too, if *A* yells at *P* while *P* is assaulting *V:* "Kick him again; he's still moving!"

But what if *A* is simply present while *P* commits an offense? Is the mere act of "being there" sufficient to constitute the actus reus for accomplice liability? This conduct is ambiguous. Nonetheless, presence during the commission of a crime by another *is* legally sufficient to constitute the actus reus provided *P knows A* is there to render encouragement or to help if necessary. If, however, *P* does not understand that *A* will assist if needed, then a person's mere presence with knowledge that *P* is committing a crime does not satisfy the actus reus requirement. In addition, yelling words of encouragement at *P* is insufficient if *P* does not hear them.[24] (But note that the MPC would consider an attempt at aiding and abetting sufficient for responsibility.)

Omission

The Common Law

The actus reus requirement can also be satisfied by an omission, provided *A* has a legal duty to act. Thus, a police officer who stands by and watches *P* attack and rape *V* in a bar has satisfied the actus reus requirement. This is a classic case of a failure to act when there is a legal duty to act generating criminal responsibility.

The Model Penal Code

The Model Penal Code also takes this approach. A person who has a legal duty to prevent the commission of the offense is responsible for that offense if he "fails to make proper effort" to prevent it. MPC §2.06(3)(a)(iii). The passive police officer observing a rape would also be liable under the MPC.

How Much Aid Is Enough?

Perhaps the most difficult question is how much aid is enough to become an accomplice? Short answer: any aid! This compact summary obviously needs some explanation.

The Common Law

There can be instances in which *A* renders aid to *P*, but it really is not very helpful. Nonetheless, courts generally will find *A* guilty if his help was useful in any way to *P*. Thus, in *Wilcox v. Jeffery*, the defendant was found guilty of aiding and abetting an American jazz musician play unlawfully in England because *A* attended a concert along with hundreds of others in the audience and later wrote about the concert in a magazine.[25] Of course, the musician would have performed whether or not *A* was present or wrote about his concert. Here, there is accomplice liability without *any* meaningful causal connection between *A*'s presence and *P*'s crime.

In *State ex rel. Attorney General v. Tally*, the court impeached Judge

Tally for sending a telegram trying to prevent the delivery of another telegram sent earlier that warned the intended murder victim of his peril. In considering when the action of an accomplice will impose responsibility, the court said: "If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a *single chance* of life, but for which he would have had, he who furnishes such aid is guilty though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of the chance."[26] Note that it is not necessary for *P* to know that *A* is assisting him before *A* can be found guilty of accessorial responsibility. In the *Tally* case, the principals did not know that the judge had sent the telegram in order to help them kill their victim. Nonetheless, *A* will still be guilty as long as his aid had some minimal effect on *P*'s being able to commit the crime.

In some cases, the offered assistance will have no impact at all on *P*'s commission of the crime. Suppose that in the *Tally* case the telegram operator had simply delivered the warning telegram while tearing up Tally's telegram. Or if *A* shouts words of encouragement to *P* to commit a crime, but *P* is deaf and cannot hear *A*. As long as the aid is completely ineffective or *P* does not know that any encouragement is being given (thus leaving *P* unaware that anyone is encouraging him to commit the crime), most courts will probably not find accomplice liability.

The Model Penal Code

The Model Penal Code takes a broader approach. It considers any effort at aiding, even if ineffective or unknown to *P*, as satisfying the actus reus requirement of accessorial liability. The MPC does this by providing that a person is an accomplice of another if she "aids or agrees or *attempts* to aid such other person in planning or committing" the crime. MPC §2.06(3)(a)(ii) (emphasis added). Thus, an "attempt" at providing aid is sufficient for accomplice responsibility even if it is unsuccessful. The term "attempt" most likely has the same meaning here as it does under §5.01. And, as you recall from our discussion of attempt in Chapter 12, the MPC requires that the actor's conduct "strongly corroborate the actor's criminal purpose" (§5.01(2)).

The MPC thus converts the question of how much aid is enough from a substantive element into an evidentiary element — that is, has the accomplice done enough to persuade a jury that he acted with the *purpose* of aiding in the commission of the crime, even if he wasn't helpful at all?

Immunity from Conviction

The Common Law

Accomplice liability cannot be used to convict an individual whose behavior is not punished by the substantive law. For example, statutory rape laws make it a crime to have sexual intercourse with a minor because minors lack the maturity necessary to give legally effective consent.[27] A prosecutor cannot charge a minor who encouraged the defendant to have sexual intercourse with her with liability as an accomplice to statutory rape. Because she is a victim in need of protection, the substantive law of statutory rape does not punish the minor. Permitting her to be convicted as an accomplice would undermine the legislative policy expressed in the substantive offense. (This same limitation applies to conspiracy. *Gebardi v. United States*, 287 U.S. 112 (1932). See Chapter 13.)

The Model Penal Code

The MPC takes the same approach. Under §2.06(6)(a) a person cannot be an accomplice if he is "a victim of that offense." Thus, an underage minor could not be convicted under the MPC of being an accomplice to a principal charged with statutory rape.

Conduct Necessarily Part of the Crime

What if the legislature has only punished one party to a criminal transaction that necessarily involves another person? Can the other party be convicted as an accomplice?

The Common Law

Courts generally have said no. Again, using accomplice liability in such cases would undermine the policy of the substantive offense. Thus, a customer who hires a prostitute cannot be convicted as an accomplice to prostitution if the substantive law of prostitution does not punish his behavior. Prostitution necessarily involves a customer and a provider. If the legislature had wanted to punish both parties, it readily could have done so.

The Model Penal Code

Section 2.06(6)(b) provides the same result. An individual cannot be convicted of being an accomplice if "the offense is so defined that *his conduct* is *inevitably incident* to its commission" (emphasis added).

Legal Incapacity to Commit Substantive Crime

Occasionally, only an individual with certain attributes can commit a crime. Under common law, a husband could not rape his wife,[28] but he could be guilty of raping his wife if he acted as an accomplice.

In *Regina v. Cogan and Leak*, [1976] 1 Q.B. 217 (Eng.), Leak, the husband, persuaded Cogan to have sexual intercourse with Leak's wife by incorrectly telling him that his wife consented to have sex with him. Cogan was acquitted of rape, based on *Morgan*, because he did not intend to have intercourse without consent. Leak argued that *he* could not be convicted because he was the victim's *husband*. The court disagreed, concluding that Leak had used Cogan as an innocent agent. Therefore, while Leak could not be convicted as aider and abettor to Cogan as originally charged, his guilt as a principal had been clearly established and his conviction was upheld. This case demonstrates that courts will not allow individuals to hide behind their own legal incapacity to commit a crime if they use others to accomplish it.

The Common Law

In the infamous *Morgan* case,[29] for example, the husband could have

been convicted as an accomplice to rape either for encouraging others to rape his wife or (if you believed the defendants) for using innocent agents to rape her. The husband would be held liable even though *he* could not have been guilty as *P* if he had forcibly had sexual intercourse with his wife.

The Model Penal Code

The MPC follows this approach also. Under §2.06(5), a defendant who was herself legally incapable of committing a particular crime may become an accomplice if she helps someone who is legally capable of committing the offense.

THE RELATIONSHIP BETWEEN PRINCIPAL AND ACCESSORIES

The Common Law

The Requirement of a Guilty Principal

As noted at the outset, accomplice responsibility is *derivative*. *A* is legally responsible for the crimes committed by *P* that *A* aided or (in some jurisdictions) that were a natural and probable consequence of the crime *A* aided. Thus, complicity is a means of attributing the criminal responsibility of *P* to *A*. This means that there *must* be a guilty *P*; without a guilty *P*, there can be no guilty *A*. (Of course, if *P* is convicted of an *attempt* rather than the completed offense, *A* can be convicted of being an accomplice to that attempt.)

At common law, the acquittal of *P*, for whatever reason, precluded the conviction of *A* as a principal in the second degree or as an accomplice. (There is an occasional exception to this principle. See our discussion of *Cogan*, supra.) Even if *P* did commit the crime and *A* fully intended to aid *P* in its commission, *A* could not be convicted if *P* was acquitted. This was true even if *P*'s defense was personal, such as diplomatic immunity, or if *P* had an excuse, such as legal insanity. The

requirement of a guilty *P* can benefit *A* in fortuitous ways that are unrelated to *A*'s moral culpability. Nonetheless, some jurisdictions still retain the requirement of a guilty principal.

The Pretending Principal

Can *A* be convicted if *P* does not have the mens rea necessary for conviction? No. Thus, in *State v. Hayes,*[30] *P*, related to the store owner, entered the store in an apparent burglary. However, *P* had no intention of stealing the goods inside. He only went through with this charade to secure *A*'s conviction. Because *P* was acting as a citizen decoy, he did not have the mens rea necessary for burglary and larceny. Consequently, *A*'s conviction as an accomplice on these charges had to be reversed for lack of a "guilty principal" even though *A*'s moral culpability and need for punishment were apparent.

Some courts and commentators, however, have indicated their dislike for this rule.[31] In *Vaden v. State,*[32] the Alaska Supreme Court upheld the conviction of a pilot for aiding an undercover agent to shoot foxes illegally from the pilot's airplane. The majority held that the undercover agent's actions were not justified under a public authority defense. Thus, there was a "guilty" (though unprosecuted) *P*. The majority also said in dicta that, even if the defense were valid, it was *personal* to *P*, and *A* could therefore be convicted. This approach is inconsistent with traditional common law rules. The acquittal of *P*, even under a personal defense, would have precluded the conviction of *A* at common law.

Differences in Degree of Culpability Between Principal and Accomplice

There is no clear consensus among jurisdictions as to whether *A* can only be convicted of the same crime as *P* was convicted or whether *A* could be convicted of a *greater* offense. Put differently, does the level of *P*'s responsibility establish the upper limit of *A*'s responsibility?

Consider a case in which Iago (*A*) with cool deliberation provokes Othello (*P*), through false information, to kill *V*. *P* might be able to

prove that he did not premeditate or that he acted in the heat of passion. *A*, on the other hand, could not. Can *A* be convicted of a more serious crime than *P*? Or consider the *Richards* case in which a wife hired two men to beat her husband severely enough to be hospitalized; they, however, merely roughed him up without serious injury. Can *A*, the wife, be guilty of a more serious assault charge than either *P*?[33]

At common law, *A* was convicted of the same offense as *P* unless the crime was homicide. Because murder and manslaughter were considered different forms of the same offense,[34] *A* in the homicide case above could be convicted of murder even though *P* had been convicted of manslaughter. In the *Richards* case, however, the court held that the accomplice could not be convicted of a more serious assault charge than that for which the *P*s were convicted.

Today, some jurisdictions have changed the common law approach and permit *A* to be convicted of a more serious offense than *P*.[35] This approach allows the law to assess the moral culpability of each party according to his or her *individual* mens rea.

Withdrawal of Aid

Under the common law, *A* could avoid criminal responsibility if she withdrew her aid before *P* committed the offense. As in withdrawal from conspiracy,[36] *A* must (1) inform *P* not to commit the offense and (2) do everything possible to render ineffective any aid she has already given.

If *A* had encouraged *P* to commit the crime, she must try to discourage *P*. If *A* had provided physical assistance of some sort, she must try to render it useless. *A* must take these steps in sufficient time to prevent *P* from committing the crime. *A*'s efforts can satisfy the required elements of withdrawal even if *P* independently decides to commit the crime anyway without *A*'s help.

The Model Penal Code

The Requirement of a Guilty Principal

The MPC *seemingly* does not require the conviction of *P* for *A* to be guilty, *provided P* has engaged in the *conduct* required by the commission of the object crime or by an attempt to commit it. This is true regardless of the basis of *P*'s acquittal.

This is the result reached if "conduct" in §2.06(1) refers *only* to *A* assisting *P* to engage in conduct sufficient to constitute the offense (or an attempt) and does *not* refer to the mens rea with which *P* engaged in the conduct or to *P*'s guilt for having engaged in the conduct. Put more simply, §2.06(1) makes *A* responsible for *P*'s conduct and for *A*'s mens rea or culpability. This reading is consistent with the MPC's focus on each individual's moral culpability. A contrary reading of this section is possible, however. If a court did not accept the approach we outline, it might well require a guilty *P* before *A* could be convicted.

There is a more difficult question. What, if any, responsibility does *A* have if *A* "aids" *P* to commit a crime, but *P* does not engage in conduct sufficient to constitute the crime or even an attempt to commit the crime? Section 5.01(3) or 5.03(1)(b) covers this situation. *A*'s conduct would be an "attempt" to commit the object crime (not *attempted* aiding and abetting) or conspiracy, if there was preconcert of action.

The Pretending Principal

For the reasons explained in the previous section, a pretending *P* does not affect responsibility under the MPC. Thus, an *A* who assists a *P* who cannot be convicted (because he lacks mens rea or has a personal excuse, for example) can still be convicted under §2.06(1).

Differences in Degree of Culpability Between Principal and Accomplice

Under the MPC, an accomplice is graded based on the *conduct* committed by *P* and the *culpability* of *A*. Thus, the MPC readily allows differential punishment for *P* and *A*.

Withdrawal of Aid

Section 2.06(6)(c) permits an accomplice to withdraw previously provided assistance and thereby avoid criminal responsibility already incurred. To accomplish an effective withdrawal, *A* must terminate his complicity before *P* commits the offense and do any one of the following: (i) completely deprive the aid of its effectiveness, or (ii) give timely warning to the police, or (iii) otherwise make a "proper effort to prevent the commission of the crime."

Examples

Whom would you charge? With what crime? Why? Who is an accomplice, principal, or accessory?

1a. Linda robs a bank while Brad drives the getaway car.

1b. Linda enters a bank to rob it. She turns to Clara, a kindly elderly lady, and says: "Would you deliver this note to my boyfriend? He is the teller behind that first window. I don't want to get him in trouble for conducting personal business during banking hours." Clara gladly delivered the folded note to the teller. The teller opened and read it: "I have a gun and will use it. Put all the money in a bag and have this lady give it to me." He complied and gave the bag to Clara, asking her to return it to the person who gave her the note. Clara, not suspecting anything, took the bag and gave it to Linda, who promptly left the bank with the cash.

1c. Linda enters the bank to rob it and points her gun at Olga, a bank customer, saying: "Get all the cash from the tellers and put it in a bag for me or else you're dead!" Olga does this and hands Linda the bag with all the cash in it. Linda then runs out the door with the cash.

1d. Same facts as Example 1c except that after Olga hands Linda the bag, Linda hits the bank guard over the head with her gun to immobilize him. Two days later the guard dies from massive internal bleeding in the brain.

1e. Linda and Brad are married. Unknown to Brad, Linda robs a bank by herself and comes home with a lot of money. She tells Brad of her accomplishment and asks him to throw the gun she used in the

robbery in a deep lake. Brad gladly disposes of the gun as requested.

2. Dan tells Laura, his wife, that he is going out to rob a grocery store on the other side of town. Laura shouts out as Dan is leaving: “Be sure to bring back some milk while you are at it.” Dan robs the grocery store and brings back a half-gallon of milk.

3. While driving along the highway with Tara in the passenger seat, Jennifer spotted Bob, her fiancé, several car lengths ahead of her. She speeded up to wave at him. Bob, recognizing Jennifer in the car behind him, waited until she almost caught up to him and then sped away. Jennifer then increased her speed so she could catch up to Bob once more. Again, Bob, smiling, waited until Jennifer almost caught up to him and then increased his speed even more. This game of “cat and mouse” continued as each car increased their respective speeds. Bob and Jennifer were both laughing out loud when, suddenly, Jennifer, traveling well above the speed limit, lost control and hit a tree. Tara died instantly. Jennifer was charged with vehicular homicide. Is Bob liable as an accomplice? (Remember this scenario from Chapter 7?)

4. Frank and Mark went to an ATM to get cash. Frank used his ATM card to withdraw $40. After Frank inadvertently pushed the “Enter” button a second time, the machine gave him $80, but his account only reflected a $40 deduction. Frank said: “WOW! Two for one! I asked for $40 and got $80 and my account is down only $40. You can’t beat that. I mistakenly pushed the ‘enter’ button a second time.” Mark, until then unaware of what had happened, inserted his card and, instead of withdrawing $50 as planned, withdrew $400. He pushed the “Enter” button a second time. The machine gave him $800, while his account only reflected a $400 deduction. Frank and Mark then returned to their dormitory and told Chris all about this magical machine. Chris went to the ATM and withdrew $1,000. It gave him $2,000, while his account only reflected a $1,000 deduction. Is Frank, Mark, or Chris responsible for any crimes committed by each other?

5a. Lydia covets a painting at the local museum. She persuades Bruno,

a guard at the museum, to leave a window in the ladies' room unlocked so that she can enter the museum during the night and steal the painting. That evening, Bruno leaves the window unlocked. While on her way to the window, Lydia discovers that a door has been inadvertently left open by a museum employee. Lydia enters through the door, steals the painting, and leaves.

5b. Bruno was angry at the museum for making him stand up during his day shift. One day he saw Anthony creeping slowly toward a famous small painting on display at the museum. Strongly suspecting that Anthony intended to steal the picture and hoping to get back at his boss, Bruno took an unscheduled "coffee break" to make it easier for Anthony. Anthony, unaware that Bruno had left the room, took the painting from the wall and quickly left the museum.

6. Eric and Ian are students at Columbia, a large suburban high school. They sell drugs to a number of students. Pat, a friend, often buys drugs from them. Eric and Ian know that Pat's father is an avid gun collector and that Pat has access to his father's large gun collection. Eric and Ian have frequently told Pat that they want to get their hands on guns like those his father owns so they can kill all the "jocks" and "punks" at their school. One day Eric and Ian offer Pat a very large amount of cocaine in exchange for borrowing several semi-automatic guns and a lot of ammunition from Pat. Pat knows something is brewing because Eric and Ian never make deals — they always make him pay top dollar for his drugs. Nevertheless, Pat agrees to loan them the guns and ammo in exchange for the drugs because he is not worried for his safety — after all, he is not a jock nor a punk. To be extra safe, Pat decides he won't go to school until the guns are returned. The next day Eric and Ian open fire in the school cafeteria with the guns and ammo they borrowed from Pat. Ten students are killed and many more are wounded. Is Pat guilty as an accomplice of these murders and attempted murders?

7. Sister of Fortune magazine, compiled and published solely by Amanda Ashwood, recently ran an advertisement in its classified ad section that read: "Do you need help PERMANENTLY ridding

your life of battering boyfriends? Just call Tammy the Terminator at 1-800-MRCNARRY." One week later the body of a battering boyfriend was found. Two weeks later Tammy confessed to this murder-for-hire homicide, telling the police that Leslie, her client, found her and hired her through this ad. The prosecutor wants your advice (ignoring any constitutional law or corporate law issues) on whether she can prosecute Amanda as an accomplice. Please advise.

8. Pedro's wife, Maria, recently left him for José. Pedro, upset and angry, discussed his situation with his close friend, Al. Pedro told Al he was so mad, he could kill José. Al replied: "The man who stole Maria deserves to die. Your honor will be upheld and you will feel much better. If you are a real man, you must do it."
   a. That evening Pedro grabs his pistol from his closet but cannot bring himself to leave his house. Nothing further happens.
   b. Same facts, except that Pedro leaves his house and kills José.
   c. Same facts, except that Pedro leaves his house and kills José and Maria.
   d. Same facts, except that Al gives Pedro a loaded gun and says: "Here, my friend. This is for your honor." That evening Pedro kills José and Maria.
   e. Same facts as in Example 8d except that later that afternoon Al decides that killing José is wrong. Al calls Pedro and tells him in strong language that killing José is wrong and will not solve anything. Pedro says he will think it over. Later that night Pedro uses the gun Al gave him and kills José.
   f. Pedro uses his own gun to kill José and later goes to Al's house (who does not know that Maria has left Pedro to run off with José) and says: "I have just killed the man who stole my wife with this gun. Get rid of it immediately." Al has already heard news reports that say that Pedro is the prime suspect but that the murder will probably not be solved unless the murder weapon is recovered. Al takes the gun Pedro gave him to a garbage dump where it is soon covered over with several tons of new garbage.
   g. Same facts as in the first paragraph of this Example except that Pedro tells Al that he has placed a bomb in José home set to explode at 9:00 p.m. Al replies that Maria and José will be at a

movie at that time. Pedro says: “I know that. I just want to scare them. Maybe Maria will come back to me.” Al decides that scaring Maria and José is not enough. At 8:30 p.m., Al calls José at the movie theater and tells him his house has been broken into. José and Maria immediately leave the theater and return to José’s house. The bomb explodes while they are there, killing both of them.

9. “Sharkie” specializes in lending money at illegal interest rates to individuals with terrible credit records. He tells Thug, one of his collection agents, to “do what you have to do to collect the money from Sam but, remember, I want my money.” Thug, not being terribly bright, uses his fists a bit too liberally on Sam trying to persuade Sam to pay the money he owes Sharkie. Sam dies from the beating.

10. Tiny regularly visits an exotic dancing club. The local prostitution law makes it a criminal offense for exotic dancers to make physical contact with a customer in exchange for money.

    One evening Tiny becomes extremely frustrated with the law and offers Candy, a dancer, $100 for a lap dance. Candy agrees and does a lap dance while seated on Tiny’s lap. An undercover police officer immediately arrests both. Subsequently, the prosecutor charges Tiny as an accomplice to Candy’s act of prostitution.

Explanations

1a. Brad intentionally provided assistance to Linda while she committed the bank robbery. Thus, Brad is an accomplice and could be held liable as such for the crime of bank robbery committed by Linda. At common law, Brad would be a principal in the second degree because he was present and rendering assistance while Linda, the principal in the first degree, was committing a crime.

    Under the MPC, and most modern statutes, Brad would be considered a principal and would be convicted as such for the crime of bank robbery because he purposefully rendered aid to one he knew was committing this crime.

1b. Although Clara assisted Linda in robbing the bank by delivering the note to the teller and then delivering the cash to Linda, Clara had no intention to assist Linda in the commission of a crime. Clara is an "innocent agent" who, while trying to be helpful, has been deceived as to what she is doing.

1c. Olga assisted Linda to commit the bank robbery by gathering up the cash and putting it in a bag for her. However, Olga did so only because she was threatened with imminent deadly force. Olga would have a successful defense of duress (see Chapter 16) and, thus, would be an innocent agent. She could not be convicted as an accomplice.

1d. Linda could be convicted under a felony murder/murder charge in most states. Olga also may be in trouble unless this jurisdiction allows the defense of duress to a murder charge, including felony murder. Most jurisdictions would probably allow Olga to use this defense. If not, then Olga might be held liable under the law as an accomplice.

The point here is that liability as an accomplice can depend on other legal doctrines such as duress. If the alleged accomplice has a defense in cases where she intentionally rendered aid, then she cannot be held guilty as an accomplice. If that defense fails, however, she then may be convicted as an accomplice. (*Note:* A really clever defense attorney might argue that Olga did not act with "purpose" to take the money by threat of deadly force. But that evidence may be relevant only to "motive.")

1e. At common law, Brad would not be liable as an accessory after the fact. Both husband and wife were expected to help each other avoid conviction if a spouse committed a crime.

In most jurisdictions today, Brad would be convicted of rendering criminal assistance or criminal facilitation. There is no defense for a spouse or relative who knowingly helps someone who has committed a crime avoid apprehension or conviction. Some jurisdictions, however, will reduce the degree of the offense if a spouse or relative is involved and only provides certain kinds of assistance.

2. The general rule is that *any* encouragement is sufficient even though the principal would have committed the crime anyway. If the jury finds that Laura's statement was intended to encourage Dan to commit the crime and had any impact on the principal, it would be legally sufficient to convict Laura as an accomplice. See *State v. Helmenstein*, 163 N.W.2d 85 (N.D. 1968).

3. Jennifer is clearly a principal in the first degree at common law and is a principal under the MPC.

   In many jurisdictions, Bob could be charged as an accomplice in the vehicular homicide of Tara for intentionally encouraging Jennifer to drive well over the speed limit by initiating and continuing to play this dangerous game. Granted, Bob did not verbally communicate with Jennifer to egg her on, and Jennifer was the last responsible moral agent who could have slowed down at any time and avoided this tragedy. However, the law of accomplice liability does not require significant encouragement nor does it require "but for" causation as required elements for liability. Thus, Bob can be convicted as an accomplice and could receive the same sentence as Jennifer.

4. Frank, Mark, and Chris are each responsible for their own withdrawal and each may face a criminal charge of theft if they do not return the extra cash or tell the bank. (See Chapter 10.) Frank and Mark were both present when the other obtained the extra cash. Generally, being present with the knowledge that someone else is committing a crime is not sufficient for accomplice liability unless the individual is there for the *purpose* of encouraging a crime or unless the principal knows that the individual is willing to help if necessary. Here Mark did not know what Frank had done until after Frank had obtained the extra cash. Thus, Mark is clearly not responsible for any crime Frank may have committed. Frank, however, told Mark what happened and provided Mark with essential knowledge about how to obtain extra cash. Mark, relying on that information, increased his withdrawal significantly and also received a double payment. But did Frank tell Mark what happened and provide him with vital information on how to obtain an extra payout with the *intent* to encourage Mark to commit a crime? If the

prosecution can prove that Frank did have this purpose, then Frank could be convicted as an accomplice and would also be responsible for Mark's crime. In most jurisdictions, merely providing useful information without intent to encourage another person's committing a crime does not suffice for accomplice responsibility. The MPC also requires *purpose*. This will be a close case. The same analysis applies to Frank's and Mark's responsibility for Chris's crime. It may be easier for the prosecution to prove that they did act with the purpose of encouraging Chris to commit a crime because they sought him out and provided the information necessary to improperly obtain extra cash. What do you think the result should be?

5a. Bruno would argue that his aid to Lydia — leaving the window unlocked — was completely ineffective; consequently, he cannot be convicted of being an accomplice. This argument would probably be successful. The prosecutor may have a fallback theory, however. By telling Lydia he would leave the window open, Bruno may have encouraged Lydia to commit the burglary and theft. Thus, these words by themselves might be considered legally sufficient assistance to convict Bruno of being an accomplice.

At common law, doing something that did not help *P-1* in any way to commit the offense was an insufficient actus reus for accomplice liability. Under the MPC, however, Bruno has clearly "attempted" to render assistance; consequently, under §2.06(3)(a)(i) he can be convicted as a principal even though he did not provide any useful assistance. (This assumes that leaving the window open meets the MPC's definition of "substantial step" by "strongly corroborating" the actor's criminal purpose.) The MPC focuses more on the actor's attitude rather than on whether his help was useful.

Of course, the prosecutor may also be able to establish a conspiracy to commit burglary and theft if she can show that Bruno and Lydia had entered into an agreement to commit a crime and one of them took an overt act in furtherance of the conspiracy. If this argument proves successful, Bruno would be liable for the crimes of burglary and theft committed by Lydia in a jurisdiction that follows the *Pinkerton* rule.

5b. Bruno can be convicted of being an accomplice to Anthony's theft of the painting. This is a case of omission or failure to act when there is a legal duty to prevent another person from committing a crime. As a security guard, Bruno had a civil legal duty by virtue of his employment contract to take reasonable steps within his power to prevent the theft of the picture. Instead, Bruno left the room with the purpose of making it easier for Anthony to commit the crime.

Note that Bruno is an accomplice even though Anthony did not realize that he was being assisted in committing the crime. There is no requirement that the principal know he is being assisted to commit the object offense, though this is generally the case.

6. This example is based loosely on the Littleton, Colorado high-school massacre. The tragedy really makes one think about what culpability should be required for accomplice liability.

Pat loaned his father's semi-automatic weapons and a large amount of ammunition to Eric and Ian. The prosecutor could probably prove Pat *knew* they intended to use them to kill fellow students at their high school. Eric and Ian had often told Pat they wanted to use his father's guns to kill certain students. Pat also knew something big was up because Eric and Ian had never let him swap for drugs; they always insisted on cold cash. Finally, Pat avoided the crime scene precisely because of what he expected would happen.

Nonetheless, without additional evidence, it would be difficult to prove that Pat loaned his father's automatic weapons with the *purpose* of assisting or encouraging their crimes. Pat would argue that his purpose was simply to obtain drugs and that he was indifferent as to what Eric and Ian did with the weapons and ammunition. Because Pat was able to obtain a large amount of drugs without paying for them — only by loaning these dangerous items — the prosecutor could argue that Pat had a "stake in the venture" and thus did act with purpose to assist Eric and Ian. The MPC and a number of jurisdictions would not convict Pat as an accomplice unless the prosecutor could prove Pat acted with such purpose.

Other jurisdictions, however, would convict Pat if he had had *knowledge* that the guns and ammunition he loaned his friends

would be used to commit a *serious* crime. Criminal conviction and punishment of such “enablers” is necessary to deter them and others like them from providing such aid. A much stronger case can be made that Pat had such knowledge.

In some states, Pat could be convicted of criminal facilitation because he knowingly provided significant aid, the weapons and ammunition, to someone he knew (or, in some states, had reason to know) intended to commit a serious crime. In this case, Pat would be punished less severely than Eric and Ian.

7. Amanda provided vital information about how to hire a professional killer to interested consumers. Most jurisdictions and the MPC would require the prosecution to prove that Amanda acted with the *purpose* of assisting another person to commit a crime. Some courts would hold an actor guilty as an accomplice if she provided assistance to someone she *knows* intends to commit a *serious* crime. (See the *Fountain* case, supra.) The prosecutor would point out that this information could only be used to assist someone in committing a serious crime; it had no lawful purpose. Moreover, the language in the advertisement was very clear about the ultimate criminal purpose for which Tammy would be hired. Amanda would counter that she did not know that Tammy, let alone Leslie, presently intended to commit a crime. Thus, she could not have acted with the necessary mens rea. What would you tell the prosecutor?

8a. Because Pedro has not committed any crime, there is no guilty principal. At common law, Al could not be convicted as an accomplice. Under the MPC, the result is the same; Al cannot be convicted as an accomplice because Pedro has not engaged in the conduct required to commit the object crime or an attempt to commit it.

8b. Al is guilty as an accomplice because he has provided psychological reinforcement to Pedro to commit murder and the principal committed that very crime. Because there is a guilty principal, Al would be convicted under both the common law and the MPC.

An interesting question here is whether Al might be guilty of a

greater crime than the principal. Pedro might have a heat of passion or related defense (though unlikely); Al would not. If Pedro is convicted of manslaughter, can Al be convicted of premeditated murder? At common law the accomplice's liability is generally limited by that of the principal's unless the crime is murder. Thus, Al can be convicted of a more serious offense than Pedro. If a crime other than homicide were involved, such as assault, the general rule is that the accomplice cannot be convicted of a more serious crime than the principal.

Under the MPC, and the law of some jurisdictions, the liability of the accomplice is measured by *his* culpability together with the conduct of the principal. Consequently, Al could be convicted of a more serious degree of homicide. This is true even for less serious crimes than homicide.

8c. This is a tricky one. Al encouraged Pedro to kill only José; he did not encourage him to kill Maria. Thus, Al did not intend to assist Pedro in the particular criminal action of killing his wife. The MPC and many jurisdictions would require that the accomplice act with the purpose or intent of encouraging the specific criminal conduct of the principal. Negligence toward other crimes committed by the principal is not a sufficient basis for accomplice liability. Thus, Al would not be guilty as an accomplice for Pedro's murder of Maria in these jurisdictions.

However, some jurisdictions are expanding accomplice liability to include crimes committed by the principal that were a "natural or probable consequence" of the offense the accomplice intended to aid or that should have been "reasonably foreseen." A prosecutor could argue that Al should have foreseen that a jealous husband might well kill his wife as well as her lover. (Unfortunately, this argument may reinforce the law's acceptance that male violence in intimate relationships is understandable and should be condoned or at least partially excused.) Or a prosecutor could argue that the accomplice has set in motion forces that might readily lead to this particular consequence. Convicting Al as an accomplice for the murder of Maria would be possible in these jurisdictions.

8d. The only difference here is that Al provided physical assistance as

well as psychological reinforcement. The analysis of Al's criminal responsibility here is the same as in Explanations 8b and 8c above. Evidence of the actus reus required for assistance is stronger here.

8e. By calling Pedro and telling him not to kill José, Al has clearly withdrawn the psychological encouragement to commit murder he had given Pedro earlier in the day. Thus, his call to Pedro is an effective withdrawal of aid previously furnished. However, Al also gave Pedro a loaded gun to use in killing José. Al has not rendered *that* aid ineffective. Thus, under common law, Al would still be liable as an accomplice.

The MPC is also very demanding before withdrawal will be legally effective. Al has not completely removed the effectiveness of his aid (providing the loaded gun). Al should have gone to Pedro's home and taken back the gun. Nor did Al call the police. A jury might conclude that Al has made a "proper effort" to prevent the commission of the crime, but more likely Al will be convicted because he did not take sufficient steps to prevent the commission of the crime.

8f. Al is clearly an accomplice after the fact at common law because he has intentionally disposed of a weapon that he knows has been used in a homicide, making it difficult, if not impossible, for the police to gather essential evidence for investigation and prosecution.

Under the MPC, and many modern statutes, Al would be guilty of criminal facilitation or rendering criminal assistance. The degree of punishment often depends on the severity of the crime committed by the principal. The liability of the person rendering aid after the crime has been committed usually is not affected by the subsequent acquittal of the principal. The essence of this crime is obstructing justice by aiding flight, preventing apprehension, or destroying or concealing evidence.

8g. This is an extremely difficult problem (even for us, if that is any consolation). Pedro only intended to scare José and Maria; he did not intend to kill them. Al did not intend to help Pedro accomplish that goal. Instead, Al decided to kill José and Maria. Thus, Al is a principal in a homicide charge. Granted that Pedro might be liable as a principal under a separate felony murder theory, is he guilty as

an accomplice to Al's murder? Probably not because Pedro did not act with the purpose to assist Al commit a homicide. Indeed, Pedro did not know that Al intended to commit any crime.

9. Thug is surely guilty of homicide, either "serious bodily injury" murder or manslaughter in the first or second degree. But is Sharkie also guilty as an accomplice? Sharkie did not want Sam killed because Sam's death means Sharkie will *not* get his money back. Thus, Sharkie did not intend that Thug engage in the criminal action that caused Sam's death. Because Sharkie did not have this necessary mens rea, many jurisdictions, including those that follow the MPC, would not convict Sharkie as an accomplice to Thug's crime of manslaughter.

   Some courts, however, are now holding the accomplice responsible for crimes committed by the principal if *P*'s crime was reasonably foreseeable or if *A* has set in motion a chain of events and *P*'s crime was a "natural and probable result" of this chain. In these jurisdictions, Sharkie might be convicted as an accomplice to Thug's crime of manslaughter.

10. The criminal law in this jurisdiction prohibits exotic dancers from making physical contact with patrons in exchange for money. It does not punish the customer who pays for the dance. By doing a lap dance in exchange for money, Candy has clearly violated the law.

    Can the prosecutor convict Tiny as an accomplice? After all, he initiated Candy's crime and gave very strong encouragement to her by paying her $100. Nonetheless, the charge should be dismissed. The substantive law here punishes only the conduct of one party even though the crime necessarily requires participation by two parties. A court will conclude that the legislature, in not punishing the conduct of one party essential to the commission of the crime, did not intend to impose criminal responsibility on that party. To permit a prosecutor to use accomplice liability to punish that very same conduct will subvert legislative intent.

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1. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 337-338 (1985).
2. *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932).

3. Kadish, supra n. 1, 73 Cal. L. Rev. 323 (1985).
4. Id. at 355.
5. We have modified the basic definitional terms provided by Blackstone at 4 Blackstone, Commentaries, ch. 3, 33-39.
6. *United States v. Johnson*, 546 F.2d 1225 (5th Cir. 1977).
7. Ciociola, Misprision of Felony and Its Progeny, 41 Brandeis L.J. 697 (2003).
8. See offenses provided in MPC Article 242.
9. For more on legal insanity, see Chapter 17.
10. For more on solicitation, see Chapter 11.
11. Kadish, supra n. 1, at 349.
12. *Hicks v. United States*, 150 U.S. 442 (1893).
13. Model Penal Code and Commentaries, Comment to §2.06, at 311 n. 37 (1985). "There is deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether, as in the case of attempts, the policy of the substantive offense on this point should control. . . . The result, therefore, is that the actor must have a purpose with respect to the proscribed conduct or the proscribed result, with his attitude towards the circumstances to be left to resolution by the courts."
14. 768 F.2d 790 (7th Cir. 1985).
15. See Chapter 13.
16. *Jindra v. United States*, 69 F.2d 429 (5th Cir. 1934).
17. *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938).
18. G. Fletcher, Rethinking Criminal Law 676 (1978).
19. See Chapter 13.
20. *People v. Luparello*, 187 Cal. App. 3d 410, 439, 231 Cal. Rptr. 832, 849 (1986).
21. Id.
22. *People v. Brigham*, 216 Cal. App. 3d 1039, 265 Cal. Rptr. 486 (1989).
23. See, e.g., *People v. Luparello*, supra n. 20; Me. Rev. Stat., tit. 17-A, §57(3)(A) (Supp. 2007).
24. Kadish, supra n. 1, at 358-359.
25. *Wilcox v. Jeffery*, King's Bench Division, [1951] 1 All E.R. 464.
26. *State ex. rel. Attorney General v. Tally, Judge*, 102 Ala. 25, 15 So. 722, 739 (1894) (emphasis added).
27. See Chapter 9.
28. See Chapter 9.
29. *Regina v. Morgan*, House of Lords, [1976] A.C. 182. See discussion of this case in Chapter 9.
30. 105 Mo. 76, 16 S.W. 514 (1891).
31. Kadish, supra n. 1, at 381; Fletcher, supra n. 18, at 664-667.
32. 768 P.2d 1102 (Alaska 1989).
33. *Regina v. Richards*, [1974] Q.B. 776.
34. See Chapter 8.
35. *Regina v. Howe*, [1987] 1 All E.R. 771, 799. However, the House of Lords in dicta indicated that *Regina v. Richards*, supra n. 33, was wrongly decided.
36. See Chapter 13.

CHAPTER 15

Defenses: An Initial Survey

OVERVIEW

The materials in this chapter concern two procedural hurdles that defendants may confront at trial. We will first discuss presumptions, which are far less prevalent in criminal practice now than several decades ago. Our attention for the remainder of the chapter, and indeed of the book, will be almost exclusively on the place of "defenses" in the criminal law. These are unsettled areas of the law. The notion that defenses can be categorized as either excuse or justification, which is the primary topic in this chapter, is new to Anglo-Saxon jurisprudence. The distinction, however, is hardly academic; it has many practical, as well as theoretical, implications.

This chapter investigates what we mean when we say that *D* has a "defense." Does a defense relate to an element of the crime? If so, how? May the state require the defendant to carry the burden of proof on a "defense"? And by what procedural mechanisms or labels may it do that? Chapters 16 and 17 investigate specific kinds of defensive claims. Chapter 16 looks at many claims that may be classified as "justifications," while Chapter 17 considers claims of "excuse." Throughout those two chapters, however, we will refer back to the issues raised in this chapter. They are all of the same cloth.

PRESUMPTIONS

One procedural device by which the state may attempt to shift the burden of proof (or production) to the defendant is a *presumption*. Civil

law employs many kinds of presumptions. Some are "conclusive" — no matter what proof the opposing party wishes to present, the law will "presume" the fact against her. For example, the common law presumed that a child born to a married woman was the child of the husband. No contrary facts, such as that the husband was infertile or that he had been absent for one year (or even ten), were admissible to rebut the presumption. This was a policy decision. The courts did not wish to inquire into the private lives of married couples, nor did they wish unnecessarily to label children as "illegitimate."

Other presumptions are established for different reasons. Some are based on common sense and experience. For example, the law presumes that a letter dropped in a government mailbox was delivered because, in the vast majority of cases, when a letter is sent, it actually arrives. By applying this "presumption," we move the litigation forward. Since, in our common experience, most letters are delivered, once the plaintiff has shown that he put the letter in a mailbox, the defendant must show that our common experience should not be applied to the specific facts of this specific case. It would be needlessly time-consuming to require the plaintiff to show that the letter was delivered. On the other hand, if the defendant wishes to demonstrate that the letter did not arrive, he may be allowed to rebut the presumption. He might, for example, show that the mailbox into which the letter was placed was thereafter robbed, or that, as a normal business matter, the defendant records every incoming piece of mail and that there is no such recording of the plaintiff's letter.

Finally, some presumptions, such as res ipsa loquitur, seem to be devices by which we "smoke out" the opposing party (usually the defendant), to get him to tell us what he knows about the event. These presumptions were first applied when there was little or no discovery and a defendant, merely by stonewalling, could effectively prevent the plaintiff from proving his case. *Byrne v. Boadle*, 159 Eng. Rep. 299 (1863).

We usually speak of this process as *presuming* fact B (delivery of the letter) from the *basic* (or *predicate*) fact A (posting of the letter), and require that there be some connection between facts A and B. This may be graphically illustrated as follows:

(Predicate) A → B (Presumed)

Thus, if the jury finds fact A by the proper standard, it may conclude that the presumed fact (B) is also proved.

There is considerable uncertainty, even in civil cases, as to the procedural importance of presumptions. Although some presumptions based on policy decisions are irrebuttable, such as the child-father rule mentioned above, most presumptions are rebuttable. The question contested is who must rebut them, and to what degree. Some argue that a presumption should always shift the burden of (dis)proof to the opposing party (whom we will refer to as the defendant, since it is usually the plaintiff who seeks to use a presumption). E. Morgan, Basic Problems of Evidence (1963). Others argue that most presumptions are simply "smoking out" devices and should disappear entirely if the defendant comes forward with as much evidence as he has. J. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898).

These rules may be more easily understood as they are applied. If you see puddles in the street after you've been in a building for hours, you are likely to conclude that it has rained, although you didn't see it rain. Why? Because "in the vast majority of cases" puddles in the streets come from rain. A presumption that "puddles on the street implies rain" is probably commonsensical: Proof of the predicate fact A (puddles) leads to the conclusion B (that it has rained). You may later learn that the water was from some other source (e.g., a street cleaner or an overturned water truck), but you start from the premise, based on common experience, that *if* there are puddles, it is highly *likely* that it rained. Indeed, in the absence of other suggestions, you are likely to conclude beyond a reasonable doubt that it rained.

These same empirical considerations may apply to criminal cases. Suppose, for example, that statutes prohibit the possession of certain drugs *only* if they have been imported into the United States. An instruction to the jury that if the prosecution proves the drug to be heroin, it can be presumed that it was imported, unless the defendant brings some evidence to the contrary, is constitutional because virtually no heroin is produced in the United States. On the other hand, that same instruction applied to marijuana is probably invalid because much marijuana (even if not over 50 percent) is homegrown. See *Leary v. United States*, 395 U.S. 6 (1969).

In earlier centuries, the criminal law employed many such

presumptions. A defendant was “presumed” sane. A person who used a deadly weapon in killing another was “presumed” to have “malice aforethought” (or, in a variation of this presumption, to “intend” the death). More broadly, defendants were “presumed” to “intend the natural and probable consequences of their acts.” Some of these presumptions were established not only because they might be commonsensical, but also because defendants were precluded from testifying. Thus, mens rea “had to be” presumed from facts proved by the prosecution. Whether these presumptions are valid today, when defendants have a constitutional right not to testify and to not have their silence construed against them, is highly doubtful.

Constitutional Aspects of Presumptions

Presumptions concerning the elements of the crime in criminal cases are subject to constitutional scrutiny. Establishing a “conclusive” presumption against the defendant would obviously conflict with the requirement that the prosecution carry the burden of proving every element. *In re Winship*, 397 U.S. 358 (1970) (see Chapter 1). But what about lesser “rebuttable” presumptions? And what of those presumptions that try to “smoke out” the defendant, or that don’t require but merely “allow” the jury to reach certain conclusions?

In *Allen v. Ulster County Court*, 442 U.S. 140 (1979), and *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Supreme Court divided such devices into “mandatory” presumptions and “permissive” inferences. Presumptions that actually shift the burden of proof on such elements — or could be misconstrued by the jury as doing so — are unconstitutional. Devices that only shift the burden of going forward on an element are constitutional, *if* there is a sufficient connection between A (the predicate fact) and B (the presumed fact).

The *degree* of relation between A and B — mandatory presumption or permissive inference — depends on the exact instructions given by the judge to the jury.

Mandatory Presumption: The judge instructs the jurors that if they find A, the defendant has the burden of going forward on B. → The connection between A and B must be *beyond a reasonable doubt*.

Permissive Inference: The judge does not instruct the jury on the matter, simply allowing the prosecutor to make the case to the jury, *or* is very clear that the inference is permissive, and does not require rebuttal by the defendant. → The connection between A and B must be merely *more likely than not*.

The thrust of these cases is that presumptions are on weak ground, and that they are likely to be valid only if (1) the link between A and B is very strong and (2) the judge's instructions so weaken the "mandatory" nature of the "presumption" and make it so fact-specific to the case at hand that it is no longer an abstract proposition.

The Model Penal Code

The Code does not recognize mandatory presumptions, preferring that when the legislature wishes to require the defendant to carry the burden of production or persuasion, it say so explicitly. (As already noted, the Code itself establishes only a small handful of such claims.) On the other hand, §1.12(b) allows the court to instruct the jury that it *may* (not *must*) use a permissive inference on its way to finding the presumed fact.

"AFFIRMATIVE" DEFENSES

Not everything a defendant says in an adversarial setting is a "defense." If a defendant in a tort case denies an allegation of negligence by saying that the light was green when he went through it, he is not raising a "defense" but challenging the very heart of the plaintiff's case. On the other hand, there are (affirmative) defenses in civil law. For example, demonstrating that the case was not brought within the time allowed by the statute of limitations is an affirmative defense for which the defendant carries the burden.[1]

In criminal cases, some claims that we initially think of as defenses actually go to the heart of the prosecution's case. Just as with the stoplight color issue above, a criminal defendant who claims that he was in Cleveland when the killing occurred in Poughkeepsie is not raising a

defense. He is challenging a critical aspect of the prosecutor's case: that it was *D* who was present at the crime. We call this kind of claim a failure of proof or an element negation defense because it argues that the prosecution has failed to prove even its prima facie case. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 Colum. L. Rev. 190 (1982).

Are all defenses "element negations"? Surely in the early common law that argument could be made. Virtually all defenses concerned whether the defendant should be punished as an "immoral actor" (traditional mens rea) and, if so, how severely. In that sense, all defenses were element negations.

Most modern criminal law analysts, however, would reject that approach. They would argue that, based on *Winship,* the prosecution must prove beyond a doubt only "every fact necessary to constitute the crime." This language seems equivalent to the term "material element" as used in both the common law and the Model Penal Code (see Chapter 4). These analysts would then argue that some affirmative defenses, at least, do not negate such elements or facts. The basic "rule," which is nevertheless very difficult to apply, seems to be that the legislature may require the defendant to carry the burden of proof on whatever the common law recognized as an "affirmative defense," BUT that if the legislation "copies" or is "similar to" a common law offense, the government must "disprove" such a defense. History, therefore, matters a great deal. The problem is that history is not necessarily clear. First, common law courts did not distinguish between "burdens of production" and "burdens of proof" as courts do today.[2] Second, the common law was fluid — judicial positions changed throughout the nineteenth century, raising questions of the date a court should use in deciding what the "common law" rule was. Students of constitutional law will not be surprised to find that even the Justices of the Supreme Court choose different approaches: (1) originalist (1776 or 1789); (2) originalist plus (1865, when the Fourteenth Amendment was adopted); (3) "recent history" ("in the last fifty or so years"). The problem is made more complex by the alleged distinction, discussed below, between justifications and excuses. In 2006, the Supreme Court appeared to hold that there was no federal constitutional barrier to requiring the defendant to prove those defenses called "excuses." We will discuss those

decisions — *Dixon v. United States* and *Clark v. Arizona* — in detail later in this chapter, and even more extensively in Chapters 16 and 17.

Legislative Clarity and the Offense-Defense Distinction

Let's begin with the "easy" case. Consider the following two statutes:

1. Unauthorized possession of A is a crime.
2. Possession of A, unless authorized, is a crime.

Obviously, authorization (or its absence) is relevant. In which of these statutes, however, must the state prove that the defendant "lacked" authority? In which may the state require that the defendant establish that he acted "with" authority? Does either statute clearly tell us?

Common law courts relied on maxims of statutory construction to resolve these issues. But as we have already seen in other contexts, none of these maxims solves the conundrum. Professor Robinson has argued that "whether a defense is a failure of proof defense or an offense modification may depend on the form in which it is drafted." Robinson, supra, at 203. But Professor Williams has responded that this is a purely verbal and formal distinction: "The definitional elements are those that we choose to pick out from all the elements expressed in the rules relating to the offense." Williams, Offences and Defenses, 2 Legal Stud. 23 (1982); Williams, The Logic of "Exceptions," 47 Cambridge L.J. 261 (1988).

Williams' point is essentially that legislatures have an obligation to be clear (see the discussion of the legality principle in Chapter 1) and the legislature could have made the statute clearer on this point. If the legislature wished the defendant to carry the burden of demonstrating authorization, the statute could have been written as follows:

3. Possession of A is a crime. If the defendant proves by a preponderance of the evidence that he had authorization for the possession, there is no criminal liability.

There will always be a way in which the legislature could have phrased a statute to clarify on whom it intended to place the burden of proving an issue. In accordance with the rule of lenity (see Chapter 1), an ambiguous statute should be construed to narrow the reach of the criminal law, thus requiring legislatures to reenact the statute in a clearer way. Therefore, a salutary rule of interpreting criminal statutes might be, "Unless the legislation expressly uses the form 'X is a defense that must be proved by the defendant,' all claims relevant to guilt must be proved by the prosecution." Unfortunately, courts do not adopt such easy rules. And they may apply different approaches to interpreting two apparently similar statutes (see the discussion of the Supreme Court's decisions in *Dean* and *Flores-Figueroa*, supra, pages 145, 146). The answer, then, is that some courts would require the prosecution to prove non-authorization in both statutes, while some would require the defendant to carry the burden of proving authorization, at least in statute #2.

The Constitution and Affirmative Defenses

If the common law was uncertain as to which defenses were "affirmative" — under which the defendant could be required to carry the burden of proof — there is no greater clarity regarding the constitutionality of such legislation. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court held that a defendant could not be required to prove the "affirmative defense" of "heat of passion" because that defense negated an element of the crime of murder (malice aforethought). Two years later, the Court upheld as constitutional a New York statute that put upon the defendant the burden of proving the "affirmative defense" of "extreme emotional or mental disturbance," concluding that claim did NOT negate an element of the crime of murder. *Patterson v. New York*, 432 U.S. 197 (1977). There are ways to attempt to reconcile *Mullaney* and *Patterson*. First, the statute in *Patterson* was written clearly, while the law in *Mullaney* was not. Second, the history of the common law regarding the relation of "heat of passion" and "malice aforethought" seemed to put the burden on the state, whereas the New York statute, which was enacted only in the 1960s, had no such history. Third, the New York statute, which was obviously copied from the MPC, provided

a defendant with much more opportunity than did the common law to have his homicide reduced to manslaughter (see Chapter 8 for a broader discussion). Thus, New York was giving the defendant a "bonus" beyond that which the common law recognized, and the state could, as a quid pro quo for that "bonus," constitutionally place upon the defendant the burden of showing that he deserved the "bonus." The literature on these cases and their progeny is voluminous and still very contentious. Suffice it to say that, 40 years later, there is no single "fulfilling" reconciliation between these two opinions, much less clear explanation in other cases.

The Common Law and Affirmative Defenses

The aspect of statutory interpretation described above, where a statute establishes both a rule and an exception to the rule in the same text, is known as the exception problem. But most "defenses" were established in the common law, long before the lenity rule of statutory interpretation was applicable. The problem begins where these "defenses" are raised. Healy, Proof and Policy: No Golden Threads, [1987] Crim. L. Rev. 355.

There is substantial disagreement as to the relation between defenses and the elements of a crime. For example, does a claim that the defendant was under duress challenge the mens rea (or actus reus) of the crime? Or is such a claim irrelevant to either of these two elements? Some would argue that no "insane" person can have mens rea, even if he can "intend" his acts and those acts' consequences. Others would argue that many, if not all, insane persons intend their acts and therefore are guilty of crime, even if they are insane. Perhaps when mens rea entailed moral as well as legal guilt (see Chapter 4), it could have been suggested that these claims demonstrated lack of moral culpability and hence denied guilt. The argument is much harder to make now since statutes have adopted "mental state" words (statutory mens rea) that do not, on their face, entail an additional moral culpability (traditional mens rea).

Yet all commentators and courts agree that there is a need for some generic defenses, if only because no legislation could possibly list all the factual circumstances under which an intentional crime would not and should not be punished. The Sixth Commandment, after all, is "Thou

shalt not kill," not "Thou shalt not kill except in self-defense, or under duress, or in necessitous circumstances."[3] Even if the legislature were to adopt the latter language, those terms would still have to be defined (and refined). The issue, then, is under what circumstances a defendant who appears prima facie to meet the elements of a crime should not be found guilty. We explore specific pleas such as insanity and self-defense (among others) in the next two chapters; here the inquiry is a broader one.

EXCUSE AND JUSTIFICATION: THE DEBATE AND CONFUSION

The Distinction Drawn

The early common law recognized the difference between excuse and justification, at least in instances of self-defense.[4] A justified act totally exonerated the defendant; an excused act exempted him from criminal punishment (i.e., the gallows), but resulted in forfeiture of all his personal and real property. Since forfeiture was prohibited in America, the distinction disappeared, and when England abolished forfeiture in 1838, it became less important there, also — all defendants proving either justification or excuse were simply not convicted. The distinction remained unexamined until Professor George Fletcher reintroduced it to American law professors 30 years ago.[5] For example, suppose Schmidlap has purposely parked next to a fire hydrant near a hospital. When asked why he did so, he replies either

1. "I had to. I was taking my injured baby to the hospital to save his life."

or

2. "I had to. The Martians told me to do it."

In the first response, Schmidlap is said to be *justifying* his action. He is claiming that although the act appears to be illegal, he violated the law

in order to achieve a greater social good: saving the life of his child. His claim is that his act is not wrongful; some violations of statutes are not wrongful if a greater good is thereby served. His decision to violate the law should be seen as praiseworthy.

In the second response, Schmidlap is obviously irrational. His claim is that although he should never have done what he did (it was wrong), because of some personal disability (in this case, what the law calls insanity) he should not be punished for that wrongful act. His claim is not one of justification but of *excuse*. It is often said that justification focuses on the act, whereas excuse focuses on the actor.

In some cases, it is clear that the defendant is claiming only justification. If Martha, the state executioner, premeditatedly injects George with a lethal dose of poison, her killing is not merely excused but justified. The state wanted — indeed, ordered — her to carry out the killing. Killings in war are similarly said to be justified.

The problem is very likely "academic." As one commentator has noted, "[T]here is much better reason to distinguish excuse and insanity and duress from the justifications of necessity and self-defense than there is to classify mistaken necessity and mistaken self-defense as excuses and distinguish them in that way from actual necessity and actual self-defense." Michael Louis Corrado, Self-Defense, Moral Acceptability, and Compensation: A Response to Professor Fontaine 47 Am. Crim. L. Rev. 91, 92 (2010).

The Distinction Questioned

Some courts and writers argue that many, indeed most, acts sought to be excused or justified are sufficiently morally problematic as to not be "clearly" justified or "clearly" excused. Consider, for example, the following hypothetical:[6] Gary sees Ingrid, a two-year-old, pointing a gun (which Gary knows has a hair trigger) directly at the temple of Henrietta. Gary concludes that the only way to save Henrietta's life is to shoot Ingrid. He does so, killing Ingrid. It is difficult to claim that Gary's act was morally praiseworthy and hence justified. On the other hand, the act was not "wrong," and he should not be blamed for it under

the circumstances. He did, after all, save the life of an innocent person, although he also took an innocent life. To excuse Gary suggests that he did something wrong, for which he would usually be blamed, if not punished. At best it was a tragic choice, which we should tolerate.

Critics of the distinction also argue that if academics cannot resolve difficult cases, juries may also be unable to do so. There would be no benefit in asking them to decide whether, for example, Gary's shooting was justified or excused, so long as all agreed that he should not be punished. In response to the argument that a verdict should reflect jurors' moral resolution of this issue so that it "sends a message," critics ask: What happens if the jury splits 8-4 on which of these explanations is the "better" one? Neither the proponents of the "message" theory nor courts have yet answered that question.

The Problems with Explaining Justification

As noted earlier, it is often said that justification focuses on the act whereas excuse focuses on the actor. But it's not that simple. In Chapters 3 and 4, we saw that there is an ambiguity in the term "act" — whether it means solely conduct, or whether it also includes the result. We saw that the Model Penal Code resolves that issue by distinguishing conduct from result. American academics are divided as to how to approach justifications. Some, arguing that the core requirement is an actual social benefit, focus on the results of the entire event, without considering the mental state of the actor. This school is referred to as the "deeds" school.[7] Another view is that the focus should be on the defendant's mental state. This school is referred to as the "reasons" school. The impact of these two different views will be explored below. At the moment, and in large part because the division is relatively new, these differing approaches have not had much impact on judicial decisions; it is likely, however, that courts will increasingly accept one view or the other as persons who have been exposed to the excuse-justification debate in law school argue cases before judges and then become judges themselves. It is also likely that even if judges haven't yet grappled with the different schools, your professor will expect you to

do so.

Mistake and Justification

Jane pulls out a gun and aims it at Joe, who then kills her.

Case 1: Jane actually intended to kill Joe.
Case 2: Jane did not intend to kill Joe, but Joe reasonably believed that she did.
Case 3: Jane did not intend to kill Joe, and Joe's belief that she so intended was honest but unreasonable (Jane had a water pistol).

In case 1, Jane is an actual aggressor intending to kill Joe, so some social benefit has arguably occurred from Jane's death — either because we wish to protect the life and autonomy of an innocent person, or because Jane has forfeited her right not to be killed. The deeds and the reasons schools agree here that Joe was *justified*. For the deeds school, a social benefit was achieved (dastardly Jane is dead). For the reasons school, Joe's reasons — self-preservation — were sufficient in themselves to warrant his conduct.

In case 2, Jane is at worst a practical joker who deceived Joe into believing her purported deadly threat. Jane's death is not a social gain (unless we think practical jokers should be killed). It is almost assuredly better for Joe to have been scared than for Jane to be killed. Those in the deeds school, who believe that an act is justified only if actual social benefit results, deny that Joe's act is justified (though as we will see below, they may excuse Joe); this school views Joe's act "ex post" — after the results are known. Those in the reasons school, on the other hand, assess Joe's *conduct (not the result)* and ask whether, *under the facts known to him at the time he shot Jane*, he was justified "ex ante" — before we know the result or the true facts. From that perspective, Joe was justified, because under the facts as he (and we) saw them, he was doing a social good — dispatching an apparent killer and saving an innocent life. The focus is on Joe's conduct, not on the results of that conduct.

Mistake: Honest or Reasonable?

Case 3 raises problems we have seen elsewhere, particularly in provocation doctrine (see Chapter 8).

If Joe's belief was unreasonable — if no one in the world but Joe would have believed Jane had a real pistol — should Joe lose his claim of justification and be held fully liable? Or does his mistake reduce what would otherwise be a justifiable act to a wrongful (but excused) one? The "deeds" school has no trouble here. Since only the factually justified actor is justified, the mistakenly justified actor cannot be. And he should be excused if, and only if, his mistake was reasonable. Since the unreasonably mistaken actor is "worse" and "more dangerous" than the reasonably mistaken one, the unreasonably but honestly mistaken actor is neither justified nor excused, and he should be treated as a fully culpable shooter. For the "reasons" school, however, the dilemma is greater. For them, the truly justified actor and the reasonably mistaken one are equally entitled to exoneration. The dilemma associated with that approach is whether the unreasonable actor should be (1) excused (and hence treated no worse than the actually justified actor), (2) only partially excused, or (3) not excused at all, and thus made to undergo the same punishment as a fully culpable shooter.

As we will see in more detail in the discussion of specific claims, most courts hold that a *reasonable* mistake as to justification will still exonerate the actor. But where the mistake is *unreasonable*, some hold the defendant to a reduced liability, such as criminal negligence, while others rule out any reduction and hold the defendant liable for the result of what was intentional conduct.[8]

Unknowing Justification: The *Dadson* Problem

A conundrum surrounding justification is whether the actor who is objectively justified must know that he is justified in order to claim justification. The issue arose in a real case, *R. v. Dadson*, [1850] 4 Cox C.C. 358. The defendant, *D*, seeing *V* fleeing from a house with a bundle in his hand, shot *V*. Under the common law, this was a crime because deadly force could not be used to prevent a misdemeanor. As it turned out, however, unknown to *D*, *V* had already been twice convicted of similar acts, and thus his third (misdemeanor) try was *by law* a felony. Under the then-existing common law, using deadly force to prevent a

felony was justified. This meant, in turn, that *D*'s shooting was objectively justified. Nevertheless, the court held that *D* was culpable if he did not know the facts (i.e., *V*'s prior two misdemeanor convictions), which would otherwise have justified his using deadly force.

The theoretical problem generated by this decision and situation is provocative. Under the "deeds" theory of justification, the act is justified if, on balance, *D* did the "right" thing — that is, he prevented more social harm than he caused. Dadson satisfied this condition — the law viewed the death of a felon-thief as better than the loss of the property he was taking. Therefore, no crime occurred. But the "reasons" school argues that a defendant who believes he is committing a crime should be punished because he has demonstrated (1) a bad character and (2) a criminal choice. The analogs in other areas — impossible attempts, for example (see Chapter 12) — are manifest. Unfortunately, the law is no more settled here than it is there.[9]

The debate over these matters goes to the heart of the purposes of the criminal sanction. As we go through each defense claim in Chapters 16 and 17, keep in mind these generic issues. Here is a quick summary:

	Reasons	**Dee**
D is reasonable, and not mistaken; the result is socially desirable[10]	Justified	Justi
D is reasonable, but mistaken, and the result is not socially desirable[11]	Justified	Not Justi Poss Excu
D is unreasonable, but honest in her mistake; the result, nevertheless, turns out to be socially desirable[12]	Not Justified, But Possibly Excused	Justi
D is unreasonable, but honest in her mistake; the result is not socially desirable[13]	Not Justified, But Possibly Excused	Not Justi Nor Excu
D intends to commit a crime but actually	Neither	Justi

prevents harm[14]	Justified Nor Excused

The Problem with Explaining Excuses

If the focus of *justification* is “the act” (ambiguous as that phrase is), the focus of *excuse* is said to be “the actor.” Beyond that, however, the articulation of the explanation breaks down. Some writers, for example, argue that the defendant is excused because he suffers from some “disability.” This is easily seen in the paradigm case — insanity — but it is not a helpful distinction when applied to a normal, sane actor who, at the point of a gun, commits a crime. On the other hand, a different explanation as to why the coerced actor is excused — that he was in an emergency situation — does not seem to apply well to the insane actor.

Another explanation of excuses is that the actor had “no choice” but to do what she did. But that is not really true; as Sir James Stephens argued regarding the claim of duress, a defendant who is threatened with death unless she commits a crime always has the choice to die. Although that is indeed a hard choice, Stephens contends that the actor should choose that path rather than break the criminal law. H.L.A. Hart, recognizing the cogency of Stephens’ remark, has countered that excused defendants have no “real” choice or “fair opportunity” to choose. The vagueness of that standard, however, has itself engendered criticism.

A third possible explanation of excuses is the utilitarian view that the excused defendant will not (or cannot) be deterred, and therefore, there is no point in punishing him. But while it may be true that the self-defender who is insane, under duress, or unreasonably mistaken will not be deterred, it is perfectly possible that defendants who would seek to have their acts falsely excused would not commit those acts if there were no excuse. (If Dwight thinks he can fake insanity, he may kill Chauncey if insanity is an excuse; but he is less likely to commit homicide if even the insane killer is customarily executed or otherwise punished.)

A fourth possible explanation of excuses is based on the so-called character theory of excuses. When Mother Teresa commits what would

appear to be serial murder, we just don't believe it — it is so "out of character" for her to act that way that we are convinced that she must have had some explanation. Even if she admits that she acted in cold blood (first-degree murder), we are likely to look for some "excusing condition" — if not to exonerate, then at least to mitigate her guilt (and her punishment).

Procedural Implications of the Distinctions

These debates as to whether a claim is an excuse or a justification may appear to be academic in the pejorative sense: the musings of tweed-coated law professors with nothing better to do after having pummeled and confused first-year law students. Yet these distinctions may have critical practical impacts: (1) The allocation of the burden of proof could depend on whether a claim goes to justification or excuse; (2) If an excuse does not "affect" an element of the crime, the legislature could simply abolish that excuse, which it could not do with a justification; (3) Since justified acts are "right," they cannot be resisted by others; excused acts, however, are wrong and can be resisted; (4) One may assist a justified actor but not an excused one.

The Burden of Proof Problem

In re Winship, 397 U.S. 358 (1970), held that the prosecution had the burden of proof on "all facts necessary to constitute the crime." No matter how narrowly one reads *Winship*, due process requires the state to show that a crime has been committed. A claim of justification essentially denies that a crime has been committed. Under this analysis, the prosecution must disprove any justificatory claim. On the other hand, an excuse claim appears to acknowledge that a crime has been committed but argues that the defendant should not be punished because of something unique to her. If so, then the prosecution has proved a crime, and the state may require the defendant to show that she should not be punished for that crime.[15]

In 2006, the Supreme Court concluded that duress (*Dixon v. United*

States, 548 U.S. 1 (2006)) and insanity (*Arizona v. Clark*, 548 U.S. 735 (2006)) were both excuses. Although each case can be narrowly construed, a fair reading of the two decisions is that the state may constitutionally place upon the defendant the burden of proving, by a preponderance of the evidence, that an excuse existed. There is no similarly clear decision, however, on justification and burden of proof. In *Martin v. Ohio*, 480 U.S. 228 (1987), the Court held that the state may put on the defendant the burden of proving he killed in self-defense (usually viewed as a justification; see Chapter 16), but the Court's opinion made no distinction (as did *Dixon* and *Clark*) between excuses and justifications. While this probably settles the question, it can still be argued that when the defendant raises a justification, and not an excuse, he may put the burden on the state of disproving that claim.

The Abolition Problem

A claim that does not go to whether a crime has been committed could simply be ignored by the state altogether. Thus, as discussed in Chapter 17, all "excuses" could theoretically be abolished by the legislature. Indeed, several state legislatures have abolished the "special defense" of insanity. If insanity is an excuse, this legislation would appear to be constitutional.

The Assistance and Resistance Problem

It seems self-evident that George (a condemned criminal) could not kill Martha (the executioner) and claim self-defense. The doctrinal explanation is that Martha's act was justified and hence cannot be resisted. Nor can Alexander help George, since George's act was unjustified. But Andrew can help Martha resist George's escape attempt because her act was justified. These conclusions have led most writers to suggest that only one act (or actor) may be justified in a situation. This position, however, can create problems. Suppose Gene, during a heated debate with Roy about baseball, screams, "You'll never make that mistake again, buster!" and reaches into his inside jacket pocket. Reasonably believing that Gene is reaching for a gun, Roy kills Gene with his ever-present machete. It turns out that Gene was reaching for

his baseball almanac. For the "deeds" adherent, it's an easy resolution: Roy is not justified, because a greater good has not been achieved. Gene is dead and no social good has been achieved (unless we wish to deter people from reaching into their jacket pockets). For the "reasons" analyst, however, Roy's act is justified because of his (reasonable) belief. Now assume that Roy misses Gene, and Gene thereupon kills Roy with a handy beer bottle. If Roy's act was justified, then according to the "incompatible justifications" approach, Gene's cannot be. From this vantage, Gene is either "excused" (in which case, the law says that his act of reaching into his pocket was wrongful) or has no claim at all and will go to prison. Yet that seems wrong; Gene is really the innocent person here. To call his action merely excused is to imply that he has done something wrong. This has led many to contest the view that two actors cannot simultaneously be justified.[16]

On the other hand, Schmidlap's insanity defense (see page 462, supra) does not make his act "right"; it merely establishes a reason for not punishing him. If Hermione assisted him in parking, and assuming she is not similarly obeying Martian instructions, she has no insanity claim. If she knows that Schmidlap is insane, she cannot claim an excuse either directly or derivatively. If, however, she is unaware of Schmidlap's insanity, and (reasonably?) believes he is justified because he is trying to save his child, Hermione may be either justified or excused. Similarly, if Gregory, a passerby, tried to force Schmidlap out of the space and injured him, Gregory's acts are acceptable because Schmidlap's act was not justified.

THE MODEL PENAL CODE

With a few very clearly enunciated exceptions, the Code puts on the prosecution the burden of proving any element and disproving all excuses and justifications. Section 1.12(2)(a) provides that the prosecutor need not disprove an affirmative defense "unless there is evidence supporting such defense." When there is such evidence, the prosecution must bear the burden. Section 1.13(9)(c) of the Code provides that an element includes any factors or explanations that

"negatives an excuse or justification" for the defendant's act. Neither "excuse" nor "justification," however, is defined in the Code. The prosecution will carry the burden on all issues, except those explicitly left to the defendant. See, e.g., MPC §2.13 (entrapment); MPC §2.04(3)(b) (reasonable reliance on official advice).

Examples

1. On a very hot summer night Alan, a homeless person, breaks into the house of Beatrice, who he knows is away for the week. He is prosecuted for burglary, which is defined as "the breaking and entering of the dwelling house of another" and is punishable by a mandatory five years in prison. The statute further provides, however, that if the defendant proves he did not intend to commit a felony inside the house, the penalty shall be no more than two years in prison. Alan claims that he only wanted to sleep in an air-conditioned place, and there is no evidence that he took, or even attempted to take, any items in the house. Can the state make Alan bear this burden?

2. Ronald kills his mother, who is dying of terminal cancer and has asked him to assist her to die. He is prosecuted for first-degree capital murder, but the statute provides that "whoever proves, beyond a reasonable doubt, that he has committed murder in order to alleviate the pain and suffering of a person within two degrees of consanguinity shall be guilty of merciful murder, punishable by 25 years." Can the state make Ronald prove these facts?

3. Lionel lends his car to Hampton. Six weeks later, Lionel receives in the mail a ticket with a $500 fine for parking near a fire hydrant on the day Hampton borrowed the car. The statute, after defining "illegal parking," provides that "the owner of an illegally parked car is responsible for the fine, unless he can prove that he was not driving it that day, and otherwise did not exercise control over it." May the state make Lionel prove such "noncontrol"?

4a. Claudius Hamlet's checkbook showed he had balance of $5,000. Just before leaving with his wife, Gertrude, on a six-month vacation to Nepal, he wrote a check for $3,500 as payment to a

roofer. Unknown to him, Gertrude had written another check on the same account for $1,800. As they stepped off the plane six months later, they were arrested for fraud. The relevant statute provides that anyone "who overdraws on his bank account" is presumed to intend to defraud the payee. In their mailbox are three notices from the bank indicating the overdraft. At the trial, the judge instructs the jury of the statutory presumption. Can Claudius and Gertrude successfully attack this instruction if they are convicted?

4b. Same facts and question as in Example 4a, except that the statute provides that "intent to defraud is presumed if the overdrawn check is not made good within 30 days after the payor has been notified by the bank of the overdraft."

4c. Same facts and question as in Example 4a, except that the Hamlets are prosecuted under a statute providing that "writing a check on an account with insufficient funds is a felony, unless the defendant proves that he was unaware of the insufficiency."

5. Derek, having decided to kill Ronald, his enemy of many years, comes upon Ronald bending over a package and shoots him three times in the head at point-blank range. It turns out that Ronald was about to detonate a bomb that would have killed roughly five hundred people. Derek claims his killing was justified. Is he correct?

6. Mike suffers from paranoid schizophrenia — the belief that everyone is out to kill him. Nurse Ratchet, who works in the mental hospital where Mike is detained, knows this. One day, Mike sees Jack Nichols, and shouts, "He's going to kill me. Someone give me a knife." Ratchet, who has always detested Nichols, provides the weapon to Mike, who kills Jack. Who's responsible for the death?

7. While fleeing a police officer attempting to pull him over for a traffic stop, Rob runs a red light, hitting a pickup truck in the intersection and killing its driver. Rob is charged with manslaughter. At Rob's trial, the judge does not instruct the jury concerning justification or excuse in homicide charges. Is the court in error? Does this instruction matter in regard to a manslaughter offense as opposed to a homicide offense? Does Rob have a right to

the instruction even if the facts aren't concerned with justification or excuse?

Explanations

1. This is difficult. Under the common law, burglary was defined as requiring the intent to commit a felony in the house. It thus appears that the legislature has taken one of the elements of this common law offense and turned it into a "defense." The legislature cannot alter the common law rules by turning a common law "element" into a defense. The statute is unconstitutional. The state, however, would argue that the issue should be one of proportionality, not history. Five years in prison, it would contend, would not be constitutionally disproportionate to the offense of breaking and entering a dwelling house. Thus, the state is giving Alan a break by reducing his exposure by three years, and thus can place the burden upon Alan to prove lack of (ulterior) intent. The MPC would not allow the state to put the burden on the defendant of any "excuse" or "justification." Problem solved. But would five years in prison be constitutionally disproportionate to the mere offense of breaking and entering a dwelling home, if there was no intent to commit a felony there? The example could be made even more difficult if the penalty for burglary were one to five years in prison so that even a real burglar could be punished less than Alan. Then the state would be giving Alan a break by reducing his exposure by three years, but not necessarily treating him as less dangerous than a "real" burglar.

2. Certainly. Ronald has premeditated the killing and hence has committed first-degree murder under the statute. Notwithstanding the arguments that one who kills in such circumstances lacks the mens rea necessary for murder (or even manslaughter), the common law has rejected such arguments. Thus, the state here has given Ronald a "bonus" beyond that which the common law would allow. The state may circumscribe such a defense by placing upon the defendant the burden of proving it. Under the Code, such "exceptions" seem like excuses that, pursuant to §1.13(9), must be "disproved" by the state once reasonably raised by the defendant.

3. This problem raises yet another possible argument about affirmative defenses — that the state may require a defendant to prove a "defense" in cases where it need not provide the defense at all. The alleged reason is that the "greater includes the lesser." Since the state could abolish the defense of "noncontrol," it can place the burden of its proof upon the defendant. This, of course, assumes that the state can constitutionally prohibit such parking without requiring any showing of actus reus or mens rea. Since this is a "malum prohibitum" offense (see Chapter 6), the state probably could enact such a statute. Thus, it probably can put the burden on the defendant to show noncontrol.

4a. This is a trick question. It may well depend on what else the jury was told. After *Allen* and *Sandstrom*, the complete instructions to the jury are critical. And it would appear that the instruction established a "mandatory presumption" which the jury could interpret as shifting either the burden of proof or the burden of production. If the jury understood the instruction as shifting the burden of proof, then it violates *Sandstrom.* But even if the jury understood the instruction as only shifting the burden of production, Claudius and Gertrude are probably safe. After all, many people make "innocent" mistakes involving their checkbook balances, whether for large or small amounts. It is not even a case of "more likely than not," much less "beyond a reasonable doubt," that such people intend to defraud their payees. The presumption is therefore empirically invalid. Under the MPC, the answer is again very simple — no presumption, no matter how "commonsensical," can shift the burden of proof. Problem solved.

4b. This change in the statutory language may have dire consequences for the Hamlets. Surely it is the case that many people who innocently write such a check, after being informed of the overdraft, make up the difference immediately. And the statute goes further: it allows a 30-day grace period, just in case (as here) there was an error in the keeping of the accounts. Thus, the presumed fact (fraudulent intent) does seem to flow from the predicate fact (failure to make up the deficit within 30 days) in many cases. This may be sufficient to meet the "beyond a

reasonable doubt” test enunciated in *Allen*. Although in the way we have worded the question it may seem that the Hamlets are “innocent,” a jury could certainly infer negligence, or even recklessness, from their failure to provide measures to take care of such matters should they arise while they were away. Of course, the Hamlets may in fact rebut the statutory presumption by producing evidence of nonculpability. “Fraud” generally requires “specific intent,” so that even recklessness would be insufficient as a predicate for the crime.

4c. We have now moved from presumptions to “affirmative defenses.” Does this change the analysis? There is at least some suggestion in *Patterson* that it might. After all, if the legislature could punish mere “overdrafting” (and it probably could), then it would seem within its powers to make “lack of fraudulent intent” a defense. This demonstrates the fragility of the line, which seems to be drawn by the cases, between presumptions and affirmative defenses. Since, as suggested in the text, there appear to be few limits (under a theory of proportionality) to the state’s ability to punish almost any act with almost any penalty, drafting this statute as an affirmative defense may abolish the possible constitutionality when it was cast as a presumption.

5. The answer to this example is “murky.” As noted in the text, some courts and writers (the “deeds” school) focus on the act, arguing that if the outcome of the act was socially beneficial, then Derek, who is otherwise a scumbag, should nevertheless not be punished. Others (the “reasons” school) focus on the actor and claim that actors, not acts, are justified because of their mental state. If Derek was not aware of the justifying circumstances, they argue, he cannot be justified, even if his action resulted in a social benefit. The controversy here began in two law review articles. Compare Robinson, A Theory of Justification: Social Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 266 (1975) with Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson, 23 UCLA L. Rev. 293 (1975).

6. We will discuss insanity in detail in Chapter 17, but you already know (from life, if not from a criminal law casebook) that an insane

person is excused for his crimes. But Ratchet is not insane (jealousy usually does not qualify). And since Mike's actions are not justified, but "merely" excused, Ratchet is guilty of the crime of homicide. A person who understands that an act is not justified is guilty if she helps an excused person commit that act. The criminal law may be crazy, but it's not insane.

7. A Florida Appeals Court thought so. In *Burford v. State*, 77 So. 3d 917 (Fla. Dist. Ct. App. 2012), where this fact pattern occurred, the state argued that failure to give the instruction was not a fundamental error, because the facts did not support a finding of excusable homicide. The Court disagreed, citing precedent that held, "It matters not whether any view of the evidence could support a finding of either excusable or justifiable homicide." Id. at 919. Manslaughter is a derivative offense of homicide, and justifiable and excusable homicide were excluded from this crime. Therefore, the Appeals Court held, the trial judge should have included an instruction that justifiable and excusable homicide were excluded from this crime.

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1. This is not a problem in England. In *D.P.P. v. Woolmington*, [1935] A.C. 481, the House of Lords declared that the prosecution held the burden of proof in all aspects of the case. But see Tanovich, The Unravelling of the Golden Thread: The Supreme Court's Compromise of the Presumption of Innocence, [1993] Crim. L.Q. 194. The International Criminal Code also requires all defenses to be rebutted by the prosecutor once properly raised. See Rome Statute of the International Criminal Court, art. 31-33 (adoption July 17, 1998; entry into force, July 1, 2002), available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf at art. 67(1)(i).

2. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968).

3. Some linguists argue that the original Hebrew uses the word "murder" rather than "kill." But that only postpones the problem; if the distinction between "kill" and "murder" is self-defense, duress, necessity, and so on, we still need to define those terms.

4. The literature on this topic is voluminous. For a smattering of some recent writings, see Gardner, The Gist of Excuses, 1 Buff. Crim. L. Rev. 575 (1998); Finkelstein, Excuses and Dispositions in Criminal Law, 6 Buff. Crim. L. Rev. 317 (2002); Berman, Justification and Excuse, Law and Morality, 53 Duke L.J. 1 (2003); Baron, Justifications and Excuses, 2 Ohio St. J. Crim. L. 387 (2005); Nourse, Reconceptualizing Criminal Law Defenses, 151 U. Pa. L. Rev. 1691 (2003).

5. G. Fletcher, Rethinking Criminal Law (1978).

6. Dressler, New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking, 32 UCLA L. Rev. 61, 84-85 (1984).

7. Because the commentators use this term, we will use it here. A better term, perhaps, would be the "results" school, since these writers are concerned only with the result of a defendant's

actions, and ignore the reasons for the actions.

8. Price, Faultless Mistake of Fact: Justification or Excuse?, 12 Crim. Just. Ethics 14 (1993); Larry Alexander, Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles, 12 Law & Phil. 33 (1993); Byrd, Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction, 33 Wayne L. Rev. 1289 (1987).

9. For a review of the problem, see Christopher, Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defense, 15 Ox. J. Legal Stud. 229 (1995) (cataloging the position of courts and academics). One of the hypotheticals used in discussing this problem involves *D*, who is a patient in a hospital. *D* has decided to kill *N*, her nurse, the next time he comes in. Unknown to *D*, *N* has decided to kill *D* by injecting *D* with poison. If *D* shoots *N* before *N* can inject *D* with a poison, is *D*'s act justified since it turns out that *N* was about to use illegal deadly force? The hypothetical divided academics for years, but Christopher makes the (now self-evident) point that both actors are in exactly the same posture, and that the puzzle was created only because the question was always framed from *D*'s point of view. Christopher points out that *N* is being threatened (unknown to him) by deadly force from *D*. Because two people cannot both be justified in a setting, and because the two people here are in exactly the same situation, Christopher argues that no person can be unknowingly justified in a self-defense setting. Even if that conclusion is sound, however, it is unclear whether this would bar a Dadson, who is not in a reciprocal setting, from being justified.

10. Medea honestly, reasonably, and accurately believes a firewall is necessary to stop a fire from consuming the town. She burns down Jason's house. The town is saved.

11. Medea, honestly and reasonably, but inaccurately, believes it is necessary to burn down Jason's house. The fire turns out not to be as strong as she (reasonably) believed, and it burns itself out before reaching Jason's house, much less the town.

12. Medea, at the time she burns down Jason's house, unreasonably believes the fire will reach the town. Unknown to her or anyone else, there was a strong wind that would have pushed the fire to the town, but the firebreak works to stop the fire from spreading.

13. Medea's honest belief turns out to be absolutely wrong, and there was no need to burn down Jason's house.

14. Medea sets a torch to Jason's house, gleefully crying, "Arson." But the fire serves as a firebreak; otherwise, the entire town would have been destroyed.

15. As noted earlier, England puts the burden on the state to disprove any defensive claim once it has been properly and sufficiently raised.

16. Dressler, New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking, 32 UCLA L. Rev. 61 at 87-91 (1984); Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum. L. Rev. 1897 at 1921-1925 (1984); Dolinko, Note, 26 UCLA L. Rev. 1126, 1177-1181 (1979).

CHAPTER 16

Acts in Emergency: Justification vs. Excuse

OVERVIEW

Donald, charged by a raging bull, hits it with Victoria's Ming vase, destroying the vase but diverting the bull. Is Donald guilty of intentional damage to Victoria's property? Martina tells Ken that unless Ken steals Joan's lawn mower, Martina will kill him. If Ken does so, is he guilty of larceny? Suppose the threat is not to kill Ken but to destroy his Mercedes. What then? Finally, Ebenezer sees Marley coming at him with what appears to Ebenezer to be a machine gun. May Ebenezer pull out a pistol and shoot Marley, or must he wait until Marley himself actually shoots?

In each of these situations, the defendant is faced with a situation in which a decision must be made instantly. Rather than labeling all three such acts as "emergency decisions" and treating them similarly, the common law created separate doctrines that, while similar, have been treated differently with somewhat different rules. Thus, Donald would have to argue that he acted in "necessity" (choosing the lesser of two evils). Ken, in either of the examples, would have to argue "duress." Finally, Ebenezer would claim neither of these defenses but "self-defense." In assessing these doctrines do not lose sight that each of them involves action taken in dire, emergency conditions.[1]

COMMON REQUIREMENTS, COMMON PROBLEMS

The *essence* of these three claims is that the defendant

a. is acting under *extraordinary pressure*,
b. from which there is (or appears to him to be) no *reasonable escape*,
c. to do something that *involves injury to his or another's person or property*, and that, in the absence of the emergency, would clearly be criminal (although the defendant may not recognize or know that).

Actus Reus, Mens Rea, or Both? Or Neither?

Actus Reus

Some theorists argue that the defendant who acts under such pressure does not meet even the primary requirement for criminal responsibility — a voluntary act (see Chapter 3). One who kills another while a gun is aimed at his own head is not "really" acting voluntarily, the argument goes. As is often said, the defendant may be faced with a hard choice, but it is a choice nonetheless. The contention considered in the last chapter, that a defendant in an emergency has no "fair" choice, while more appealing, does not deny the choice — merely the inculpatory nature of the choice. The law has rejected this nonvoluntary act argument.

Mens Rea

Somewhat more plausibly, a defendant who "chooses" to kill when faced with such dangers may be argued to have no mens rea. After all, who has a "mens" at all when a gun is aimed at his temple or that of his spouse or child? The argument is that the defendant's mind is "blank," not only metaphorically but literally. This argument is more persuasive if one adopts the broad (traditional) sense of mens rea (see Chapter 4) that the defendant must act in a culpable, blameworthy way. Even if one uses the narrow (statutory) meaning of mens rea (see Chapter 4), there are at least some instances when a plausible argument can be made that the defendant did not "intend" or "purpose" death. The mountain

climber who cuts the rope below him to save himself from being plunged into the canyon, thereby sending a fellow climber into a deep abyss, may hope and pray that his falling colleague is saved. And a person who, trembling, shoots another in self-defense, all the while saying, “Please just go away — don’t make me shoot you,” might well argue that it was not his “conscious object to cause death.” Nor does a bank teller who hands over money at the point of a gun necessarily have the mens rea for larceny/robbery, that is, to intend to permanently deprive the owner of his money; he probably hopes the robber will be caught instantly. Indeed, in some emergency situations, it is plausible that the defendant is not even *reckless* with regard to the risk of criminal harm. Simply put, he never subjectively thought about this risk because he was consumed only by a concern for his own safety. In such a case, the defendant really *is* arguing that there was no mens rea, even in the narrow sense, as to the result. In such a case, the defendant is arguing an “element negation.”

The argument is less tenable in other factual settings. The defendant who, under duress, destroys a car or severely assaults an innocent victim may not “want” to inflict the injury but surely foresees the unlikelihood of putting things back together again later on. Far too often the use of generic terms, such as “intent” or “mens rea,” conceals important factual differences within the assumed scenarios each writer or court tacitly posits when discussing these issues. Thus, it is more accurate to say that *some* persons in extremis have statutory mens rea, while others do not.

Why Punish?

Whether actors who see themselves as acting in necessity can be deterred is uncertain. Most persons thrust into a situation in which death seems imminent are unlikely to be intimidated by a threat of later punishment (including death) if they survive. Perhaps the only deterrent effect here is to reduce precipitous action — that is, to require the defendants to hold off until the “very last minute.”[2] However, the dilemma is that almost every defendant in such situations believes that “the final minute” has arrived.

A retributivist would argue that anyone who succumbs in these terrifying situations is not morally blameworthy for doing so and should not be punished. Many utilitarians might agree in this result, claiming that most individuals will inevitably succumb to the terror of the moment rather than worry about criminal punishment in the future. Consequently, punishment in such cases would be futile.[3]

DURESS

The common law normally does not expect most of us to be heroes — that is, to die willingly or to suffer serious bodily harm — if we can avoid this fate by doing what someone else demands of us, even if that means committing what would otherwise be a crime. So long as the pressure was great and there was no obvious escape, a defendant who acted under duress from another human being was exculpated.[4] The one exception, discussed in more detail below, is homicide. Not even the threat of immediate death will allow (justify or excuse) the killing of a person the duressed person knows to be "innocent." Instead, the duressed person is required to sacrifice her own life.

The Doctrines of Duress

As a general matter, the common law required the following elements for a claim of duress:

1. a *well-founded fear*, generated by
2. a *threat from a human being* of
3. an *imminent* (or "immediate")
4. *serious bodily harm or death*
5. to *himself* (or sometimes to a near relative)
6. *not of his own doing.*

Personal Injury

Under this restriction, no threat to property, no matter how severe when compared to the injury threatened, will sustain a duress claim. For example, if Bob helps Alex embezzle $1,000 from Bob's employer because Alex threatens to destroy the *Mona Lisa* or a $10 million building unless Bob helps him, Bob cannot claim duress. If he has any useful claim at all, it may be one of "necessity" rather than duress (see below).

Source of the Threat

The requirement that the threat emanate from a human being is hardly controversial, although, as discussed below in the prison escape cases, it sometimes turned out to be a difficulty.

"Imminence"

The common law requirement that the threat be one of "imminent" harm seems uncontroversial, at least in the paradigm case where *A* puts a gun to *B*'s head and tells *B* to steal the Hope Diamond NOW "or else." But some threats are equally effective if vague: "Sometime when you least expect it" can be almost as frightening as "I'll break your arm now." In *State v. Toscano*, 74 N.J. 421, 378 A.2d 755 (1977), the defendant chiropractor had agreed with others to file false medical claims. He contended that, when he balked at participating, one of his "co-defendants" had declared, "Remember, you just moved into a place that has a very dark entrance and you live there with your wife. . . . You and your wife are going to jump at shadows when you leave that dark entrance." The court explicitly noted that "defendant described the exit from his office as a 'very, very pitch black alleyway' on the side of the building." The court allowed the claim of duress to go to the jury, even though the co-defendant had not actually threatened to harm Toscano and his wife "immediately."

An argument can be made that the defendant should have gone to the police. Had he done so, the police would have protected him and the fraud could have been stopped. This contention certainly has an appeal — why let someone force another to commit a crime if the "duressed" person could have avoided the threatened harm by going to the police?

Nonetheless, requiring the threat to be imminent raises other serious questions (as we will see again shortly in self-defense cases, especially involving the battered spouse defense). For example: (1) to what extent should the trial investigate the actual ability of the police to protect someone like the defendant? (2) should the defendant's liability depend on whether his belief that he would not be protected was (a) reasonable or (b) merely honest, even if unreasonable? *Toscano* and similar cases would put the issue to the jury, rather than resolving it as a matter of law.

This requirement has been tested by the "drug mule" cases, where persons caught attempting to smuggle narcotics into the United States have claimed that drug lords have threatened their families. Although requiring these defendants to tell their arresting authorities in the United States about the threats will do little to protect their families in their home countries, courts almost uniformly refuse to allow the defendant to even raise the claim.[5]

Reasonableness of Fear

The common law generally provides an answer in the above scheme. (Well, at last!!!!) Under the common law, only a reasonable fear is sufficient to sustain a claim of duress. Thus, if Hans pointed at Stephi what Stephi unreasonably believes is a real gun, but what is obviously a water pistol and threatened to kill her "instantly" unless she stole *V*'s wallet, Stephi has no claim of duress to a charge of theft because the threat is not well grounded and the fear is unreasonable. As with all other instances of objectivization, however, this requirement has the undesirable effect of criminalizing a person who, in the maelstrom of circumstances, acts unreasonably but does not intend to act criminally. Again, the question of which characteristics of the defendant are relevant arises here — a threat to break a finger made to a pianist may be much more oppressive than the same threat made to a law professor.

To "Himself"

The common law appears initially to have limited duress to cases where the defendant personally was threatened. Threats to strangers, and even

to spouse and children, were insufficient. These limits have now been discarded by most states and most states would allow the claim where any person's life or bodily harm is threatened by the duressor.

Creating Conditions of Duress

Another restriction on the availability of the claim is that the defendant must not have been "responsible" for the threat. If *D* knowingly joins a violent gang and later commits a crime under threat of immediate death from fellow gang members, he will not be permitted to claim duress.

Of course, the law may seek to deter people from joining such gangs, but a good case can be made that disallowing duress in such a case is disproportionate to the defendant's blameworthiness. One may wish to punish someone for his knowing membership in the gang, but to punish him for a serious crime when he actually was duressed may be unfair. At the very least, there should be a causal link between *D*'s joining the gang and *D*'s crime. If *D* had actually heard of other inductees being required to commit criminal acts in order to be accepted and joined the gang anyway, then disallowing duress would be logically related to the defendant's moral culpability.

Duress and Homicide

Under the common law, a defendant could not claim duress if he killed a victim. Instead, he was required to sacrifice himself to the threatener.[6] Besides the uneasiness exhibited in these cases, critics of the rule argue that it is unfair to the duressed actor to be categorically denied the defense in this one crime, since many reasonable persons would kill another rather than die themselves (or have significant others killed).

Termination of the Threat

Once the threat has ceased, the defendant must cease his criminality. In a series of cases in the 1970s involving prisoners who claimed they "escaped" from prison after they were threatened with rape, the courts, culminating in *Bailey v. United States*, 444 U.S 394 (1980), held that even if the escape was warranted, escape was a "continuing offense." If

the escapee did not turn himself into authorities as soon as he was sufficiently far from the prison, he lost the claim as a matter of law. Some courts have held that this requirement is limited to prison escape cases. See *United States v. Solano*, 10 F.3d 682 (9th Cir. 1993) (so long as a defendant — in a non-prison-escape case — continued to fear a threat, it was a jury question whether he was duressed, even if he could have gone to the police).

The Guilt of the Duressor: A Note

Just in case you're wondering (or forgot about the innocent pawn doctrine), the person who threatens the defendant in a case of duress is always going to be guilty of the crime, whether or not the actual perpetrator has a duress claim. The criminal law may be weird, but it's not stupid. See Chapter 14.

The Rationale of Duress

There is no agreement on the rationale of duress. Until recently, one of the leading criminal law Hornbooks took the view that duress was a justification but in the most recent editions labeled it an "excuse." The argument that it is (or was) a justification is fairly straightforward. Under the common law, only a threat of death or serious bodily harm would sustain a claim of duress. Since duress was not allowed in homicide cases, under the common law, the defendant's act was almost surely less harmful than the harm with which he was threatened. Put simply, the defense will generally result in choosing the lesser harm, which is the essence of a justification.

In *Dixon v. United States*, 548 U.S. 1 (2006), the Supreme Court held that, at least for purposes of federal criminal law, duress is an excuse. Although that decision is certainly not binding on the states, it will likely be followed in many jurisdictions, thus perhaps bringing some closure to that question. The Court's view in *Dixon* that duress is an excuse is now widely accepted, although there are some dissenters.[7]

In deciding in *Dixon* that duress was an excuse, the Court also concluded that the defendant could be made to carry the burden of proof that he was under duress. This is consistent with the general analysis in Chapter 15 that an excuse concedes the defendant's wrongdoing, but contends that he should not be punished because he is not blameworthy.

If duress were available in homicide cases and not restricted to cases in which the actor was threatened with death or serious bodily harm, it would more clearly be an excuse. Such an expansion would recognize that defendants who act in such situations lack moral culpability. Simply put, people threatened with what they perceive as serious threats simply do not have the "vicious will" that criminal penalties require. By expanding duress in this manner, however, we would occasionally exonerate individuals who inflict more harm than they prevent.

The Model Penal Code

The Model Penal Code, §2.09, retains the common law requirement that the threat be one of personal injury rather than property damage. But the MPC allows a threat of "unlawful force" to support duress, thus allowing the threat of minor physical harm.

The Code has changed the common law of duress in several ways. It subtly varies the common law's requirement of reasonableness by requiring that the threat involved would have similarly affected a "person of reasonable firmness *in the defendant's situation*" (emphasis added). For example, if the defendant is unusually vulnerable (e.g., a hemophiliac) or has a particular fear of a particular injury (e.g., an ice skater who fears someone breaking her knees), this may be part of the "situation." Whether other factors such as extreme cowardice would qualify is less clear. Thus, as in §2.10 on manslaughter (see Chapter 8), the Code takes a much more subjective view of the possible claims the defendant might raise.

The MPC rejects most of the specific limitations imposed by the common law. Thus, (1) duress is a valid claim in all prosecutions, including homicide;[8] (2) there is no restriction to "imminent harm"; (3) the threat may be to any person, not solely a relative, or even an

acquaintance, of the defendant.

Like the common law, the Code disallows the defense if the defendant *recklessly* placed himself in a position where he could be placed under duress. Thus, if he joined a gang of known terrorists, the defendant cannot claim duress even if he is charged with a crime requiring knowledge or purpose. In contrast, if he was only negligent in joining the gang, he has a claim of duress except to a charge requiring negligence. This is in clear contrast to the requirements of necessity discussed below.

NECESSITY

The Doctrines of Necessity

The defense of necessity is available in roughly half of all jurisdictions in the United States.[9] The claim of necessity and the restrictions on it essentially replicate the claim of duress.[10] There must be

1. a *threat* (usually from a natural source) of
2. *imminent injury* to the person or property
3. for which there are *no (reasonable) alternatives* except the commission of the crime;
4. the *defendant's acts must prevent an equal or more serious harm;*
5. the defendant *must not have created the conditions of his own dilemma.*

Source of the Threat

First, the target of the threat must be a legally protected interest.[11] In contrast to duress, the source of the threat in necessity was always a "teleological" (natural) force, such as an avalanche, starvation (as in *Dudley and Stephens*), fire, or a similarly natural force. Again, this did not usually constitute a problem but did in the prison escape cases. Arcane though it might be, this qualification on necessity was followed

by some courts in the "prison escape" cases mentioned earlier. Here, inmate Brutus would threaten inmate Wally with rape. Wally would jump the wall. When caught and charged with escape, he would claim duress or necessity. But duress was unavailable because Brutus didn't order Wally to escape (indeed, that was the last thing that Brutus wanted). And necessity was unavailable because the source of the threat was human, not a force of nature (although rapists might sometimes metaphorically be so labeled). Thankfully, the courts ultimately jettisoned the restrictions of the two doctrines, at least in these cases.[12]

Necessity and Homicide

As already discussed, duress was simply not allowed as a claim when the duressed person had killed a person he knew to be innocent, no matter how severe the conditions under which the killing occurred. It is not as clear whether necessity could be asserted in homicide cases. In the movie *Seven Beauties*, the protagonist is incarcerated in a concentration camp. The commander hands him a gun and orders him to shoot his best friend and five others. If he refuses, the commander says, he will kill everyone in the barracks. The friend acquiesces in his own death. The protagonist would not have a claim of duress under the common law, but he might have a claim of necessity, since he saved more lives than he took. However, the most famous necessity case involving such a claim seemed to establish that, at least in English law, a defendant in this situation could not claim necessity either.

In *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884), four men were cast adrift in a lifeboat in the Atlantic Ocean when their ship sank. After 19 days of subsisting on two small cans of turnips and a small turtle, the two defendants killed one of the other two (Richard Parker), whom they selected because he was (a) the youngest; (b) the only one without family; and (c) the weakest/sickest. (The fourth seaman refused to participate in the killing.) The three survived by eating the corpse.

The court, while acknowledging that it was establishing a moral rule that no one could follow, refused to allow the two defendants the claim of necessity. It concluded that knowingly taking innocent life could never be allowed by the law. In this sense, the *Dudley and Stephens* limitation replicates that initially placed on duress.

However, the limitation may not hold where it is "fate" that decides the victim. In *Dudley*, the victim was apparently chosen because he was the youngest, had no family, and was the weakest. On the other hand, in *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842), an almost identical case, an American court had suggested that, if lots were chosen to select the victim, the claim might be recognized.[13] Similarly, in a hypothetical often used by law professors, if several mountaineers suddenly find themselves hanging over a crevasse, with the rope threatening to break from the excessive load, the topmost may cut the rope holding the ones below, since fate decided the "obvious" victims. Of course, a perverse law professor might ask, particularly on an exam, how it was that *D* became the "topmost." If *D* determined the order in which the mountaineers were linked, it is arguable that he, and not fate, decided who would be the "lowermost." Or consider this case: If in order to save 100 houses and their occupants from a flooding river, someone breaks a dike and causes the destruction of three houses and the death of their five occupants, the principle of necessity would appear to apply.

A tragic event in England in 2001 raised the question of necessity in dramatic form. Doctors sought permission from a court to separate conjoined twins, although they acknowledged that this operation would mean the death of one twin. If, as one interpretation of *Dudley and Stephens* would argue, necessity cannot be pled to allow the taking of an innocent life, the operation could not be justified as necessary. Moreover, since doctors agreed that the twins could live conjoined for a significant period of time, the threat to the one twin was not "imminent." Nevertheless, a court authorized the operation.[14]

The Problem of Imminence

Many of the problems discussed in the duress section apply here as well. For example, it is not clear what "imminent" means in this context. Similarly, the question of what alternatives are relevant and must be considered (thereby rendering the threatened harm "nonimminent") is uncertain. Blackstone argued that a starving person could not claim necessity for stealing bread because in eighteenth-century England there was always help and food for the starving. Judge Cardozo once

suggested that no act is ever "necessary" at the time it is committed, because relief might come the very second after the act is done: "Who shall know when the masts and sails of rescue may emerge out of the fog?"[15] In short, one can never be completely sure of the future, and therefore one cannot justify actions based on speculation about the future. Not surprisingly, the issue here (and in self-defense) splits the "deeds" and "reasons" schools (see Chapter 15). To the first group, if no rescue occurs until a substantial number of days after Parker is killed, the homicide is justified because the facts demonstrate that without the killing, the three would not have survived; if, however, just as the knife slits Parker's throat (or the mountaineer's rope), a ship (or a tow truck) arrives, the act was not "necessary" and hence not justifiable. The "deeds" school would not necessarily punish the defendant; if he was reasonable, his act would excuse him. For the "reasons" school, if *D*'s decision was reasonable, even if mistaken, the act is *justified*. Again, *D* is exonerated, but on different rationales. The "deeds" school would not justify the unreasonably but honestly mistaken actor, while the "reasons" school would excuse him.

Choice of Evils and Alternatives

"Necessity" is also referred to as a "choice of evils" claim. Someone (usually the defendant) is threatened with serious harm and chooses (to the extent that one chooses in such a situation) to inflict harm in a way that would otherwise be deemed criminal. If the harm the defendant inflicts is less (or, in some versions, not greater) than that which would have occurred had he not acted, a social benefit has occurred, notwithstanding that the harm inflicted would otherwise be criminally proscribed. He has chosen the "lesser evil." (However, if the "lesser evil" does nothing to actually prevent the harm, then there is no necessity.)[16]

Thus, if Elvira purposely burns down Josh's barn to act as a firebreak, which prevents the fire from destroying the town, the town has a net benefit. What would otherwise be arson is no longer criminal. One problem with viewing necessity as limited to "lesser evil" cases is that when two innocents confront each other, neither can claim necessity in killing the other. The chestnut case is John and Jim, two innocent

passengers of a capsized ship, each swimming toward a plank that can hold only one. If John kills Jim by pushing him off the board, he cannot meet the strict test of self-defense, which requires that the force against which the defender acts be “unlawful” (see infra). And if necessity requires a “lesser” evil, the death of neither is a “lesser” evil than the death of the other. This conundrum also occurs if Jim is an infant, mentally disturbed, acting under duress, or otherwise excused. Yet it seems outrageous to punish John for his actions.[17]

What constitutes a “lesser evil” is largely based on community standards.[18] An individual defendant might conclude for herself that her criminal conduct is a lesser evil, but, ultimately, it is for the jury to decide whether the crime was sufficiently proportional.[19]

Creating Conditions of Necessity

As with duress, if the defendant “created the conditions of his own necessity,” the common law denied the claim. The point is just as ambiguous here as it was there. For example, in *Dudley and Stephens*, it is not clear why the yacht sank, although there is some indication that alterations to the ship, which had been a racing vessel and not meant for ocean duty, were insufficient and that the ship, unknown to Tom Dudley (the captain), was of dubious seaworthiness. Suppose, however, that Dudley or Stephens had been negligent (or worse) in navigating the ship. Should that alone preclude the claim for a much different event that occurred much later in time? On the other hand, suppose that the starving condition of the lifeboat occupants was due to reckless consumption of the foodstuffs they had. What if, for example, on the first day in the lifeboat they had eaten four large hams, which otherwise could have been used to feed them for three weeks? (Does this sound familiar? Does the term “proximate cause” spring to mind? If not, see Chapter 3. If so, see it anyway.)

Excuse or Justification?

As with duress, the question arises whether necessity is an “excuse” or a “justification.” The court in *Dudley and Stephens* framed it only as a

justification, but the Canadian Supreme Court held that necessity could only be an excuse and never a justification.[20] The answer may be that it can be either. That is the answer that some foreign legal systems have given.[21]

Neither the question nor the answer is academic. A justificatory claim would have to demonstrate that the defendant achieved, or intended to achieve, a "greater good" (or lesser harm) than he committed. In contrast, an excuse claim would argue that the defendant was not morally blameworthy in choosing, in extremely severe and pressing circumstances, a path that at the time looked reasonable, even if it (a) was not in fact reasonable and (b) did not result in a "greater good." This debate, in part, reflects the same debate between the "deeds" and "reasons" approaches to the general issue of defenses discussed in Chapter 15.

The justificatory analysis may be construed to support a quantification approach. Thus, in *Dudley*, Lord Coleridge resisted a quantification analysis because it would allow Dudley and Stephens to claim necessity if they later killed Brooks (the fourth passenger) and then allow Dudley to kill Stephens (or vice versa). Calculating net gain (or loss) in this manner would, according to Coleridge, allow one survivor to justify the killing of three other people. Consequently, Coleridge rejected the plea of necessity.

Coleridge, however, was wrong on two grounds. First, the surviving sailor of the four would claim not that he killed three to save one, but that he killed three rather than allow all four to die. Second, such manipulation of the quantification approach is undesirable. The real question should be whether a person acting under such extreme pressure can be held morally culpable if he "capitulates" to those pressures.[22] That's why we have juries.

The quantification limitation is exemplified by the "trolley" case. Don is a conductor on a trolley, which loses its brakes. Down the track, five people are asleep in a train. The trolley must hit and kill them unless Don turns the trolley down a spur line, on which there are two people, asleep, who also are certain to be killed. If Don does nothing, and the five are killed, his inaction will probably not be criminal, unless he owed a duty to any of the people on the track. (See Chapter 3 and the discussion of omissions.) If there was such a duty, and if necessity is

"quantified," then his failure to act will not be justified. (He killed five to save two.) On the other hand, if he acts affirmatively to go down the spur, his action *is* justified, because he killed two to save five. Aside from other consideration, quantifying human life seems distasteful, and perhaps a bit ghoulish. Judith Jarvis Thomson, The Trolley Problem, 94 Yale L.J. 1395 (1985).

Duress vs. Necessity

Necessity does not require a threat of death or serious bodily harm. As long as the defendant inflicts less harm than he was threatened with, the claim of necessity can be made. Thus, if Trump lashes his $500,000 yacht to a dock in a fierce storm, thereby doing $500 worth of damage to the dock, he has a defense to the criminal charge of intentional destruction of property.[23]

This means that necessity may serve as a "default" claim for some cases where duress cannot apply. Thus, Bob, who helped Alex embezzle money from Bob's employer rather than have Alex destroy the *Mona Lisa*, has no claim of duress. But he might have a claim of necessity, depending on how the jury balances the employer's money against the loss of a valuable piece of art.

The Problem of Democracy

Another problem, though not unique to necessity situations, occurs more frequently there than in duress situations: The legislature may have already addressed the balancing of harms, even if indirectly. Texas has taken this approach one step forward, by providing that a defendant has a claim of justification if "the legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear."[24] Many recent attempts to invoke necessity have involved civil disobedience in one form or another. For example, sit-in demonstrators at nuclear plants or abortion clinics, patients using prohibited drugs to ease the pain or to stop the progress of a disease,[25] or public health advocates distributing clean needles to drug addicts in an effort to

prevent the spread of AIDS[26] have claimed necessity when charged with crimes arising out of their acts of civil disobedience. Some juries have acquitted in these cases. Appellate courts, however, have almost unanimously rejected the claims on two grounds: (1) the threatened injury (suffering AIDS or death) was not "imminent" enough or (2) the legislature (or in the abortion cases, the Constitution) had already weighed the conflicting policies and resolved them against the disobedients. The defendants could have participated in the political process to alter public policy but chose not to (or previously lost the issue in the legislature). Consequently, their claim that breaking the law to protest public policy was justified by necessity was rejected. As one commentator has put it: "[T]he necessity defense attacks the very foundation of American capitalist and democratic structures."[27]

Jury nullification can undermine the rationale adopted by courts. Appellate courts have generally held that it is not reversible error to preclude evidence of defendants' beliefs from being introduced at trial, thereby reducing the possibility of nullification on such claims.

Most of these cases involve civil disobedience, where the "dissenters" see themselves as taking the moral high ground — protesting against racially discriminatory laws, or abortions (which they see as murder), or the operation of nuclear power plants (which they see as endangering thousands of lives). They contend that the political (or judicial) process has been corrupted and they therefore have "no choice" but to take direct action against the current law. Scholars — but not courts — often distinguish between "direct" civil disobedience, where the law that is violated is the "direct" target of the protest (sit-ins at restaurants to protest segregationist serving laws; distribution of clean needles to addicts), and "indirect" civil disobedience, where the law violated is not the target (a sit-in to protest the war in Vietnam).

The Model Penal Code

The Code recognizes a claim of necessity or "lesser evils."[28] *D* must believe that his conduct is necessary to avoid harm to himself or others and that the harm inflicted by committing a "criminal" act is less serious

than that sought to be avoided by the criminal law. The Code rejects most common law restrictions on the claim. Thus, the Code's provision (a) does not require that the actual infliction of the harm be "imminent"; (b) does not distinguish between threats from human versus nonhuman forces; (c) does not restrict the claim to instances involving a threat of death or serious bodily harm; and (d) does not preclude the defense in a homicide. The Code appears to resolve the "democracy" problem by requiring that the claim be allowed only if the harm "sought to be prevented" *outweighs* the harm that the law broken seeks to prevent. The decision as to this balance is apparently one of law to be made by the judge, who will ostensibly consider the political apparatus available in cases of civil disobedience.

In contrast to its section on duress, which made that claim unavailable if the defendant had recklessly created the conditions of the threat, the Code provides that if the defendant has been reckless or negligent in placing himself in the position where the necessity occurred, he may still raise the claim in all instances where he is charged with a purposeful or knowing crime. However, he may be prosecuted for a reckless or negligent crime. Thus, a defendant will be treated differently under the Code depending on whether he has a claim of duress or necessity. Someone who has been reckless in creating a duress situation will be guilty of murder, while a defendant who has been reckless in creating a necessitous homicide situation will be guilty only of manslaughter.[29]

Finally, to make clear the relation between necessity and duress, the *duress* section of the Code explicitly provides that §2.09 does not, by negative implication, limit any defense that would be available under §3.02.[30]

It is unclear whether federal law generally would recognize a necessity defense. The Supreme Court has suggested (but not held) that it is available only if a statute expressly permits the claim.[31]

Examples

In which of the following can the defendant(s) claim a justification or excuse of duress or necessity?

1a. Boris and his wife Natasha are sitting in their car at a traffic light when they are suddenly confronted by six men wearing ski masks and armed with machine guns who "hijack" the car. Three miles later, the men kidnap a police officer and handcuff him. They then force Natasha to drive to a remote spot, where they order Natasha to hold the officer still while Boris shoots him in the head. The men threaten to kill Boris, Natasha, and their two children (who are not in the car) unless the two comply. Natasha holds the officer, but Boris, after firing three wild shots, faints. The men then order Natasha to shoot the officer while they hold him. She does so.

1b. Suppose, instead, that Boris and Natasha are kidnapped and told to help rob a bank by holding open the bags into which the money is put. During the robbery, one of the original robbers accidentally shoots and kills a teller.

2. Alvin tells Van Cliburn (a famous concert pianist) that unless Van helps him extort money from Sylvia, Alvin will break his fingers so that Cliburn can never play the piano again. Van helps Alvin and is charged as an accomplice.

3. Three days after 9/11, Carla, a devout Sunni Muslim wearing hijab, is driving her car non-negligently in an area known to be highly indignant about the terrorist attack, when Jimbo, a 4-year-old white child, runs right in front of her car and is hit. Carla immediately calls an ambulance on her cell phone. A crowd gathers and recognizes the hijab as Islamic attire. Carla then departs. During her trial for leaving the scene of that accident, she tries to introduce evidence that (1) someone in the crowd shouted, "She's a terrorist," and (2) a resident of the neighborhood, whom she knew well, said to her, "You'd better get out of here now. This crowd is getting nasty." The trial judge refused to allow this testimony. Was the judge right in doing so?

4a. Darrell, a bank executive, has spent the last 20 years of his life writing his version of the great American novel. He has only one hard copy of the manuscript, which is now 98 percent complete. Douglas steals the one existing hard copy of the manuscript and erases the original from the hard drive. He tells Darrell that he will

destroy the piece unless Darrell gives Doug the combination to the bank vault. Darrell, after much agony, complies and is charged with theft.

4b. Suppose, instead of threatening to destroy the manuscript, Douglas threatens to kill Shadow, Darrell's five-year-old golden retriever, whom Darrell rescued as a pup and has cared for ever since.

5. Jonathan, the head of a dedicated right-to-life organization known for using violence, tells Bruce, the secretary of an abortion provider, that unless Bruce gives Jonathan the key to the office so that Jonathan can destroy the equipment in the office, he will kill Bruce "when he least expects it, sometime in the next month, or the next year, or whenever." Bruce complies.

6. Horace, a nurse at the local hospital, has spent the last three years ministering to those in the last stages of AIDS. Distraught by what he has seen, he steals hypodermics and syringes from the hospital and distributes them to heroin and cocaine addicts in an attempt to reduce the spread of AIDS. He is prosecuted for (1) larceny; (2) distribution of drug paraphernalia.

7. Despite adverse weather predictions and warnings from several knowledgeable climbers, Edmund Hillary tries to scale K2, a mountain in the Himalayas, with a crew of four. All are tied together, with Hillary at one end. The weather is indeed terrible (even worse than forecast), and the five fall into a crevasse. Hillary cuts the rope that holds three of the other four, and they die.

8. While driving down the street at a legal rate of speed, Clara is suddenly beset by a mob screaming at her and clearly intending serious bodily harm. The streets are blocked, and she drives on the sidewalk, in desperation, seeking an avenue of escape. She is arrested and charged with driving on a sidewalk.

9. Gottfried is driving to Pittsburgh in a car that has failed to pass environmental and safety inspection four times. In the middle of this drive, he stops at a rest stop. As he gets back into the car, Himmelfarb, an escaped convict, comes up, points a gun to his head, and says, "Drive to Pittsburgh." Gottfried complies. He is

charged with (1) driving an unsafe car; (2) assisting Himmelfarb's escape.

10. Jack, an accountant, is ordered by Gertrude, his boss, to fraudulently increase the billings for customers by 30 percent; she tells him he will be fired unless he complies. Unknown to Gertrude, Jack has a daughter who will die unless she obtains a liver transplant in the next week. If Jack is fired, he will not have sufficient funds to pay for the transplant. Jack complies. Has Jack committed fraud?

11. Reread the case of Paul Hill in Chapter 8, Example 6, on page 253. Consider that case in the context of this chapter.

12a. Paul, a licensed doctor, believes that the medical profession should help those who are truly terminal and who have made what appears to be a rational decision to die, and do so with the most dignity possible. He makes his views well known, and over a period of several years assists several people in committing suicide, after interviewing them extensively to assure himself that they are not clinically depressed or otherwise unable to make such a decision. He then tapes one such death and puts it on national television. If he is prosecuted for his actions, will he claim excuse or justification?

12b. Paul's father is dying of terminal cancer. He is in the hospital, in severe pain. The doctors say that he could continue to live for several years, but that he will not improve. His son comes to the hospital several times a week for several months. One night, he finds a way to deceive the nurse into leaving the hospital room, pulls out a gun, and shoots his father four times. He waits for the police, and explains that he killed his father to end his suffering. If he is prosecuted for his actions, will he claim excuse or justification?

13. Enrico and Mario are employees of Brinks Armored cars. They have just picked up $1,000,000 in cash when Aloysius approaches Enrico and says, "I've got your child, Christopho. Put the money in this bag now, or else Georgina will kill him." Enrico starts putting the money in the bag. Mario, who cannot escape, but who also is

not directly threatened by Aloysius, helps Enrico. Enrico and Mario are later charged with robbery. What result?

14. Darth and his 15-year-old son Luke walk into a bar. Darth orders two scotch and sodas, but Carrie, the server, refuses to give one to Luke, who is obviously under the legal age for drinking. “He’s my son,” says Darth. “I can serve him anything I want.” “Not here,” replies Carrie. Darth demands to see the owner-manager, Han, who reaffirms Carrie’s decision. At that point:
    a. Darth pulls out a badge, which shows that he is with the Alcohol Beverage Commission. “If you don’t serve my son right now, I’ll close you down for six months. See how that helps your business in this economy.” After that the liquor flows freely for both customers.
    b. Darth pulls out the same badge and says, “If you don’t serve my son today, I’ll be sure to revisit you within two weeks. And you’d better not have any violations, or I’ll close you down for six months.” The liquor flows freely again.
    c. Darth pulls out a light saber and destroys one of the wine bottles on the bar’s shelf. “Want to see how much damage this can do? And it doesn’t just destroy bottles, either,” he says. The liquor flows freely for both Darth and Luke.

    Carrie and Han want to plead duress when charged with serving alcohol to a minor. Will they be successful?

15. George Estate went out riding on his snowmobile on a bright sunny day. He took a trail, which he knew was near a national park, but thought nothing of that because he had been on the trail many times without getting into the park. Suddenly, however, there arose a “ground blizzard,” which blinded George. His snowmobile soon failed. He built himself a snow cave and was rescued from there 24 hours later, suffering from frostbite. He is later prosecuted for violating 16 U.S.C. §551, which prohibits using a motor vehicle on national park land without permission. At his trial, the trial judge instructed the jury that he carried the burden of proving necessity. George appeals his conviction on the ground that the government had to carry the burden. Who’s right?

16. Jean Val Jean steals two loaves of bread to feed his starving family. Necessity?

17. Reginald is a pizza delivery guy. While out on delivery one night, he knocks on a door and is confronted by two armed men, who immediately insist he comes inside. Afraid for his life, Reginald complies. It turns out the two men are criminals and they want to use Reginald to drop off some drugs for them. They hand him a brick of cocaine and tell him to walk to the 7-Eleven down the block and wait there for a man in a red jacket. They tell him if he fails to do comply with their instructions they will "carve him up with a butcher knife." Reginald is terrified. He takes the brick of cocaine and goes to the 7-Eleven. A man in a red jacket approaches him and asks if he "has it." Without a word, Reginald hands the cocaine over and then runs. Moments later he is stopped and arrested by a police officer that had watched the whole exchange. Reginald is booked and charged with distributing drugs. Does he have a defense?

Explanations

1a. The threat here is obviously serious enough to constitute duress: It is a threat of death or serious bodily harm that would make any person reasonably fear that it will be carried out in the immediate future. The threat to the children, however, might not be "imminent" enough under common law. If the threat had only been to the children, the original doctrine of the common law *might* have barred the use of the threat at all, as it sometimes required that the threat be to the defendant personally. Most courts, however, would now allow a jury to consider the threat. Nevertheless, under the common law, neither Boris nor Natasha would be able to assert the issue since they are charged with homicide. The Model Penal Code would allow both to claim duress. Some states have found a "compromise" position by allowing defendants to reduce their liability to manslaughter.[32]

There is one other possibility. Since the threat was to kill four people, and only one was killed, Boris and Natasha might have a

choice-of-evils (necessity) claim. This depends on whether the common law would have allowed the claim in a homicide case, notwithstanding *Dudley and Stephens* (remember — there, three were saved, although one was killed). Moreover (although this is an arcane rule), some courts still restrict necessity to those cases in which a force of nature posed the threat. Since the threat here is human, that doctrinal restriction would have been sufficient to preclude a claim of necessity.

1b. This death falls under the felony murder rule. (Go back to Chapter 8 if this sounds only vaguely familiar.) Can duress be a defense to *felony* murder, even if not to "regular" murder? Most courts have said yes. Whether this would be true if it were one of the duressed who accidentally killed the teller is unclear.

2. There are two issues here. First, is this "serious bodily harm"? If not, then under the common law, which only allowed the claim if the threat was one of "serious bodily harm or death," a claim of duress would not be viable. Bodily injury is a risk but what is the meaning of the word "serious"? (This doesn't mean that broken fingers don't hurt, but if the word means anything, surely this is a dubious application.) Under the MPC, however, the threat need only be "unlawful force." Second, if we assume that this is serious bodily harm, would a person of "reasonable firmness" have resisted the threat and accepted the broken fingers? This is obviously a difficult question. That is what juries are for.

   Assume, however, that a jury would conclude that a "usual" person would prefer broken fingers to having Sylvia suffer extortion. What, then, of the Model Penal Code's restriction that the defendant's "situation" must be considered? Is the fact that Van Cliburn is a concert pianist whose career will be ended part of his "situation"? Again, the issue is difficult. And we can make it more difficult. Assume, for the moment, that a concert pianist of reasonable firmness would not help the extortion. Or change the threat to Sylvia from extortion to rape. How does one balance these interests and assess these threats and interests?

3. According to the court in *Knight v. State*, 601 So. 2d 403 (Miss. 1992), no. Carla's claim of necessity depended on why she left the

scene. Since the purpose of the statute — to assure assistance to Jimbo — had been achieved by the presence of the crowd and the calling of the ambulance, Carla's continued presence was not required, and if she feared for her life, it is at least possible that the jury might have found her departure both reasonable and necessary. (The *Knight* cases actually involved a 48-year-old black defendant who hit a 5-year-old white child riding a "Big Wheel" toy into the car's path.)

4a. Even if a reasonable person in Darrell's position would give the key to Douglas, the common law would not allow Darrell a claim of duress to a charge of being an accomplice, since the threat is not one of serious bodily harm or death. The Model Penal Code would similarly disallow a duress claim and for the same reason. Poor Darrell. We told you to always have a backup copy.

4b. While we dog lovers may become deeply emotionally attached to our pets, Shadow is only "property" under the law, and a threat to her life is insufficient to raise a question of duress, even under the Model Penal Code.

Wait, Darrell! Don't pack for prison yet! Even if you don't have a claim of duress, you might have a claim, at least under the MPC and possibly even under common law, of necessity. If the jury felt that your decision was the "right" one — that is, balancing all the interests, the lesser of two evils — you might be exonerated.

5. Under the common law, the threat must be one of "imminent" violence if the defendant is to be able to use the plea. A vague threat such as the one here has divided the courts over whether there is such a plea. In *State v. Toscano*, 74 N.J. 421 (1977), a case of threats of unspecified future injury, the Court adopted the rationale of the Model Penal Code that duress was a question of fact for the jury rather than a question of law for the judge.

6. The claim here must be one of necessity. Yet the threat of death to the addicts is surely remote for most of those who received the needles: Even if some of them were to become afflicted with the disease, their deaths are not "imminent."[33] Moreover, from an objective viewpoint, Horace has alternatives, including those of the usual political process. Therefore, Horace should be admonished to

use those processes. On the other hand, Horace may seek to assert an "excuse" version of necessity; given his personal anguish over the plight of those with AIDS, he was subjectively unable to weigh carefully such arguments and honestly believed he was doing the "right thing." But will this defense work for the theft? Probably not, since Horace had an alternative — he could have bought the syringes. The case also asks whether, in assessing the weight of the defendant's actions against the crime committed, one should weigh the crime "in the abstract" (larceny) or in the context of the facts (larceny of needles from a hospital with distribution in mind). Horace will not have a defense under the common law but would have a possible defense under the Model Penal Code.[34] In the past 20 years, all states have adopted, either by statute or administratively, some programs of needle distribution, which might dilute Horace's claim of necessity. He may think the statutory process is too narrow, but his claim that the political process is unyielding will be harder to make in 2018 than it would have been in 1990.

7. Under the common law, if *Dudley and Stephens* is the rule, Hillary would have no defense to a homicide. Even if *Dudley* is not the clear rule, she has (at least) negligently placed herself in the situation of peril and loses all claim of necessity. Under the Model Penal Code, however, Hillary would have a defense to prosecutions for purposeful and knowing murder, and possibly even reckless murder, but almost surely not for reckless manslaughter or negligent homicide.

8. This case poses the same dilemma as that of the prison escape cases. Clara has no claim of duress, since the mob did not want her to escape. On the other hand, under the earlier common law, she has no claim of necessity since the force is not a teleological one. Some courts have created a claim that they have called "duress of circumstance" to reach this case, while others have simply left the case to the jury on the issue of "responsibility." Some writers have urged rejection of any such "situational duress" claim, lest it swallow all concepts of free will and moral culpability; yet, this may show a lack of faith in the jury's ability to weigh these

intricate and difficult moral issues.

9. If Gottfried were charged with aiding Himmelfarb's escape, he could easily claim duress (or necessity). He has been threatened with serious bodily harm or death, he has no route of escape, and his choice to drive the car is clearly the lesser of the two evils. But what if he is charged with driving an unsafe vehicle? It is not clear that Himmelfarb's threat induced him to drive to Pittsburgh; he was already on the way. Moreover, even if that were not a problem, it is not clear that duress or necessity *could* be used as a claim in what may be a strict liability crime. If it goes to mens rea, duress is probably *not* allowable since strict liability offenses do not require mens rea.

10. This problem raises the issue of immediacy since it is *possible* that the hospital would perform the operation in any event. Even though the question says Jack's daughter "will" die, nothing in the future is certain. Jack's daughter *might* undergo a spontaneous remission, or another hospital might perform the operation for free. But, as the court suggested in *Toscano* (page 479), a believable threat of harm "in the future" should still form the basis of a jury question. But leaving that aside, the problem really raises the issue of whether the duressor has to know that her threat endangers life. If Jack did not have a dying daughter, he would be unable to claim duress since the threat of losing one's job has not been recognized by the law in a duress context. However, here *he* knows that the threat is one to life but Gertrude does not. Does the threat then meet the common law's requirements of "death or serious bodily harm"? All the policy reasons for allowing a claim suggest that it should be so considered. But the common law was often very restrictive and hewed closely to doctrine. On the other hand, Jack may be able to claim necessity in any event. Any reasonable person would have chosen to have committed fraud rather than see his daughter die. At the very least, whether he chose the "lesser evil" would constitute a jury question.

11. In the actual case, Hill was precluded by the court, as a matter of law, from raising the plea of necessity. The court concluded that under the United States Constitution fetuses were not "human

beings," and Hill could not therefore argue that his shooting was justified by the need to save lives. Had the doctor been planning to kill "human beings," Hill might have had a claim of necessity. But even then he would face two further hurdles: (1) whether their deaths were "imminent" since Dr. Brittan had not even entered the clinic; (2) whether a killer can claim necessity. The Second Circuit reached the same conclusion as to necessity in killing abortion providers in *United States v. Kopp*, 562 F.3d 141 (2d Cir. 2009).

Notice that these problems exist as well under the MPC, which requires not only that the defendant believe his act is necessary but that the court determine that a jury could find that he has in fact (and law) done the "right thing." If this were not the case, all terrorists might successfully plead necessity. Indeed, in *Dudley*, Lord Chief Justice Coleridge quotes from Milton's *Paradise Lost* that the devil, in explaining his temptation of Eve, claimed necessity — "the tyrant's plea." On the other hand, Paul Hill is, in his own eyes, not acting immorally. And he is certainly not the "bad actor" that a paid assassin is. How should the law differentiate between these two?

12 a. This is a (very) shortened version of the facts involving Dr. Jack Kervorkian, sometimes referred to as "Dr. Death," who conducted a national crusade in the 1980s and 90s to call attention to this issue. He was prosecuted several times, all of them unsuccessfully, except the last one, which resulted in his conviction for second-degree murder. Kervorkian was clearly claiming a justification — that while the law prohibited taking life, either directly or indirectly, in a premeditated manner, there were some situations where taking life outweighed the suffering that continued life would bring to the patient. He argued that, as a doctor, his first duty was to relieve his patients of pain.

12b. These facts are typical of euthanasia cases and track those of *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987). While Paul could, like Kervorkian, claim justification (ending his father's pain was a greater good than having his father continue to suffer in pain for years), he could also claim, which Kervorkian could not, that his killing was excused. He would argue that his personal anguish and

the great emotional stress placed upon him by seeing his father in this condition simply overwhelmed him and that while he killed premeditatedly, he simply had no "real choice." Under the common law, this claim would not be heard, but under the Model Penal Code, it is at least arguable that the killing might be seen as done in "extreme emotional or mental disturbance" and reduced to manslaughter. Many — perhaps most — of these cases are never prosecuted and, quite often, the grand jury refuses to indict, or the trial jury acquits.

13. Under the *very* early common law, Enrico might not have a defense of duress, which required that the threat be made against *him*, not even a close relative. But under "modern" common law, that claim is extended to include at least threats against family members. Mario would not fare so well — only in a Model Penal Code jurisdiction, which allows a threat of bodily harm against any person, even unrelated persons, would he have a real chance of a successful claim.

14a. No. Threats of an economic nature cannot be a basis for a duress claim. Even if Han believes that his business would go bankrupt, he has no duress claim.

14b. No. In addition to the economic nature of the threat, this example concerns a "non-imminent" threat. Han, at least in theory, could prevent the closing or could appeal it.

14c. No. The destruction of the bottle, while immediate, is still only economic. Carrie and Han have a plausible, but still weak, argument that they feared that Darth would turn the laser on them. But Darth's words are ambiguous, and there is nothing in the Example, as worded, that would lead to a reasonable belief that he would harm them. If there were such facts, the issue might then go to a jury. But note — under the common law, both Carrie and Han must claim that they feared that Darth would harm the person claiming duress. If the threat to Han, for example, was to harm Carrie, Han would not have had a claim of duress — the harm has to be to oneself (or, later, to a family member).

The MPC would give the same answer in (a) and (b) —

economic threat is not a basis for a duress claim. However, the Code does not require that the threat be imminent — merely that a person of reasonable firmness might capitulate. In (c), however, the Code allows the claim if any person (not necessarily the duressed person) is threatened. Carrie and Han would therefore have that argument, but, again, only if Darth's words were construed as threatening personal injury.

Caveat. This question was phrased only in terms of a "duress" defense. If Carrie and Han had a creative attorney, they could also raise a "lesser evils" argument. While the common law often required that the source of a necessity threat be human, many common law courts, as well as the MPC, have rejected that as a separate element. And neither the common law nor the Code precluded the lesser evils argument if the threat was economic. But it might be hard to persuade a jury that loss of a liquor license is a greater evil than serving an underage customer. Their best bet is to persuade the jury that serving the defendant's *son* is not a greater evil, because the defendant is the one who wanted his son served.

15. The judge. First, there is the possibility that this is a strict liability "public welfare offense," in which case no mens rea is required for guilt (see Chapter 6). If so, there is some question as to whether *any* defense is available. Second, even if that were not the case, the Supreme Court has questioned whether a claim of necessity can be raised under a federal statute unless Congress has specifically permitted it. Third, even if the claim may be raised, it is arguable (though certainly not clear) that as in duress (see the *Dixon* case cited in the text), the government may require the defendant to carry the burden of proof. The contrary argument is that necessity is a justification, while duress is an excuse, and that it may be that the two are different for purposes of burdens of proof. See page 488-489. See also *United States v. Unser*, 165 F.3d 755 (10th Cir. 1999).

16. This, of course, is Les Miserables. In the *Dudley* opinion, Lord Coleridge addressed this precise question, saying that theft of food would not be justified because England provided relief for the poor. But what if the government could not provide relief? During

Hurricane Katrina, many people stole food because government relief was unable to provide all of the needed food. Was this justified? In similar situations, some have argued that the defendants are in a "state of nature" and no longer governed by the laws of man.[35] Six states actually have anti-looting statutes, and it is unclear whether the actions of defendants even in Katrina would be protected. Ironically, Louisiana had enacted an anti-looting statute "during the existence of a state of emergency," which became effective exactly two weeks before Katrina hit. One woman was arrested for stealing sausage because she lived across from the police station; the view was that she could have asked the police for food. (The charges were ultimately dropped.) On the other hand, three defendants who took liquor, beer, and a case of wine coolers were sentenced to fifteen years in prison.[36]

17. Under the elements of duress, Reginald would not likely have a defense. Initially, there was certainly a real and immediate threat of bodily harm or death. The two men were armed with firearms and apparently were capable of disposing of Reginald. Even under the more stringent, objective test that requires that a "reasonably firm-willed" person would have complied, Reginald would have a good argument; however, Reginald's defense may fail because he could have escaped. He could argue he was still under duress when he left the house because the two men had told him they would be watching him, but Reginald had not seen anyone. The prosecution could argue that a person of a "reasonably firm-will" would have chosen to go to the police as soon as he or she got to a public space and called the police instead of carrying out the drug deal.

SELF-DEFENSE

The claim of self-defense was one of the first recognized by the common law. Definitions and restrictions on its use were slow in coming, and over the centuries there has been much confusion in its application. Although courts and scholars are unanimous that self-defense should be recognized as a claim, there is substantial uncertainty

about why this is so. From these disagreements come disagreements on the conditions under which self-defense may properly be claimed, and the degree to which the law should use a subjective standard to judge such claims.

A utilitarian might argue that failure to recognize a claim of self-defense would be pointless, since, as with other acts done under threat of death, the law's threat of punishment in the future is unlikely to deter an actor who believes he must act or die now. As Justice Holmes once said, "Detached reflection cannot be expected in the presence of an uplifted knife." Other utilitarian explanations, sounding in partial or total justification, would posit that (a) the defendant-slayer did the right thing, and (b) by initiating an aggressive (or deadly) attack, the aggressor "asked for" the response and lost his right not to be injured or killed. In addition, allowing victims of aggressive attacks to respond with proportionate force may deter future aggression.

A retributivist would argue that innocent victims of aggressive attacks are not immoral actors and cannot be seen as "blameworthy" when they respond to such attacks. Moreover, people who are or believe they are suddenly threatened by death may not think clearly. Unlike Holmes, who argued that a threat of punishment *could not* change a human response to a threat of death, the retributivist would care only that the defendant *did not* reflect, even if others could be made to do so. To paraphrase Holmes (supra), "Detached reflection *is usually not present* in the presence of an uplifted knife," or more particularly, "This defendant did not reflect in the presence of an uplifted knife, and that is not morally blameworthy."

Still another, morally based, explanation is that the defendant has a right to autonomy, which she cannot be made to surrender even if she must kill to enforce that right. Thus, even if the defendant could avoid injury to the aggressor by retreating, we authenticate her right not to have her "space" and autonomy infringed.

THE RULES OF SELF-DEFENSE

Self-defense mimics other in extremis claims, requiring

1. a *threat* of
2. "*imminent*,"
3. *unlawful*,
4. *(serious) bodily harm*,[37]
5. to which there are, or appear to be, *no available alternatives* to the defendant except the use of force.

Some courts add a sixth requirement:

6. *nonculpability* on the part of the defendant in *bringing about the situation.*[38]

Imminence; No Alternatives

The essence of self-defense is that it "sounds in necessity." Like that claim, self-defense usually demands that the defendant take any and all escape routes available before taking human life. The one exception — the "no retreat" rule — will be examined later.

Preemptive Strikes

In most states a claim of self-defense requires that the harm threatened be "imminent." If Mike threatens to kill Harry "the next time I see your ugly face," or tells Harry to "get out of town by sundown or else," Harry has alternatives to killing Mike. As with necessity, this can be articulated by the requirement that there be no (nonviolent) response possible. He can leave the territory, obtain police protection, try to persuade Mike to recant, or hope that Mike will reconsider (or die). However, some jurisdictions recognize that those who engage in "preemptive strikes" may be acting properly or at least excusably in some circumstances.[39]

In one sense, this phrasing is misleading — every act of self-defense is "preemptive."[40] Even Darth Vader, brandishing a light saber at an unarmed Obi-Wan Kenobi, *might* change his mind and walk away. But

Obi-Wan need not wait until Darth Vader actually “fires” his weapon; if Obi-Wan can miraculously find some method of protection (including the use of deadly force), he may use it. As we shall see later, the real question is whether his decision has to be “reasonable.”

To Retreat or Not to Retreat, That Is the Dilemma

The common law of the eighteenth century recognized two kinds of claims that we now combine under the heading of self-defense: (1) prevention of felony and (2) homicide *se defendendo*. The distinction worked as follows: If John Mouse, while walking peacefully down the street, was suddenly affronted by a “murderous assault” by Jim Godzilla (“your money or your life”), Mouse’s killing of Godzilla was a justifiable *prevention of felony*. If, on the other hand, Mouse and Godzilla were engaged in a friendly argument that escalated into mutual combat, during which Mouse killed Godzilla on the spot, Mouse was guilty of manslaughter “in chaud [chance] medley” (see Chapter 8). *If*, however, Mouse “retreated” from the site of the dispute and ran “to the wall,” with Godzilla pursuing, and only then killed Godzilla, the killing was *“se defendendo,”* and Mouse was “excused” (not justified). In one sense, this looked like a “prevention of felony” killing. However, since Mouse had played a part in creating the situation in which deadly force became “necessary,” the state leveled a severe “civil sanction,” the forfeiture of all Mouse’s property to the state.

The retreat requirement applied only to homicides *se defendendo* and not to “prevention of felony” slayings. In the mid-nineteenth century, however, American courts, possibly because of the abolition of the forfeiture sanction, jumbled the requirement, applying it either to *all* killings or to none. Thus, in some states retreat was *always* required, even of the obviously innocent victim of an aggressive, murderous attack, while in other states it was said that “no true man” (the actual language of some courts) would ever retreat in the face of an attack, even if he had helped create that situation.

A full “retreat” or “no retreat” rule would have at least established a bright line. However, in those states that *did* require retreat, exceptions were soon created. The courts held that the slayer need not retreat in, or

from, his own home (no doubt a residue of the "home as castle" view). Unable, however, to articulate why this exception applied only to homes, some courts then expanded the exception to places "like" homes, in which a person *should* feel, and should be able to feel, secure — offices, private clubs, cars, and so on. At the same time, other courts, uncomfortable with the doctrine that allowed the (by hypothesis) otherwise unnecessary taking of life, restricted the application of the exception by severely redefining "home" to include (a) only the curtilage and not the entire residential "lot"; (b) only the house and not even the curtilage; (c) only the interior of the actual house and not even the porch.[41] Other problems occur: must a co-tenant or co-owner retreat if the aggressor is the other tenant/owner? What relationships might apply here? In the past ten years, several states, spurred by the battered spouse issue, have, either judicially or legislatively, eliminated the requirement that a co-owner retreat.[42]

"Stand Your Ground" Laws

Beginning in Florida in 2005,[43] a number of states (approximately 24[44]) enacted so-called "stand your ground" laws. Although the statutes differ at least marginally, Florida's provides as follows:

1. **No requirement of retreat, whether in the house or "in a place where he or she has a right to be."** Although this provision changed the law in Florida (and in several other states which adopted it thereafter),[45] the rule requiring retreat was, even at that time, a minority rule. Even the Model Penal Code, which purports to require retreat, does so only if the defendant knew that she could retreat with "complete" safety.
2. **A presumption that a person using deadly force while in his dwelling or vehicle had a reasonable fear of imminent death.** This presumption appears to be irrebuttable. While there are exceptions to it, this presumption alone makes successful prosecution of a home-dwelling killer very difficult. If the presumption is irrebuttable, as the legislative history suggests,[46] a home-dwelling killer will effectively be free from prosecution.

3. **A presumption that a stranger forcibly and unlawfully entering a dwelling intends to commit an unlawful act involving force or violence.**
4. **A ban on arresting the killer unless law enforcement "determines that there is probable cause that the force that was used was unlawful."**
5. **"Immunity" from both civil and criminal prosecution if he is justified in using such force.** Florida courts have interpreted the statute as requiring a hearing, at which the defendant carries the burden of persuasion by a preponderance of the evidence, that he did act properly under the statute(s). The trial judge is to weigh the credibility of the witnesses;[47] if immunity is granted, there is no further prosecution and the case never goes to trial.[48] Of course, if the judge does not grant immunity, the prosecution will have to prove, beyond a reasonable doubt, at trial that the defendant did not have a reasonable fear of death or serious bodily harm and therefore did not act in self-defense.

The Trayvon Martin Case

These provisions of the Florida law (and other laws like them) were thrown into deep controversy in 2012 when Trayvon Martin, a seventeen-year-old African American visiting his father's fiancée in her community was killed by George Zimmerman, a Hispanic resident of the community who had been involved with Neighborhood Watch programs (but was not so involved at the time). While many of the facts have been controverted, at this point these appear to be the basic facts: Martin was unarmed, carrying only a bag of candy and a cell phone. Zimmerman, in a car, had followed Martin for several blocks as he walked through the neighborhood. Calling Martin's actions "suspicious," Zimmerman phoned the police, who told him to stay in the car, but he left the car and confronted Martin. It appears that he told the police who arrived on the scene after the shooting that Martin assaulted him and was beating him on the ground, at which point he pulled his gun and shot Martin. Although Martin was clearly unarmed, the police accepted Zimmerman's claim of self-defense, and did not arrest him, although they took him to police headquarters for several hours.

Many characterized the police's failure to arrest Zimmerman as racist, and a national outcry ensued. The statute, however, actually precludes even an arrest unless the police "determine that there is probable cause that the force that was used was unlawful."[49] As the Martin case showed, in self-defense cases there are often no (or at least no apparent) witnesses when the police arrive, and the only tale they hear is from the killer.[50] After the case generated national publicity, a number of persons who heard (but did not see) parts of the event were discovered. Thereafter, a new prosecutor was named, who then obtained an indictment against Zimmerman for second degree murder. On July 13, 2013, Zimmerman was found not guilty of second degree murder and acquitted of manslaughter.[51] The jury was in deliberation for over sixteen hours before concluding that Zimmerman was justified in killing Martin.[52]

Right to Carry Laws. Although not directly involved in self-defense doctrine, it is important to note that a strong majority of states (42)[53] have now adopted so-called "right to carry" laws, which provide that a licensed gun owner may seek a permit to carry a firearm, concealed, in public.[54] When some places (churches, bars, educational institutions) forbade the carrying of such weapons therein, some states specifically enacted legislation allowing for the right to carry in such places. This book is not the place to debate the efficacy of gun control laws, but combined with the movement to "stand your ground," these statutes arguably make shootings (ostensibly in self-defense) more likely and more likely to result in acquittals of the shooters.

Proportionality and Subjectivity

Consistent with an attempt to limit the use of deadly force, self-defense doctrine has generally required that the defendant use no more force than "necessary" to repel the aggressor. Whether deadly force is "necessary," however, depends on a number of factors relating to the victim and the defendant. If, for example, Maury (the defendant) is 5 feet 3 inches and weighs 120 pounds, and Rocky (the threatener-

aggressor) is 6 feet 4 inches and weighs 240 pounds, it may be "necessary" for Maury to use deadly force to prevent Rocky from carrying out a threat to "beat Maury to a pulp." If, however, the sizes are reversed, Maury's claim to self-defense, much less to the use of deadly force, is suspect. Thus, while the muscular Maury might use "some" force to push away the diminutive Rocky, he cannot use force that is disproportionate not only to the threatened harm, but also to the force necessary to avoid that harm.

Similarly, in a jurisdiction requiring retreat, the respective ability of each actor to escape may be relevant. If Egmont the track star is accosted by Theodore in an open street, he may be required to try to outrun Theodore to a point of safety. If, however, the threat occurs in a moving train, the relative running talents of the two are less important. ("You can run, but you can't hide" in a train.)

This raises the general issue, already discussed in many other contexts, of the extent to which the characteristics of the defendant or victim are relevant in the case. As in other areas, the decisions are mixed.

In *State v. Wanrow*, 559 P.2d 548 (Wash. 1976), the defendant was a 5 feet 4 inch woman on crutches who shot and killed an unarmed, drunk 6 feet 2 inch man who had not overtly threatened her, but who she ostensibly believed had threatened to molest her child, who was asleep only a few feet away. Outside the house, but only a few steps away, were two men in the family, each carrying a baseball bat. The relative size, weight, and mobility of the defendant and the victim were clearly relevant facts under existing law. *Wanrow* broke new ground, however, by holding that a jury could find that women, as a group, are socialized *not* to use intermediate force against aggressors, particularly aggressor males. Thus, if Sid hit Wally in the nose, Wally "would probably" react by hitting Sid back or wrestling Sid to the ground. But if Sid hit Henrietta in the nose, Henrietta (the court implied) would only either submit (to further force) or employ deadly force. Thus, proportionality had to be assessed from the viewpoint of a defendant with the characteristics, at least the gender characteristics, of the defendant. At the same time, the court suggested, but did not hold, that the concept was not limited to gender. If a male defendant could demonstrate that he, individually or as a member of a culture, had not been taught how to

use intermediate force, the claim would be similarly available.[55]

The problem here, as in other areas where the law begins to "subjectivize" an objective standard, is finding the stopping point. Courts had long recognized, as suggested above, that the respective sizes of the defendant and the victim were relevant. Similar problems arise when considering defendant's habits (does he watch violent TV shows, such as "Criminal Minds," "CSI" (and its several hundred progeny and reruns), and "Narcos"?), his own past experiences (suppose the defendant has been assaulted before), or his understanding of others' experiences (suppose he knows someone who has been assaulted or has read about people who have been). In the (in)famous case of the "subway shooter," Bernhard Goetz, the New York Court of Appeals, while saying it adhered to an objective standard, held that most of these latter characteristics should be considered by the jury in assessing the reasonableness of Goetz's reaction when confronted in the subway by several youths who appeared to him to be threatening to rob him.[56]

Many courts, following the lead of the Model Penal Code, discussed below, allow the jury to consider specific aspects of the defendant's character. A few appear to embrace virtually full "subjectivization" of the "reasonably prudent person" (RPP) test,[57] whereas others do not allow the jury to consider the defendant's "courage" (or lack thereof). As with provocation and claims of "cultural defense" (see Chapter 8), the question is whether the defendant's failure to meet "objective" standards of conduct should result in full, partial, or no exculpation. The issue is complicated by the debate over whether he is justified or excused. One writer, seeking to jump this hurdle, has argued that self-defense, even when "necessary," should always be explained as an excuse rather than a justification.[58]

These questions are often played out in evidentiary rulings. Thus, virtually all courts hold that evidence of a victim's prior violent acts is admissible *if* the defendant was aware of these acts (or rumors of them) on the grounds that this evidence goes to the reasonableness of the defendant's fear. And a significant number of courts allow the evidence to be admitted, even if the defendant was unaware of these acts, for the purpose of showing that the victim may have been the aggressor.[59] As with those other areas, there is no easy resolution of these questions. The

cases are very fact-specific, and while it is probably true that there is a trend toward allowing subjectivization, it would depend on specific jurisdictions and specific facts. The best approach here is simply to be aware of the issue in every case — particularly one that might appear on an exam.

Mistake and Reasonableness

We have already seen that the law puzzles over the effect of mistake in any allegedly necessitous situation. In self-defense cases, the defendant could be mistaken in his belief that he is about to be attacked, or about the need to use deadly force to repel the attack, or in his belief that retreat is not likely to be successful. Suppose, however, that (1) his belief is wrong; (2) his belief is not only wrong but unreasonable. The traditional classroom hypothetical is one where *B* and *C* become involved in a heated argument over the respective lifetime batting averages of Ty Cobb and Pete Rose, leading *B* to shout, "I've had enough of your lying, you SOB; I'll make sure you don't make that mistake anymore," while reaching into his coat pocket. *C*, fearing that *B* will pull out a gun, kills *B* instantly. Inside *B*'s coat pocket is the encyclopedia of baseball but no weapon.

The early common law appeared to allow the mistake defense to any person who honestly believed that he was the victim of an aggressive attack even if that belief was unreasonable.[60] Therefore, *C* in the above hypothetical would be exculpated. In the mid-nineteenth century, however, many American courts adopted the rule that a defendant who killed in the mistaken belief that he was the victim of a deadly attack would entirely lose the defense if the mistake was unreasonable. This "all or nothing" approach appears to be the current rule in the majority of jurisdictions. Its advocates argue that defendants who act unreasonably should not be exculpated. Moreover, they contend, this rule will make persons who are or perceive themselves to be threatened act more cautiously before using any deadly force.

These arguments are misguided. If a defendant honestly believes she is threatened now with death, she is certainly unlikely to be deterred

from self-defense by the threat of future state punishment. Moreover, even if she is negligent in not taking more time to assess the situation, it seems excessive to punish her equally with a killer who makes no such exculpatory claim at all. The harshness of the "all or nothing" approach has led many courts to create an intermediate position dubbed "imperfect self-defense,"[61] under which an unreasonable but honestly held belief would reduce the killing to manslaughter.

Another problem, never addressed by the courts who used the reasonableness standard, is that unless jurors are instructed to the contrary, it is at least possible that they will assume that the term "reasonableness" reflects the normal "tort" standard of the reasonable person. Thus, although the courts have struggled to make clear that criminal negligence is "more than" mere tort negligence (see Chapter 4), the objective standard may sneak in through the back door of defenses relying on reasonableness.

A particularly difficult version of this problem arises when police kill someone who turns out to be innocent and even unarmed. On the one hand, police officers are trained not to act precipitously and should be held to a higher standard of "reasonableness" than other citizens.[62] On the other hand, police are also trained to be cautious all the time; unlike most of us, they may be the target of a deadly attack by a complete stranger. And their very profession will bring them into contact with more people who are likely to be dangerous. The issue becomes even more difficult, and more controversial, when (as is often the case) the race of the victim and that of the police officer are different. Although the law should not embrace a "reasonable bigot" standard[63] (that is the point of the debate over racial profiling), the issue in a criminal prosecution, when self-defense is raised, is whether this defendant overreacted, given all his life experiences, and should be criminally punished for doing so. However conceptualized, it is a thorny question.

The Position of the "Aggressor": Withdrawal

The rules articulated above apply to the innocent victim of an aggressive

attack. The aggressor cannot claim his protection as *long as the initial aggression has not ended*. Thus, if *A* attacks *B* with deadly force, and *B* responds with similar force, *A* cannot claim self-defense when he injures or kills *B*, since *A* began the “episode.” However, if *A* makes clear to *B* that he “withdraws” from the initial aggression, the right to self-defense returns to *A*, and *B* is now the “aggressor.” *A* can make his withdrawal clear by (1) stating that he is withdrawing and/or (2) physically removing himself from the immediate area. This position reflects the common law, described above, which required retreat during a “chance medley” that had escalated to the use of deadly force. The retreat itself was surely evidence that the retreater wished to “withdraw” from the fight.

Suppose the initial aggressor changes his mind, but the putative victim then kills him. Does the victim kill in self-defense? In large part, the courts have said this depends on (a) the obviousness of the aggressor’s decision to abandon the fight and (b) the original victim’s perception of that abandonment. In other words, if the initial victim simply doesn’t understand that the aggressor has withdrawn, or has become too frightened to perceive that, or simply thinks the aggressor is stalling for time, the victim may claim self-defense. (This may also hinge on the reasonableness of the victim’s perception. If Polonius waves a gun at Claudius, who then pulls his Uzi, at which point Polonius drops his gun and tries desperately to flee, Claudius’ use of the Uzi may well be seen as revenge, rather than self-defense. If, however, Claudius claims that others around the scene did not believe Polonius’ acts were sincere, he may succeed on his self-defense claim.)

It is often hard to determine who the “aggressor” was or when an “episode” started or stopped. When *B* is walking peacefully down the street and *A* comes at him with a machete, it’s a cakewalk. But in a barroom dispute that escalates from words to shouts to dares to threats to use of “some” force, it is not easy.[64] Suppose Linda picks up a (full) bottle of Lafitte Rothschild in the midst of an intense verbal dispute with Reina. Is that deadly force? If she lifts it? If she swings it? At what point does one of them become the “aggressor”?

In some cases, the courts have held that *A* may have so disoriented or terrified *B* that *B*’s failure to comprehend *A*’s attempt to stop the fight is *A*’s “fault,” and therefore *A* cannot avail himself of the self-defense

claim. Similarly, if *B* believes that *A*'s withdrawal is merely a ploy, and not seriously undertaken, *B* has an obvious right to continue to use defensive force, thus making *A*'s claim less potent.

The "Not Unlawful" Aggressor

Another way of articulating this aspect of self-defense is to say that defensive force can only be used against "unlawful" force. Suppose, however, that the "aggressor's" force is not "unlawful," although wrong? For example, suppose that Henrietta, loping down the sidewalk, suddenly sees Mary's car coming at her? Mary is having a seizure (see the *Decina* case in Chapter 3), and hence is not acting "unlawfully"; indeed, she is not even acting. Can Henrietta use force — including deadly force — to prevent the car from hitting her? Or suppose that she is attacked by Bugs, whom she knows to be insane? If Bugs were to kill Henrietta, his use of force would be excused (trust us; see Chapter 17). Does that mean that it is not "unlawful," such that Henrietta cannot defend herself? These questions keep academics awake at night debating whether Henrietta is (1) justified or (2) merely excused. The courts, using common sense, allow Henrietta to defend herself, often without even using the terms "excuse" or "justification."

Time Frames

In discussing provocation (Chapter 8), we mentioned briefly the issue of "cumulative provocation." The issue of time framing is raised by all claims of justification and excuse. In a necessity case, for example, we consider whether the defendant has "created his own conditions" of a claim (see, e.g., the example of Hillary on page 493). In self-defense cases, that question is even more germane. If we simply ask whether Pat was acting in self-defense when, at 5:05 p.m., he killed Vanna, who was coming down the street in his direction, apparently unarmed, the answer seems fairly clear. But if Pat is allowed to introduce evidence that Vanna has beaten him badly three times in the past, requiring hospitalizations each time, and that she threatened to kill Pat if she saw him after 5:00

p.m., and that Vanna is known to carry a firearm, Pat's actions may become a bit more "reasonable." Defendants will almost always wish to cast the time frame backward as far as possible to give their actions "context," while prosecutors will want to focus on the immediate moments before the shooting. In the *Wanrow* case, supra, page 509, the defendant shot the unarmed victim in the living room of a friend's house. The defendant believed that (a) the victim had molested children in the past and (b) the victim had attempted to molest another child on the afternoon preceding the shooting. The state said those beliefs, even if true, were irrelevant — the only question was whether shooting an unarmed man could be self-defense (or defense of others). The court held that the state's position too severely limited the jury's ability to consider "all the evidence."

The Battered Wives Cases: A Challenge to the Doctrines

Virtually every aspect of the claim to self-defense has been challenged in cases involving battered wives[65] who have killed their husbands in what are called "nonconfrontational" settings.[66] The challenging fact pattern often involves a husband who, over many years, has continuously beaten and abused his wife. He beats her again and falls asleep. Often, he threatens her with resumptions of the beating when he awakes; in other cases, she believes (reasonably?) that the beating will resume, even though he has said nothing in particular about this. She kills him while he sleeps. The issues raised in these cases have required courts to rethink the rules of self-defense. Even where the decisions have not altered these rules, the process of examination itself has proved illuminating.

The major doctrinal issue posed by the sleeping spouse cases is the meaning of "imminent." This, in turn, has two doctrinal components. First, if the husband is asleep, it may be hard to see any threat to injure the wife when he awakes as constituting an "imminent" threat such that the spouse has "no" alternatives left. Second, it may be argued that his sleeping puts an end to the entire episode. Several courts have held,

often in the face of vigorous dissent, that when the abusive husband goes to sleep, the battering episode has terminated.[67] Thus, even if the battered wife *reasonably* believes that the battering will continue when the husband awakes, *she* becomes the "aggressor" against the sleeping husband in a new "encounter" and cannot avail herself of the self-defense claim at all. In short, these killings are perceived as preemptive strikes and, no matter how "reasonable," are disallowed.[68]

Prosecutors in these cases contend that the threat was not imminent because the defendants could simply leave their house, or their husbands, or both. These defendants have sought to explain why they did not do so. In effect, they seek to enlarge the time frame by pointing to past beatings (and past "recaptures" by their husbands) to demonstrate what they believed (in their view, reasonably) to be the futility of "leaving." They often point out that when in the past they have left, their spouses have simply followed them, beaten them, and "recaptured" them. This, of course, does not explain why they did not *then* leave.

To meet this issue, battered wives have relied on what has been termed "battered wife syndrome," a cycle of "learned helplessness" aggravated by the so-called Cinderella complex. The "learned helplessness" factor argues that, over a period of cycles involving beatings, reconciliation, and growing tension, the wives have come to believe that there *is* no escape. The Cinderella complex is said to convince the wives that it is they, not the husbands, who are to blame for the beatings; if they were simply better wives, the husbands would not beat them. Thus, a mixture of fear and guilt persuades these women to submit to intolerable abuse.

Forty years ago, evidence of battered wife syndrome was inadmissible in virtually all courts. Today, all courts admit evidence of the syndrome, and some state statutes now explicitly provide that this evidence is admissible, although there may be differences as to the precise point(s) as to which the evidence is permitted.[69]

In arguing that there were no realistic alternatives to the killing, battered wives often point to a history of inadequate protection by police and other governmental agencies.[70] Two objections to such evidence are raised: (1) it may distract the jury from the killing at hand to the *general* question of police response; (2) no matter how accurate a picture of governmental response the evidence may cast, it cannot generate a

justification for the wife, who "should have" tried those avenues (or retreated) once more before taking life. The surrebuttal to the first point is that if the system has in fact failed to protect a person who has, by default, taken the law into her own hands, it *should* be subjected to such scrutiny. Fairness to the defendant, the argument goes, demands no less, and the community as a whole should be made aware of these failings. As to the second objection, it merely restates the subjective-objective question of necessity. Clearly, if the battering and the "syndrome" are part of the reasonable person's background, then the test is one of the reasonably battered woman who suffers from learned helplessness.

Even academics who conclude that a battered wife who kills in a nonconfrontational setting should be acquitted disagree whether her action is justified or excused. Because the traditional rules of self-defense seem to preclude viewing her action as justified, many writers have argued that it is better to analyze the slayer as seeking to excuse her conduct; indeed, defendants in early cases often sought to raise an "excuse" of either diminished capacity or insanity. Others respond that because excuse requires a "disability," this path improperly treats the women as victims whose mental ability is suspect. They argue that the death of the batterer is a social gain and should be seen as justified or that the woman's choice was reasonable, under all the circumstances.[71] Others argue that a new "syndrome" — *active survivor theory* — better captures the experience of battered women.[72] At least one commentator has suggested that people who kill their sleeping spouses could use a defense of duress (and not necessity or self-defense), at least under the Model Penal Code's language.[73] Many of those who believe that a battered spouse in a nonconfrontational setting does not have a full self-defense claim may agree that her killing constitutes "imperfect" self-defense, thus reducing her liability to manslaughter. In 2009, while altering its statutes regarding provocation (see the discussion, supra, Chapter 8), England also provided that a killing due to loss of control spurred by fear (as opposed to anger) would establish a partial defense reducing the killing to manslaughter, a concept expressly intended to allow some mitigation to battered wives who kill in a nonconfrontational situation.

The contentiousness reflected in these various views often hides the general consensus that, whatever the explanation, these spouses should

not be criminally punished. Some writers argue that the rules of self-defense, as with provocation, were written by men, and were designed to deal with situations in which men typically used deadly force: stranger-on-stranger or at least acquaintance-on-acquaintance confrontations. Where the relationship is longstanding and intimate, they argue, the need for examination of the rules of self-defense is evident. Attempts to "shoehorn" these claims into an existing category of defense, or to deny the claims entirely, suggest that they may be right.

DOCTRINAL PROBLEMS OF SELF-DEFENSE

The Mens Rea of Self-Defense

Kant and Bentham become involved in a heated discussion about retribution and utilitarianism. Bentham grabs a bottle of beer, breaks it, and walks menacingly toward Kant, saying "I'll kill you, you retributivist, you." Kant pulls out a knife and says, "Don't come any closer. Just let me be. I don't want to be hurt." Bentham lunges at Kant, who stabs Bentham. Bentham dies.

We normally think of this typical scenario of self-defense as demonstrating an intentional death that *A* wishes to explain by referring to self-defense. But it can be argued that the killing was not intentional. Rather, Kant's *intent* (purpose) was to escape, without any clear reference to the possibility of killing Bentham. Catholic doctrine, for example, uses the so-called double effect analysis to explain self-defense.[74] More difficult is the issue of whether *A* was highly *reckless* ("under circumstance manifesting extreme indifference to the value of human life" in the words of the MPC, or manifesting a "depraved heart" in the common law language) as to *B*'s death. A jury could surely find that a person in *A*'s position *did* consciously disregard such a risk, but it could just as easily find that *A* did not consciously think about the consequences to *B* at all.

The issue here is whether a claim of self-defense is really a claim negating the mens rea of the crime. If so, then the prosecution must carry the burden of proof on this issue, once properly raised (see Chapter

15).[75] At one level, the question goes to what we have already called "statutory mens rea." At another level, however, the question involves what we have called "traditional" mens rea. (See Chapter 4 for both these terms.) Thus, even if a jury concludes that Kant "intended" or was "reckless" as to Bentham's death or serious bodily harm, it might well find that Kant was not "evil" or "malevolent" because of the exigent circumstances under which Kant operated. As already discussed, this sense of mens rea has somewhat disappeared from criminal law, but analysis should consider its impact.[76]

Defense of Others

If Yitzhak sees Yassir "beating up" Clyde and comes to Clyde's defense, Yitzhak may use force to defend Clyde to the same extent that he may use force to protect himself. This result can be understood by many of the explanations surrounding self-defense. For example, Yassir, the aggressor, has "given up" his right not to be assaulted.

But suppose Yitzhak is mistaken, and Yassir is (a) responding — legitimately — to Clyde's initial aggression or (b) a police officer arresting Clyde. Should Yitzhak be liable for assault on Yassir? States are divided on what result should obtain. On the one hand, we applaud Yitzhak's humanitarianism. On the other, Yitzhak has been an "officious intermeddler" — indeed, a vigilante. Early common law punished Yitzhak on the ground that he could use only as much force as Clyde could. This was known as the "alter ego" rule. Most courts — and the Model Penal Code — have now decided to encourage reasonable intervention and would exculpate Yitzhak.

THE MODEL PENAL CODE

The Code adopts many of the changes wrought by American courts in the nineteenth and twentieth centuries. Under §3.04, retreat is required before deadly force may be used except at *D*'s home or office, but only where the defendant "*knows* he may retreat in *complete* safety"[77]

(emphasis added). This may totally undercut the retreat requirement; in an age of guns and other such weapons, it is the rare case where the defendant "knows" (in contrast to believes or hopes) that he may retreat in "complete" safety. The Code, however, broadens the notion of "imminence" and also enlarges the notion of when an "occasion" occurs or ends. The Code also changes the aggressor rule slightly — a person is considered the initial aggressor if he had the purpose of causing death or serious bodily harm. The aggressor may regain the use of force in self-defense if he does not use it in the same "part of the encounter" in which he was the provoker. This seems, first, to narrow the definition of "initial aggressor" and then to allow "recapture" of the right to use force a bit more readily than the common law allowed.

Beware, the Code's initial sections on self-defense consistently describe the defendant's honest belief as sufficient to allow the claim. Section 3.09, however, dilutes this view by allowing prosecution for manslaughter or negligent homicide if the defendant has been reckless or negligent, respectively, in reaching a mistaken belief. Thus, on this issue, the Code is much more subjective than those courts adopting the "all or nothing" approach with regard to the self-defense claim, but only slightly more subjective than those endorsing the "imperfect self-defense" doctrine.

Examples

In which of the following can the defendant(s) claim self-defense?

1a. Hubert is walking down the street when he is confronted by Lyndon, who pulls a knife, drags Hubert into an alley and demands money. Hubert pulls out an Uzi and kills Lyndon.

1b. Same facts, except that Hubert has no Uzi and instead wrestles the knife away from Lyndon and then stabs him to death.

2. Quincy is mowing his lawn one day when his neighbor, Ralph, comes over, shovel in hand. "Your dog has ruined my azaleas again, Quincy," he shouts, and swings the shovel madly at Quincy. Quincy drops the mower, grabs a pitchfork, and kills Ralph.

3a. Jack, a famous movie actor, is driving on a major road when Bert's

car pulls in front. Enraged because he believes he has been "cut off," Jack follows Bert's car to the next intersection, where both cars stop for a red light. Jack leaps out of his car with a golf club in his hand, and begins screaming at Bert, "I'll kill you, you S.O.B." He then begins smashing Bert's car. Bert jumps out of his car and wrestles Jack to the ground, breaking two of Jack's fingers.

3b. Bert also grabs the golf club and flings it into nearby bushes, hits Jack, runs to his car, and attempts to lock the door. Jack pulls Bert out and hits him several times in the face with his fists.

3c. Bert thereupon pulls out a knife and confronts Jack with it. Jack backs up and runs for his car. Bert follows. Jack finds another golf club and hits Bert once, killing him.

4. Jules and Jacques have lived in neighboring apartments for nearly 40 years. They were close friends until ten years ago, when they got into an argument about cable television lines. Since then, they have yelled at each other and verbally threatened each other with death. Indeed, one time, Jacques stabbed Jules with a small knife, inflicting a minor wound. One night, they are yelling at each other through their common wall when Jules pulls out an iron pipe and smashes the wall, making an indentation that Jacques can see. Jacques runs out of his apartment, and Jules opens his apartment door, standing in his doorway. Jacques comes nose to nose with Jules, declares "I'm going to kill you," and reaches into his pocket. Jules, still standing in his doorway, hits Jacques with the pipe, killing him. Self-defense?

5. Lyle, 14 years old, has been beaten by his father at least once every two months since the time he was seven. One night, three days before his junior high school graduation, Lyle and his father have another run-in, but his father is on the way to work. "You won't live to see graduation," says his father as he leaves. That night Lyle is unable to sleep. The next morning he goes to school but leaves at 11 a.m. to return home, where he picks up his father's shotgun and loads it. At 3 p.m. that afternoon, his father walks through the front door, and Lyle empties both barrels, killing him instantly.

6. Iran has stated that it supports the extinction of Israel, and it

considers the United States a great evil and its primary enemy. Iran has not expressly said that it would bomb either country; indeed, it insists that it wants to develop nuclear power only for peaceful purposes. If Israel, or the United States, were preemptively to bomb the Iranian facilities before that country had a nuclear weapon, would its actions be justified? Excused? What if a new president of Pakistan (which already has nuclear weapons) were to make similar statements?

7. Leonard, 5 foot 3 inches and 135 pounds, is walking down a dark street at 2 a.m. Suddenly, as he turns a corner, he is confronted by a man who asks him for a light. As Leonard fumbles for a match, the stranger says "Well, maybe you can help me with something else," and puts his hand inside his pocket. Leonard draws his concealed handgun and shoots the man instantly. At trial, the prosecutor shows that the stranger was reaching for a street map. Leonard seeks to introduce evidence that (a) five years ago he was attacked by a stranger and severely beaten; (b) his best friend was recently mugged in this same area; (c) the stranger vaguely resembled the drawing, which had appeared in a number of local newspapers and which Leonard had seen at least five times, of a suspected robber, whose robberies, however, had occurred in another section of the city. Leonard also seeks to introduce evidence that (d) the victim was 6 foot 6 inches, weighed 268 pounds, and was redheaded; (e) defendant has always had a dread fear of redheaded men; (f) the stranger was wearing a raincoat but it had not rained for three days and the temperature at the time of their encounter was 65°F. Which, if any, of these pieces of evidence bears on a defendant's liability and is therefore admissible?

8a. Metropolis, population 150, is threatened with annihilation by a flooding stream. Shakir tries justifiably to divert the flood onto Nelson's farm, knowing that Nelson will be drowned as a result. Nelson runs out of his farmhouse and shoots Shakir before he can divert the stream. Is Nelson guilty of any crime?

8b. What if Shakir has a court order allowing him to divert the stream?

9. Fran, 90 years old, uses a walker to help her move around. One

day, while playing bridge with three friends at the nursing home, she becomes enraged when Retief improperly plays a trump and claims the hand. Fran shouts, "I've had enough of your cheating!" She swings at Retief with her knitting needle. Retief, a 70-year-old former pro golfer who carries a walking stick crafted from the five iron with which he won the U.S. Open, immediately hits Fran and kills her. Retief is charged with second-degree murder. What result?

10. Samantha and James meet in a bar and go to James' apartment, where they spend the night "Netflix and chilling." The next morning, they are awakened by Jennifer, James' ex-girlfriend, who has a key to the apartment. Jennifer throws a book at James, knocking him out. She and Samantha then get in a fight, at which point Samantha sees a gun on James' coffee table. She picks it up and aims it at Jennifer, who runs into the bedroom and closes the door. Samantha aims the gun at the door and pulls the trigger once. Jennifer is killed instantly. Samantha claims self-defense. Will she succeed?

11. Yitzhak has invited his good friend Raisha to stay in his home while Raisha is touring the city. Four days into the stay, Yitzhak goes to work, leaving Raisha with a key in case he wants to see the sights. Instead, Raisha decides to sleep in. Two hours later, he hears the sound of glass and sees a figure coming through the porch door. Raisha is standing by the front door and could easily leave. Instead, he grabs a nearby rifle and shoots the figure, killing her.
    a. The figure is a burglar, intent on stealing Yitzhak's priceless violin.
    b. The figure is Helen, Yitzhak's girlfriend, who had forgotten her key and was desperate to enter the house and surprise Yitzhak.

12. For 20 years, Mortimer has abused his wife, Sheila, with some regularity. He has broken her arm twice, thrown her down stairs numerous times, and frequently threatened to kill her. She has left him several times, but each time he has persuaded her to return, pleading that he loves her. The typical cycle of atonement, slow buildup, and then battering has occurred continuously over the

years. Tonight Mort said to Sheila, "Tomorrow's the day. I'm not taking any more. You are dead." Then he left the house. Sheila went to her next-door neighbor, Laurie, and told her, "I think he really means it this time. Give me your gun." Laurie hesitated, but finally acquiesced. When Mort returned that night, Sheila shot him five times as he came through the doorway. Sheila and Laurie are charged with murder. What result?

13. Marian, a private security guard who is licensed to carry a gun, is off duty enjoying her third glass of Chateau LaFitte Rothschild at the Dew Drop Inn while watching the New York Yankees lose (again) to the Boston Red Sox. She is delighted as A-Rod strikes out for the fourth time in the game. "I always said that no-good (ethnic slur) wasn't worth the money they paid him," she shouts. A patron at the other end of the bar walks up to her and declares, "A-Rod and I are personal friends. No one speaks about him like that when I'm around, particularly some chick. Someday, when you least expect it, I'm going to send you to that ballpark in the sky." He opens his coat, revealing a gun, which he does not touch. Discuss the potential self-defense claims if:
    a. The stranger starts to walk away, but Marian pulls out her revolver and shoots him dead.
    b. As the stranger walks away, the bartender says: "Do you know who that was? That's Don Giovanni — the top hit man for the mob. You've got real trouble." Marian runs after Don, who is out the door and 100 feet away, and shoots him dead.

14. Trent Hatfield and Jack McCoy have been bitter enemies for years. One day, as Jack is walking with his three-year-old son, Real, Trent grabs the child, puts a gun to his head and says: "You think you've suffered? Watch this." He then kills Real. Jack whips out his Colt .45 (legally carried) and shoots at Hatfield, but the bullets go far wide of their mark and kill Saw Waterston, Jack's dearest friend, who just happens to come around the corner at that moment. Charged with Waterston's *murder*, Jack pleads heat of passion. What result?

15. Chris and Frank got into a heated argument outside Frank's trailer. Chris threatened to "take Frank's head off," and swung at Frank but

missed. Chris then walked quickly to his truck, which was parked about 50 feet away, turned it around, and slowly went past Frank, with the driver's window down. Just as the truck passed, Frank "felt something whiz by" his head. He reached down, picked up his ever-present Winchester rifle and shot twice at the truck, which was moving away slowly. The second bullet hit Chris in the neck, killing him. There was no weapon in Chris's truck, and neither the alleged bullet Frank "felt" nor its source were ever found. At his trial for second degree murder, Frank sought instruction on (1) self-defense; (2) provocation. Lilith, the prosecutor, argued that the two concepts were incompatible — self-defense requires a reasonable fear of injury, while heat of passion showed no "reason" at all. If you were the trial judge, what would you do? (Sorry — recusal is not an option.)

16. Jedidiah is walking down the street when his arch rival Archie comes running at him with a gun in his hand, screaming "I've had it with you, J. Today's the day you meet your maker!" Jedidiah pulls out his (legally possessed) magnum .357 and kills Archie. The state statute follows the "stand your ground" Florida law, and provides that the person who uses defensive force cannot be "engaged in an unlawful activity." It turns out that Jedidiah has two (unsmoked) marijuana joints on him. Has Jedidiah's claim of self-defense gone up in (non)smoke?

17. Twelve people, including George Prado and Joan Miro, all quite intoxicated, become entangled in a fight outside a bar. By the end of the fight, Miro has been fatally stabbed by Prado. Prado asserts that Miro came at him, punched him twice and shouted, "Tonight you die." None of the other ten saw the struggle nor heard any words. Prado moves to dismiss the indictment, under a "stand your ground" statute which provides "immunity" from prosecution unless the state can establish, prior to trial, "probable cause" to disbelieve his claim. What result?

18. Joe is peacefully walking down the street when Jim steps out of an alley, raises his fist and says, "Give me that Rolex or I'll break your nose." Joe quickly reaches into his pocket, pulls out a switchblade and swings at Jim, missing him. Discuss the potential self-defense

claims if: (a) Jim pushes Joe lightly, but Joe falls and cracks his skull on the cement; (b) Jim pulls out his own switchblade and stabs Joe, killing him.

19. Zephyr and Magnus are brothers. Since they were young, they have had a tense relationship; Magnus, the older of the two, used to physically and emotionally abuse Zephyr. The two brothers had a falling out when Zephyr stood up to Magnus's bullying one day. Years later, Magnus divorced his first wife with whom he has four kids. Magnus has continuously failed to pay child support since he divorced his wife. He expressed to Zephyr that he wanted nothing to do with his kids, even after his ex-wife died of breast cancer. Zephyr thought this was unacceptable since the four kids would be separated in the foster care system, so he told Magnus not to worry — he would adopt the kids. Magnus, thinking that Zephyr was after the child support money, threatened his brother, telling him that if he adopted the kids, Magnus would "shoot [him] in the head." Magnus thought the threat had been enough to convince Zephyr to change his mind, but a few months later he heard that his brother had, in fact, adopted his kids. In a fit of rage, Magnus drives to his brother's home in the middle of the night to teach him a lesson. Zephyr is awoken by the headlights shining into his home and looks outside to see his brother. Zephyr knows that Magnus is a big gun enthusiast with dozens of rifles and handguns and believes that Magnus is there to shoot him in the head like he threatened, so he fetches his revolver from the closet. Zephyr tells his wife and kids, who are now awake, to stay inside. He walks outside onto his porch and sees Magnus walking toward him. Yelling, "Stay back — I will shoot you!" Zephyr points the revolver at Magnus. Magnus, who is unarmed, runs back to his vehicle, where he grabs his own revolver from the glove compartment. Magnus fires two shots at Zephyr, missing both times. Zephyr returns fire, striking Magnus three times in the chest. Magnus dies instantly.
    a. Does Zephyr have a claim of self-defense?
    b. Now imagine that instead of missing, Magnus shot Zephyr, killing him. Does Magnus have a claim of self-defense?

Explanations

1a. This is the classic case of self-defense. Hubert is the innocent victim of an unprovoked felonious attack. He is clearly justified in killing Lyndon. Even in a jurisdiction requiring retreat, there is no apparent way for Hubert to retreat safely. Deadly force can respond to deadly force — even an Uzi to a knife.

1b. Now the facts have changed. Hubert *was* under deadly attack. But when he wrestles the knife away from Lyndon, the situation may be different than in Example 1a. Since Hubert now has the knife, it is at least arguable that he could have retreated. On the other hand, Hubert might reasonably conclude (particularly in emergency conditions) that Lyndon would continue the pursuit, perhaps with another deadly weapon, unless Hubert stopped him now.

2. Even in a jurisdiction that requires retreat, Quincy is on his own property, thereby apparently nullifying the requirement. Some courts, however, have restricted the "castle" exception to the house. Since Quincy is not in his house, he might lose the exception. If he could have ducked into the house, he may be required to do so in these jurisdictions. If Ralph had not swung the shovel at Quincy, we would have the issue of whether Ralph intended to hurt Quincy (as opposed to his dog) and also whether Quincy's perception that Ralph was threatening him was reasonable. See the next example.

3a. These facts show the ambiguity in many altercations. Although Jack's words carry a threat of serious bodily harm or death, his actions belie them. He has used force against Bert's property but not against Bert. Yet he has threatened Bert's person. If Bert used deadly force, it might be deemed excessive. On the other hand, it is not clear whether the force that Bert used could be characterized as deadly force. Whether Bert could *reasonably* fear serious bodily harm may be one for the jury.

3b. Since Jack was the initial aggressor, he cannot respond to Bert's use of force. Moreover, it appears that Bert has attempted to withdraw. Jack has no claim of self-defense.

3c. Bert's use of a knife may change this into a new encounter. Even

though Jack used his golf club on Bert's car, he did not aim for Bert's head or other vital parts. Therefore, Jack was not threatening or using deadly force. Bert's reaction, however, does constitute deadly force, and Jack may respond to it accordingly. In a jurisdiction generally requiring retreat, however, Jack may have to retreat, since Bert may not have the ability to pursue, catch, and stab Jack if he runs away. These factual questions and whether Jack's assessment of his chance of successful retreat was reasonable will be for the jury to decide.

4. We couldn't make this up. These are the actual facts of *People v. Aiken*, 4 N.Y.3d 324 (2005). The New York Court of Appeals, declaring that the "castle doctrine" should be severely restricted because it allowed people to (otherwise unnecessarily) take life where they could retreat, upheld the trial court's refusal to grant a self-defense instruction. Even if Jules "reasonably feared" that Jacques was reaching for a knife and would stab him, said the court, he had a duty to retreat to his apartment — and the doorway was *not* his apartment. Therefore, as a matter of law, he was not entitled to a self-defense instruction.

5. These facts are very close to those of an actual case, *State v. Janes*, 64 Wash. App. 134 (1992). The questions raised include whether the father's words constituted an "imminent threat" of serious bodily harm or death, whether Lyle had alternatives other than killing, and whether he could reasonably believe those alternatives to be futile. All these issues could be used to determine whether the killing was "justified" self-defense. Still another issue that might be raised is whether Lyle had to retreat even if his father intended to beat him. Although he lives in the house, it is not, as a matter of property law, "his" house.

   Assuming for a moment that the killing is not justified, one other issue is whether Lyle could be excused: whether, notwithstanding the "intentionality" of Lyle's acts, the obvious stress under which he operated suggests that he is not as blameworthy as other "intentional" killers. If not, he might have his liability reduced to manslaughter. See Chapter 8.

6. Interceding in Iran to prevent that country from building a nuclear

weapon would almost surely be premature, even if one recognizes the "preemptive strike" doctrine. There are still many steps required before Iran can build such a weapon. Experts disagree on how many years it will be before Iran has that capacity. On the other hand, we know that Pakistan has nuclear weapons. Whether it has the capability to deliver these weapons by an air strike on either Israel or the United States is unclear, since there is always the fear that such a bomb could be packaged in a suitcase or some other container and shipped to a target country.[78]

7. The question deals with the extent to which the reasonable man has characteristics of the defendant. As suggested in the example, these questions usually arise during evidentiary rulings. If the jurisdiction allows the comparison, then the evidence is admissible; if not, then the evidence is excluded. The stranger's resemblance to the robber is likely to be admissible even in a jurisdiction using the objective test, since a "reasonable person" might be aware of the drawings and therefore might be more justifiably afraid of someone with this resemblance. The dress of the victim is likely to be admissible because it goes to whether Leonard's fears were reasonable (contrast cases involving a person wearing a three-piece suit and one where the stranger is wearing a leather jacket and a set of brass knuckles). The two crime incidents are unlikely to be admitted in many jurisdictions because they do not go to what the "reasonable man" (as opposed to Leonard) might draw from them. Leonard's paranoia about redheads is also likely to be excluded, and therefore, the fact that the defendant was redheaded.[79] The longstanding paranoia is almost certainly not admissible since "reasonable people" are not paranoid. All the information is admissible in a jurisdiction that allows a claim if the defendant "honestly" believed himself to be in danger.

8a. This is tricky. Nelson may claim self-defense, but self-defense is, as a general matter, defined as a justified use of force against "unlawful" force. Shakir, as explained in the text, is justified in diverting the stream, and is thus not using unlawful force. Nelson therefore cannot be justified. Can he be excused? Usually, it is said that self-defense "sounds in" justification; can it also, on occasions

like this, sound in excuse? There are at least two arguments for saying yes. First, in the case of an unreasonably mistaken self-defender, some jurisdictions allow a reduction to manslaughter, thus clearly recognizing that the slayer's acts, though not justified, could still be partially excused. Second, to the extent that we are interested in results, and only secondarily in explaining those results, there is surely no reason for treating Nelson as a murderer, cold-blooded or otherwise. On the other hand, he is *not* mistaken, unlike the putative self-defender. Could Nelson claim necessity? Not if necessity requires that he achieve a greater good relative to the harm he has inflicted. As it is, Nelson kills one to save one (himself). This demonstrates, again, the difficulty the common law had with analyzing one-on-one situations, where neither party was initially culpable. Of course, it could be argued that Nelson is killing 151. If so, even if Nelson killed Shakir to save Nelson's entire family (15 people), a quantification approach to necessity would deny him a defense.

8b. These circumstances make it clear that Shakir is justified in his act. But merely because he is justified does not mean that we should ignore Nelson's personal tragedy. Even if he were not justified, viewing him as excused seems correct.

9. Retief may be playing his last rounds in prison. First, although Fran "threatened" force, it is hard to see that she was threatening deadly force — while it might be deadly in the hands of a 25-year-old, a knitting needle is probably not deadly when swung by an elderly person. Thus, Retief is not allowed to use deadly force to respond to nondeadly force. Even if the needle is deadly force, however, Retief has two options: (1) he could almost surely disarm Fran rather than kill her; (2) he could retreat. After all, he is more spry than Fran, who probably would have only one chance (at most) even to hit Retief. It may be that the jury could conclude that Retief couldn't move faster than Fran (and that would be a jury question), BUT he could just use nondeadly force (pushing her over), which would surely allow him to escape.

10. Unlikely. Jennifer used force, but not deadly force, so Samantha's use of deadly force was probably excessive. Even if Jennifer had

used deadly force, however, it is arguable that her race to the bedroom constituted withdrawal, thus nullifying Samantha's claim. If that weren't enough, Samantha probably will have to retreat — although she's James' guest, most states would probably not allow her to avail herself of the "castle" doctrine.[80] However, this decision was rendered prior to the "Stand Your Ground" Act in Florida, quoted in the text. Under that statute, even though Samantha cannot claim the "castle" doctrine, she can claim that she had a "right" to be in the apartment, and therefore did not have to retreat.

11a. The question is whether Raisha has to retreat. In virtually every state, including those that would otherwise require retreat, Yitzhak, the owner of the house, could clearly kill the burglar — an owner's home, after all, is his castle. But is a guest's temporary "home" *his* castle? The courts are split. Some say that the guest stands in the shoes of the owner. Others argue that the "no retreat" rule should be narrowly applied, since it allows the (by hypothesis, unnecessary) taking of life. Note: The length of Raisha's stay would be irrelevant to either of these schools of thought; if Raisha had been there only one hour, he still either "stands in Yitzhak's shoes" or he doesn't.

11b. Here the issue is whether, assuming that Raisha did not otherwise have to retreat, he had to wait to see if the intruder was threatening deadly force. The answer is generally NO. So long as the shooter made a reasonable mistake (and not waiting for the intruder to actually threaten to use deadly force is hardly unreasonable), Raisha's off the hook.

12. This is really complicated. The first question is whether Sheila will have a self-defense claim. This may depend on whether the jurisdiction allows an expert to testify about battered spouse syndrome, but virtually all do today, so Sheila will be judged by the "reasonable battered spouse." On the other hand, Mort was not threatening her at the very moment she shot him. This nonconfrontational case raises all the issues generated by a long-time, simmering, and explosive relationship, and is not well handled by black letter self-defense law. Sheila will at least get her

case to the jury.

Under the Model Penal Code, Sheila has a stronger claim. The common law required "imminency" for a claim of self-defense. The Code, instead, substitutes the phrase "immediately necessary on the present occasion." The Code is not concerned with the timing of the possible attack, but with the necessity to use force. As in the hypothetical, the question of imminence is most vividly raised by the "sleeping husband" cases, e.g., *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

Laurie's case is even more difficult, and her defense may depend on how Sheila's acts are characterized. If the jury finds that Sheila was *justified*, then Laurie's assistance will also be allowed. If, however, the jury concludes that Sheila was merely *excused* under current doctrine, a nonexcused or justified person cannot aid a person who is merely excused — because she does not share the actor's "disability." On the other hand, Laurie will raise a second claim — that she gave Sheila the gun only to be used if Mort actually attacked her, not when Mort walked in the door. Was Laurie unreasonable — or even reckless — in her belief that Sheila would not use the gun in a nonconfrontational situation? Under current accomplice law, discussed in Chapter 14, Laurie will not be an accomplice to Mort's death unless she "intended" that death or, in some jurisdictions, unless she was reckless (not merely negligent) as to whether her assistance would result in a crime. This is obviously a jury question — and a close one that might depend on more facts than a mere hypothetical can offer.

13a. The question raised is whether the threat is "imminent." Given the facts, it is not even debatable that Don's threatened acts are "imminent." Even under the Model Penal Code, it would be hard for Marian to give credence at all to Don's threat, much less believe that it was necessary for her to use force "immediately . . . on the present occasion." Marian's days as a security guard are history.

13b. NOW the threat is actually plausible — if the bartender is correct, Marian might become Don's latest notch. But again, the very words Don uttered make it clear that he was not going to use deadly force now. And his departure from the bar makes it extremely unlikely that he will return. Moreover, Marian could retreat, either by

finding another exit, or simply by outwaiting Don. She certainly continued the quarrel by going after him.

On the other hand, under the Model Penal Code, Marian may well have feared not only that the threat was real, but that using alternatives (informing the police, for example) would be futile and that this force was necessary in the "immediate" occasion. She would have a claim of self-defense to a charge of murder, but if the jury concluded that her decision was either negligent or reckless, she could be convicted of the corresponding level of homicide.

14. This should depend on how and why we think a heat of passion/provoked killing should be mitigated. If the basis is that the victim (partially) "asked for it," then this is certainly not true of Sam, who was totally innocent. If the basis is that the *result* was (partially) justified, then this is also not the case. We do not have even a partially good result here; a totally innocent person has been killed. But if the question is whether Jack's *act* was partially *excused*, then the *result* becomes irrelevant, and Jack should be able to reduce his conviction to manslaughter because of his extreme "disability." It is also possible to argue that Jack should be able to claim "transferred justification (or excuse)." After all, if intent can follow the bullet, then why can't passion?

15. The self-defense claim is on thin ice. After all, Frank did not *see* Chris shoot at him. Indeed, it may have been a figment of Frank's imagination. Moreover, Chris was driving away, so it may be difficult for Frank to claim "defense" as opposed to "revenge." Nevertheless, a jury might conclude that Frank had a reasonable fear that Chris would return, or even throw the truck in reverse (contrast the case if Chris had driven at a high rate of speed after the "bullet" whizzed by Frank). If the jury rejects the self-defense claim, however, there is still some evidence that would allow them to find that, believing himself to have been a victim of a shooting, Frank was "provoked" by Chris, and had no time to "cool off" (even under the common law). If, additionally, the jurisdiction recognizes not merely anger, but fear, as a possible impetus to action, the claim of heat of passion might be sustainable. It was so held in *Howell v. State*, 917 P. 2d 1201 (Alaska App. 1996).

16. One would think not. After all, the whole point of the "stand your ground" statute would seem to be to protect a non-aggressive party, and Jedidiah meets that definition. One could argue that the provision against "unlawful" behavior was to deal with aggressors. But possession of marijuana is a crime. In *Dawkins v. State*, 252 P.3d 214 (Okla. Crim. App. 2011), the court held, under a similar statute, that possessing an illegal weapon deprived the defendant of the "stand your ground" protection. In dictum, the court further suggested that "current crimes (which would exclude the statute) include . . . possession of illegal drugs. . . ." Oops.

17. Although the facts were much more complicated than this in *Lemons v. Com.* S.W.3d, 2012 WL 2360131 (Ky. App. 2012), the court held that the indictment should be dismissed because there were simply no actual witnesses to the stabbing to dispute the defendant's claim. Potential witnesses who might have testified otherwise were too intoxicated to provide substantial credible testimony to amount to probable cause (statute "dramatically changed the practice of criminal law in Kentucky").

18. (a) Joe had a right to defend himself and his property — but not by the use of deadly force. He may only use force proportionate to that threatened by Jim, and Jim has not threatened death or serious bodily injury. Even though he was the original aggressor, Jim may now respond to Joe's escalation by using equivalent force. Here, he has not used deadly force, but only nondeadly force, which, unhappily, resulted in Joe's death.
    (b) Even here, Jim has the right to defend himself from the excessive force that Joe attempted by the use of deadly force (the knife). Test this by putting the robbery out of the picture, and assume that Jim "merely" wanted to punch Joe without taking any property. Note that this is not a "withdrawal" question — had Jim threatened deadly force, taken the watch and then left, after which Joe followed him using deadly force, Jim would be entitled to use deadly force only if his departure was an "obvious" withdrawal from the initial fray. But here the question is one of escalation, not of withdrawal.

19a. First, there is an issue of whether Zephyr reasonably believed he

was in danger. Zephyr will argue that his response to Magnus was reasonable, both objectively and subjectively, particularly because Zephyr did not shoot until Magnus fired at him. Zephyr will want to introduce evidence of the brothers' strained relationship, especially how Magnus used to abuse him physically. This is similar to the "battered wife" argument, but with some meaningful differences: The brothers were largely estranged from each other; there was no cycle of abuse taking place. Still, Zephyr has a good argument for self-defense. He will argue that Magnus's past treatment of Zephyr, combined with Magnus's threat to shoot him if Zephyr adopted his kids (which he did) and the fact that Magnus has the means to do so — i.e. multiple different firearms — shows that he was reasonable to believe that Magnus presented a serious, even potentially lethal threat to him. Perhaps shooting at Magnus right away would have been unreasonable, but Zephyr waited; he warned Magnus, telling him to "stay back," and refrained from shooting until Magnus fired at him. But was Zephyr really reasonable? Sure, Magnus had threatened him and he owned firearms, but Magnus and Zephyr are brothers. Is it reasonable to believe your brother would murder you, even if he had physically abused you in the past?

The prosecution will make a number of additional arguments that Zephyr cannot claim he acted in self-defense: (1) Zephyr could have retreated, (2) Zephyr had an alternative option to using force and, by confronting Magnus on the porch, Zephyr contributed to the creation of the dangerous situation that compelled him to shoot Magnus.

First, the prosecution will argue that Zephyr could have retreated, even though he was on his porch. Some states do not require retreating where it is into the home or curtilage (like a porch); however, if it is a minority jurisdiction that requires defendants to retreat even from their curtilage into the home, the prosecution may have a strong argument.

If the jurisdiction has adopted a "stand your ground" law, this argument will not go far. Under a "stand your ground" law, like the one found in Florida, there is no requirement to retreat from a location where the defendant has a right to be. Zephyr will argue

that he has as much right to be on his porch as he does to be in his home.

Second, the State will argue is that Zephyr is not entitled to a claim of self-defense because he had other options and was culpable in bringing about the situation that resulted in Magnus's death. Zephyr created the dangerous situation when he saw Magnus outside his home and, instead of calling the police and/or simply ensuring his doors were locked, he chose to leave the confines of his home and confront Magnus with a firearm. This is likely the State's strongest argument.

Zephyr could argue that perhaps he was not reasonable to believe Magnus would kill but he was reasonable to believe that Magnus would cause him serious bodily harm because of his history of physically abusing Zephyr. Still, Zephyr will run into an obstacle when trying to explain away why he chose to confront Magnus instead of calling the police. Even if the jurisdiction does not apply the fifth element requiring the defendant to not have been culpable for creating the dangerous situation, Zephyr will be hard-pressed to prove he had no other alternative than using force. Does it matter that he did not fire his revolver until Magnus fired at him?

19b. Magnus could claim that he acted in self-defense by shooting Zephyr. He could assert that when Zephyr pointed his revolver at him, Magnus reasonably believed his life was in danger. However, this may be a hard sell. Zephyr had shouted he would kill Magnus but he also shouted, "Stay back," implying that shooting Magnus was conditional on him continuing forward toward Zephyr. The prosecution will argue that this shows that Magnus had another option, that he could have retreated safely, and that his decision to shoot Zephyr was unreasonable. Additionally, the prosecution will argue that Magnus did not act in self-defense because he was the aggressor and as the aggressor, he has no right to a defense of self-defense. Magnus had threatened Zephyr months prior and upon hearing that his brother had adopted his kids, Magnus drove to Zephyr's house to "teach him a lesson." Still, this is not as clean cut as it could be; who is the aggressor here? Is it really Magnus? Is it Zephyr?

PROVOCATION — EXCUSE OR JUSTIFICATION?

One more instance where the actor is (usually) acting "suddenly" is provocation (heat of passion). As with the other three claims discussed here, there is fierce academic debate[81] over whether this is a partial excuse or a partial justification (since the claim only reduces the killer's culpability, rather than exonerates him, no one has argued that it is "total"). Those who argue partial justification[82] point out while that the *anger* is justified (the victim did something that would upset a reasonable person) and therefore is partially justified, the *conduct* — actually using deadly force — is excessive and cannot be justified, the defendant is excused. The other camp contends that anyone acting in a heat of passion is, by definition, "not himself" and should be partially excused[83] because he is "similar to," but not identical to, one claiming diminished responsibility or insanity. The Model Penal Code's "extreme emotional disturbance" provision weakens the justification contention, since the MPC does not require that the victim (or someone else) provoke the defendant; it is enough that he's acting under EED. Moreover, *if* the claim is "only" an excuse, it is conceivable that it could be eliminated entirely (as several jurisdictions have done). (See Chapter 8 for more discussion.)

DEFENSE OF PROPERTY AND HABITAT

Most people work hard to acquire their property and want to keep it safe from others. We have laws, such as those against theft, to help safeguard our property, but the law also allows people to use force if necessary to prevent others from taking or destroying their property.

Even more important, most people want to be safe in their homes. The maxim, "A man's home is his castle," though sexist by contemporary standards, recognizes that threats to our physical safety while we are in our homes commonly cause fear and fierce resentment. That is why we have laws against burglary and trespass. Again, however, the law also allows people the use of force, including deadly force in some cases, to defend themselves in their homes if they

reasonably appear to be threatened.

Using force can involve harming those who want to take our property or harm us in our homes. It can also create a risk that innocent people will be hurt. Thus, the law must balance the need to forcibly defend property and personal security, on the one hand, and the need to protect lives and safety, on the other. The law prefers the value of human life (including that of the thief) to that of property. It does this by only permitting the use of nondeadly force to defend property, thereby ensuring that human life is not taken merely to save property. However, the law also prefers the value of innocent human life over the lives of aggressors who threaten innocent life. Thus, the law permits the use of deadly force in some cases to defend habitation.

Use of force to defend property or habitation is justified under the law because the owner's superior claims to possession and personal security are considered more important than the aggressor's bodily safety. Because the individual must act under tremendous pressure in an emergency situation, the law permits him to resort to self-help by using force against thieves and aggressors.

The Common Law

A defendant has a legal right to use nondeadly force when he has an honest and reasonable belief that it is necessary to protect real or personal property in his possession from imminent unlawful taking, damage, dispossession, or trespass. He may also use nondeadly force to reenter real property or to recover personal property immediately after it has been taken. However, as described below, there are limits on this right to use nondeadly force.

Other Lawful Means Available

Force may not be used if there is time to take other lawful measures, such as calling the police. Consistent with other defenses and excuses grounded in necessity, this rule avoids the possibility of physical harm to someone unless it is really required.

Warning

If he can do so without risk to himself or his property, an individual must warn the aggressor to stop unless it is clear the warning would be useless.

Deadly Force Not Permitted

A person may not use deadly force solely to protect property. This rule is based on the value judgment that human life is worth more than property.

Personal Property

An individual may use *nondeadly* force to protect personal property from imminent unlawful taking or destruction. If the property owner is then met with what reasonably appears to be deadly force by the thief, the owner may respond with deadly force in self-defense. The thief's resort to deadly force has changed the situation from the defense of property to the defense of human life, and the rules of self-defense now apply.

Conversely, if the property owner uses *deadly* force when the thief does not appear to be using it, the thief then has the right to use deadly force in self-defense because the property owner has exceeded his legal privilege to use force. (See the discussion of self-defense above at page 518.)

Real Property

In contrast to the rules governing the use of force to defend personal property, the common law is somewhat more permissive in authorizing the use of deadly force to defend real property.

Defense of Dwelling. One early English case held that deadly force could be used to prevent forcible entry into a dwelling, provided a warning had been given not to enter. Most jurisdictions, however, no longer follow this rule.

Today most jurisdictions allow the use of deadly force to prevent forcible entry into a dwelling only if the occupant has a reasonable belief that the intruder intends to commit a felony inside. The occupant can use deadly force in these circumstances because the balance of interests has changed dramatically. Now there is a threat of imminent harm both to property and to human life.

Several states have recently enacted laws that expand the right to use deadly force in self-defense in the home. Dubbed "castle laws" or "stand your ground" laws, they effectively allow residents to use deadly force against intruders entering a dwelling (and, in some cases, an occupied vehicle) unlawfully and forcefully.[84] Residents are presumed to have a reasonable fear of death or great bodily injury; they no longer need to determine the intent of aggressors using force to intrude into their homes, nor do they need to retreat. (See discussion at page 520.)

Mechanical Devices. Most jurisdictions do not permit the use of deadly mechanical devices, such as spring guns, to protect property. These devices operate automatically even when the occupant is not there. They pose serious risk of harm to innocent people, such as firefighters, and also activate deadly force when the occupant's life is not in jeopardy.

A few jurisdictions permit the use of these deadly devices, but only if the defendant would have been privileged to use deadly force if he were there. If a firefighter responding to an alarm at the dwelling is killed or injured, the occupant is strictly liable for the unlawful use of deadly force.

Some jurisdictions will permit the use of *nondeadly* devices, such as electric fences, provided proper warning is posted.

Mistakes. Most jurisdictions allow the use of force, including deadly force, if the occupant reasonably believes that the elements of the privilege exist. If, however, the defendant is *negligent* in forming his belief, his use of force is unlawful.

The Model Penal Code

The MPC also permits the use of nondeadly force to defend real or

personal property.

Initial Aggression

Section 3.06(1)(a) permits a person to use nondeadly force (i) to defend against an entry into, or trespass against, her real property, or (ii) to prevent another from taking her personal property when she believes it is immediately required to prevent it. The actor must believe the land or personal property is in her possession or in another's possession for whom she is acting. Section 3.06(2) defines "possession."

Retaking Property

Section 3.06(1)(b) allows individuals to forcibly reenter land or retake personal property taken by another. The actor must believe that the other person does not have lawful title to the property and that she (or the person for whom she is acting) is entitled to possession.

The actor must also satisfy either of two additional requirements: (i) she uses force immediately or in "fresh pursuit," or (ii) the actor believes she is using force against someone who has no claim of right to possession and that, in cases involving real property, it would impose an exceptional hardship to wait for a court order before reentry.

Use of Force

Somewhat begrudgingly, the MPC authorizes the use of force to defend or retake property. The balance of §3.06 imposes limitations on the use of force otherwise authorized by that section. Some of the more important limitations are indicated below.

Request to Desist

The actor must first request the aggressor to stop, unless the actor believes that the request would be useless or dangerous or that substantial harm will be done to the property before the request can be made.

Risk of Serious Bodily Injury

Force, even if otherwise justified, cannot be used if the actor knows it may expose the aggressor to serious bodily injury.

Use of Deadly Force

The actor can use deadly force only if (a) she believes she is defending her dwelling against someone with no claim of right to possession, or (b) the aggressor is committing a serious crime and has used or threatened deadly force, or (c) the actor's use of nondeadly force would expose her (or someone else in her presence) to substantial danger of serious bodily injury.

Use of Mechanical Devices

Use of mechanical devices to protect property is permitted, provided they do not threaten death or serious bodily harm, are reasonable, and either are customarily used or a warning is given.

Examples

1. Maria Rodriguez owns a holiday condominium in Kansas City. She stays at the condo periodically and keeps her irreplaceable collection of twelfth- and thirteenth-century Mayan and Aztec jewelry from Latin America there. Last year, two attempts were made to break in; they almost succeeded. The condo cannot be made more resistant to break-ins and the jewelry cannot be insured. One night, Maria wakes up and hears someone in the kitchen. She grabs the .38 pistol under her pillow, quietly enters the kitchen, and shoots the intruder, killing him. Was Maria's use of deadly force lawful?

2a. Afraid to leave her invaluable jewelry at the condo without effective protection, Maria wants to use a deadly cobra snake as a "watch dog." She would place it in a very secure box that could be released electronically only if a door or window to her condo is opened. Advise Maria.

2b. Would your advice be different if Maria said she would post easily recognized warnings — "Do Not Enter Without Permission: Deadly Cobra Inside" — on the outside of her condo?

3. Finally, Maria decides she must put her rare jewelry in a bank safe-deposit box. She loads it into her large purse and drives downtown. While walking to the bank, a large man tries to snatch her purse by grabbing onto it and trying to pull it from her. Maria desperately hangs on. The man yells, "Let go. I'm not going to hurt you. All I want is your purse." With her free hand Maria manages to free her .38 pistol from her pocket and shoots the purse-snatcher, killing him instantly. As prosecutor, would you charge Maria with murder?

4. Jorge had a running feud with his Orlando neighbor, Julio. For several weeks, Jorge had complained to local authorities that Julio consistently placed four garbage cans out for collection every week, when only two were allowed. Julio, upset by Jorge's actions, went to his front door and knocked loudly. Jorge opened the door. Julio yelled at Jorge to "mind his own business." Jorge said, "Go to hell!" and started to close the door. Julio put his foot in the door and tried to open it. Jorge shot Julio with a pistol, wounding him. Did Jorge assault Julio or act in lawful self-defense?

5. Dani and Jon recently went through an ugly break-up. Before they met, Dani had adopted three pugs, one of which had died — a fact that had been instrumental in Dani and Jon getting together. While they were together, Jon developed a strong affection for Rhaegal, the bigger of the two remaining pugs, but when he and Dani split up, Dani refused to let him visit Rhaegal. One day while Dani was away, Jon broke into her apartment. As Jon sneaked down the hall he was suddenly struck by a dart from Dani's mechanical, home-defense device that flings darts at intruders. Fortunately, he had kept close to the wall and a single dart had struck his shoulder, causing only a flesh wound. Had he been closer to the middle of the hallway, the darts would have struck him in the chest, almost certainly killing him. Jon finally found and took Rhaegal. While walking to his car, Dani drove up and started yelling at him, but he jumped in his car and sped away. Dani followed Jon to his

apartment and into his front room. Jon kept yelling for her to leave. Dani refused and attempted to retrieve Rhaegal from Jon. He moved away to stop her, so Dani sprayed her pepper spray in Jon's face. As Jon writhed on the floor, clawing at his face furiously, Dani left with Rhaegal. Discuss.

Explanations

1. As an occupant in lawful possession of a dwelling, Maria may use deadly force against an aggressor only if she reasonably believes he intends to commit a felony against person or property therein. The difficulty here is that there are no facts indicating what the dead aggressor intended once inside. The defense will argue that a homeowner should not have to make further inquiry to ascertain the intruder's intentions because that would only put Maria at greater disadvantage and increase her danger. Moreover, it is reasonable to infer that the intruder had a felonious purpose in mind when entering Maria's condo.

   Though this is a close case, a jury would probably find Maria was justified in using deadly force to defend herself and her dwelling from the intruder.

   The MPC takes substantially the same approach as the common law. Maria would have to persuade the jury that she reasonably believed the aggressor was committing a serious crime or that, without recourse to deadly force, she risked serious bodily injury. Again, the jury would probably agree with her.

   Under recently enacted "castle laws," Maria would have a much stronger case of self-defense. These laws effectively presume that an intruder who forcibly and unlawfully enters a residence intends to kill or do great bodily injury to anyone inside. Residents are presumed to have a reasonable fear for their lives and can use deadly force in self-defense without any duty to retreat. Shoot, Maria! Shoot!

2a. Hopefully, you immediately told Maria that she may be criminally liable for using a deadly cobra as a mechanical watch dog. Neither the common law nor the MPC authorizes the use of deadly devices

to defend property, including a dwelling. The fact that this deadly device is also defending extremely valuable personal property does not make a difference. Human life, even that of a criminal, is considered more valuable than property. Thus, tell Maria to immediately take her killer cobra back to the pet store for a refund. Otherwise, she may be charged with a serious crime such as homicide or assault if the cobra is released during a break-in. You might also point out that her slinky sleuth also presents serious risk to innocent people like firefighters or caretakers who might be forced to enter the condo in an emergency.

2b. Posting warning signs would not relieve Maria of criminal responsibility. Neither the common law nor the MPC permits the use of deadly force to protect unoccupied dwellings or personal property located there. The MPC permits the use of unusual mechanical devices to protect real or personal property if adequate notice is given, but only if they do not pose a substantial risk of serious bodily harm.

Posting warnings does not relieve Maria of responsibility for using a *deadly* mechanical device to defend her property. Most jurisdictions prohibit the use of such devices. The MPC allows the use of nondeadly devices if they are customary (like razor-sharp wire around a warehouse) or if notice is posted. It does not allow the use of deadly mechanical devices under any circumstances.

3. Maria is not entitled to use deadly force to defend her personal property from a thief even though it is very valuable and, in this case, is not insured. Thus, she is guilty of homicide. Maria might claim that she reasonably feared death or great bodily harm at the hands of the thief, but he was unarmed and told her he would not hurt her and that he only wanted to steal her property.

4. In many states, Jorge would be charged with assault with a deadly weapon. A homeowner generally cannot use deadly force to defend his property. There was no reason to believe Julio was armed or threatened Jorge with death or serious bodily injury. In some states, however, a homeowner can use deadly force if he reasonably believes an intruder intends to commit a felony in the home. This might not help Jorge because Julio wanted to continue the

argument. In states such as Florida, however, which have passed "castle laws," Jorge might successfully argue legitimate self-defense. A resident is presumed to reasonably fear for his life if an intruder unlawfully and forcibly enters the dwelling of another; the homeowner can stand his ground. The prosecution could argue that Jorge knew that Julio was unarmed and only wanted to talk to him about the garbage cans. In a very similar case, prosecutors in Florida declined to prosecute.[85]

5. Dani will probably be charged with assault for setting up the dart trap that injured Jon. Under the common law, setting up automatic mechanical devices that seriously injure or kill intruders or emergency responders indiscriminately is illegal. In some jurisdictions, the use of nondeadly devices is permitted so long as there is a warning. The dart trap likely does not fall into that category since Jon likely would have died if he had not been hugging the wall and had been hit with the full force of the darts in a more vulnerable part of his body. There was no warning — such was the purpose of the device, after all: to catch an intruder unaware. Thus, Dani will not be able to assert defense against property for her assault against Jon via the dart trap.

   Many jurisdictions do not permit a defense of property defense where other lawful means of protecting the property are available. Under this rule, Dani probably acted criminally by following Jon home and trespassing on his property to retrieve the pug (under the law, pets are considered property). Instead of following Jon to his apartment, trespassing and assaulting him, Dani could have contacted the police to have Rhaegal returned to her.

   If the jurisdiction has adopted the MPC, Dani may fare better. The MPC permits a party to enter another's land to retrieve her personal property if it has been stolen. The party must be in fresh pursuit OR obtaining a court order to enter would impose an exceptional hardship on her. Here, Dani was in fresh pursuit, following Jon from the "scene of the crime" to his apartment where she immediately followed him into his apartment. She likely satisfies the MPC here; however, the remaining question is whether her use of force was lawful.

   The MPC permits the use of force if the party tells the other to

stop (unless that would give rise to a risk of substantial harm to the property). Dani had yelled at Jon to not take Rhaegal when she drove up. She likely satisfies this requirement. The second requirement under the MPC is that the party not use force if she knows it would cause serious bodily injury. Dani could argue that the use of pepper spray against Jon, while painful, did not cause serious bodily injury to him.

USE OF FORCE

Trained police forces are a modern development. Before they were established, citizens often had to make arrests and bring those suspected of committing crimes to the public authorities. The common law developed special rules governing the use of force by peace officers and citizens to apprehend criminal suspects and prevent their escape.

Because citizens, as well as police, may need to prevent others from committing crime, the law authorizes both police officers and citizens to use force to stop crime. Again, the common law distinguishes between the use of *nondeadly force* and *deadly force* and between the authority of *police* and of *citizens* to use either kind of force.

To complicate matters, both police and citizens can be mistaken about whether a crime has been committed and whether the person they suspect has indeed committed it. Police and citizens may also be mistaken about whether a crime is in progress or whether the person they suspect is *attempting* to commit it. Thus, the law must strike a delicate balance between allowing police and citizens to arrest criminals and prevent crimes, while also protecting innocent people who may be mistakenly suspected of committing crimes.

Arrest

The Common Law

The common law permits both peace officers and citizens to use force, including deadly force in certain cases, to arrest individuals suspected of committing a crime. The common law distinguishes between the use of

force by the police and by private citizens and between the use of nondeadly and deadly force. Not surprisingly, the common law provides broader authority for peace officers to use force than it does for citizens.

Police Authority to Arrest

At common law, police can arrest a suspect if they have a warrant for his arrest. They may arrest someone without a warrant if they have reasonable grounds to believe that the suspect has committed a felony or if the suspect commits a misdemeanor in their presence. Today most jurisdictions have enacted statutes that explicitly confer this same scope of arrest authority on police officers.

Nondeadly Force. Police can use nondeadly force when they reasonably believe it necessary to make a lawful arrest for any crime, including a felony or a misdemeanor. Apprehension of criminal suspects is considered more important than the risk of bodily injury that can occur when nondeadly force is used to make an arrest or prevent escape. Note that the police need only have reasonable grounds for believing that the suspect committed a crime. Their use of force under these circumstances is permitted even if it turns out that no crime was committed or that the suspect did not commit it.

Deadly Force. Police can use deadly force if they reasonably believe it necessary to prevent a felon from escaping arrest. Deadly force cannot be used to prevent the escape of a misdemeanant.

Some jurisdictions impose more restrictive limits on the use of deadly force, authorizing it only when police reasonably believe that the felon trying to escape arrest is dangerous. The officer must reasonably believe the fleeing felon is armed or has committed a serious crime dangerous to life, such as murder. This approach limits the possible taking of life to cases in which the felon, if not apprehended, may pose a future risk to human life.

Constitutional Limits. The Supreme Court has narrowed the common law authority of police to apprehend criminal suspects. The Court held that it is an unreasonable seizure of a person in violation of the Fourth

Amendment for police to use deadly force to apprehend a fleeing felon unless (i) deadly force is necessary to prevent escape; (ii) if practical, a warning is given; and (iii) the officer has probable cause (essentially the same as "reasonable grounds" at common law) to believe the felon poses a serious threat of death or serious bodily injury to others if he is not apprehended.[86] Risking the life of a dangerous felony suspect is justified in this situation in order to prevent risking the loss of innocent life.

There are sound reasons for not allowing police to use deadly force to apprehend a criminal suspect who is not reasonably believed to be dangerous to human life. Killing a non-dangerous, unarmed suspect effectively deprives him of his due process right to a trial to determine his guilt or innocence and to be punished according to law. The police officer, in effect, becomes prosecutor, judge, and jury. Moreover, killing the suspect imposes a much harsher punishment than could be imposed for the crime he is suspected of committing unless it is a capital offense.

Self-Defense. If met with forcible resistance while trying to apprehend a criminal suspect, police are entitled to use force in self-defense, including deadly force, if they reasonably fear imminent death or serious bodily injury. (See pages 478-481.)

Private Citizens

The common law gives citizens authority to make arrests for any felony or for a misdemeanor involving breach of the peace occurring in their presence, provided (i) the offense was committed and (ii) the citizen reasonably believes the suspect committed the felony. The actual commission of the offense is a strict liability element. If no crime occurred, then a citizen who uses force to arrest or prevent flight of a criminal suspect is criminally responsible even if her belief was reasonable.

Thus, while a police officer may use force even when no crime has been committed provided he has probable cause to believe it has occurred, a private citizen will be criminally liable for the use of force in such circumstances.

Assisting the Police. A private citizen asked to help police officers

stands in their shoes. The citizen can assert any defense that the officer can assert, including nondeadly or deadly force.

Nondeadly Force. Private citizens acting on their own may use nondeadly force only when they reasonably believe it necessary to arrest someone for a felony that was actually committed. If the felony was not committed, the private citizen is strictly liable for her use of force.

Deadly Force. The authority of a private citizen acting alone to use deadly force to apprehend a felon is narrower than that of a police officer. A citizen may use deadly force when she reasonably believes it necessary to arrest a person who has actually committed a felony (and perhaps only a dangerous felony). If the person did not commit the felony, a private citizen using deadly force is strictly liable. Thus, unlike a police officer, a private citizen uses deadly force to apprehend a felon at her own peril.

The Model Penal Code

Use of Force in Law Enforcement

Section 3.07 authorizes the use of force when the actor is making (or assisting in making) an arrest and believes it immediately necessary to effect a lawful arrest.

Limitations

This section limits the privilege as follows:

Nondeadly Force. Force is not justified unless the actor informs the person, if feasible, why he is being arrested and, if the arrest is made under a warrant, the warrant is valid or believed to be valid.

Deadly Force. Deadly force is not justified in making an arrest unless (a) the arrest is for a felony; (b) the person is a peace officer or assisting someone she believes is a peace officer; (c) the actor believes there is no substantial risk to innocent people; and (d) the actor believes the suspect committed a crime involving the use or threat of deadly force or there is

a substantial risk the person will cause death or serious bodily injury if apprehension is delayed.

Note that (1) *all* four elements must be satisfied before deadly force can be used, and (2) a *private citizen* cannot use deadly force to arrest a felony suspect unless she believes she is assisting a police officer. Note also that §3.09(2) of the MPC allows an actor to be prosecuted for an offense requiring proof of recklessness or negligence if she was reckless or negligent in forming the beliefs required for justification under §§3.03 to 3.08. Thus, if the actor was reckless or negligent in forming the beliefs set forth in (b), (c), or (d) above, she can be prosecuted for any applicable offense requiring those culpability states.

Preventing Crime

The Common Law

Nondeadly Force

Individuals may use nondeadly force if they reasonably believe a misdemeanor is being committed. Deadly force is never permitted to prevent a misdemeanor. Preventing a minor crime is simply not worth the loss of human life that can occur when deadly force is used.

Deadly Force

There are two views on the lawful use of deadly force to prevent commission of felony.

Any Felony. Some jurisdictions allow both police officers and private citizens to use deadly force when they reasonably believe it is necessary to prevent the commission of *any* felony. Because it includes *all* felonies, this broad rule accepts the possible loss of life that deadly force may cause in order to prevent crimes that, though serious, do not necessarily pose danger to human life.

The balance of interests struck by this rule is even more remarkable because a *reasonable belief* is sufficient to justify the use of deadly force. Thus, human life may be taken even though the person killed may

not actually have intended to commit any offense. For example, a citizen who shoots and kills a stranger he reasonably mistakes to be stealing the citizen's expensive mountain bike could not be convicted of homicide.

Dangerous Felony. Some jurisdictions only allow the use of deadly force to prevent the commission of felonies dangerous to human life. This appears to be the modern approach.

The Model Penal Code

Section 3.07(5) authorizes the use of force when the actor believes it is immediately necessary to prevent suicide or serious self-injury, a crime involving or threatening bodily harm, damage to property, or a breach of the peace subject to these two limitations contained in §3.05(a)(i) and (ii):

a. Other limitations on the use of force contained in the MPC apply even though the person against whom force is used is committing a crime.
b. *Deadly* force is not justified unless the actor believes: (a) there is a substantial risk the person will cause death or serious bodily injury to another if he is not prevented from committing the crime and there is no substantial risk of injuring innocent people; or (b) use of deadly force is necessary to suppress a riot or mutiny after the rioters (or mutineers) have been ordered to disperse and warned that deadly force will be used if they do not.

Examples

1. Rex is working alone at the grocery store late Friday evening. He notices Ruth, a suspicious woman who is quite small and wearing a long coat, loitering in the corner. He sees that a plainclothes police officer buying some milk has also noticed her. Suddenly, Ruth pulls a rifle out from under her long coat and, though having a great deal of trouble holding the weapon steady, points it in Rex's direction, saying, "Give me all the money in the cash register." The plainclothes officer, realizing what is going on,

moves carefully toward her. Seconds after Rex has given Ruth all the money in the register, the officer lunges at the woman, knocking the rifle from her hands. She escapes his grasp and runs out into the parking lot.

a. Rex picks up her rifle, aims it at Ruth and shoots, killing her instantly.
b. The plainclothes officer aims his service revolver at the legs of the fleeing suspect in order to wound her and fires. Unfortunately, the bullet strikes Ruth in the head, killing her instantly.

As prosecutor, would you conclude that either Rex or the officer were justified in using deadly force?

2. Several young boys are playing basketball on a Saturday afternoon in an apartment complex. Julio thinks they are making too much noise, so he takes the basketball away from them and takes it to his apartment. Eric, one of the boys, runs to his dad, Hector, and tells him what Julio did. Hector starts walking toward Julio’s apartment. Julio, seeing Hector coming, closes his front door. Rather than knocking, Hector simply opens the unlocked front door and walks into Julio’s apartment intending to discuss the incident with him. Julio shoots Hector in the chest with a double-barrel shotgun, killing him instantly as he enters the apartment. Murder or a justified killing? Your call, district attorney.

3. Juan is driving a truck loaded with immigrants on a highway near San Diego. Officers Smith and Wesson spot the truck and suspect Juan is violating immigration laws. They turn on the siren and pursue Juan. Juan speeds up. After a very dangerous chase at high speeds, Juan pulls over and stops the truck. Most of the occupants (all immigrants whom Juan was smuggling into the country) flee. Officers Smith and Wesson pull up and see Juan running away from the truck and give chase. Smith yells, “Stop! Police!” Juan ignores the warning and continues to flee. Smith finally catches Juan and tackles him. Juan is sitting passively on the ground when Officer Wesson arrives on the scene and starts beating Juan severely about the head and shoulders with his baton. Can Officer Wesson be charged with assault?

4. River is walking home from work one winter night when he sees a homeless man fussing with the door of a red Lamborghini. The man is heavily clothed in dirty winter garb, with an unkempt beard, and combat boots. River walks toward him to see what the man is doing and notices that he is attempting to pick the lock of the car with a wire. Immediately, River becomes enraged, thinking the man is trying to steal the car. Only last month, River's car was stolen and found wrecked on the side of the road. River yells at the man to stop and starts walking toward him. The man turns, looking alarmed and afraid. "That doesn't belong to you, buddy!" River shouts, closing in on the man. Before the man can respond, River punches him in the face and proceeds beat him to a pulp. Soon the police arrive, intervening. It turns out that the man, despite his disheveled appearance, is the owner of the expensive vehicle. The man had lost his keys when he dropped them on the ground and ruined his nice clothing while searching through for them in the snow for hours . . . until he gave up and decided to try to pick his own lock. River is charged with assault. Does he have a defense?

Explanations

1a. Rex is not preventing a crime. The suspect has broken off her criminal enterprise and is fleeing. Thus, Rex's privilege to use deadly force must be analyzed under the law of arrest, not crime prevention.

Under the common law, a private person can use deadly force to apprehend a fleeing felon, provided a felony was committed. Here, Rex shot at someone who had, in fact, committed a felony. Thus, his use of deadly force to apprehend the woman is justified and he may not be convicted of any crime.

The MPC does not allow a private person acting alone to use deadly force to apprehend a felon, even one who might pose a danger to life if not apprehended. Was Rex acting alone? Or can he persuade the fact finder that he was actually assisting a police officer? Did the police officer ask for assistance? Ruth was committing a felony, so that element is met. But Rex must also show (1) he believed there was no substantial risk to innocent

people; (2) the suspect committed a crime involving the threat of deadly force; and (3) the suspect is dangerous if not apprehended. He could probably prove the first two elements. But was Ruth dangerous if not apprehended? This is a close case on the facts and could go either way.

1b. Under the common law, a police officer may also use deadly force to apprehend someone he has reasonable grounds to believe committed a felony. Because he may act on "reasonable grounds," a police officer has more authority to use deadly force than a private citizen who acts at his peril that a felony has been committed.

The MPC limits police use of *deadly force* to arrest in the same manner as it limits private actors. Thus, the same analysis applies to the undercover police officer as we applied to Rex (except, of course, there is no dispute that the officer is a "peace officer" within the meaning of the MPC).

Tennessee v. Garner, 471 U.S. 1 (1985), imposes more stringent limits on the use of deadly force by police officers to arrest a fleeing suspect than the common law did. Police officers cannot use deadly force to apprehend a fleeing felon unless (1) deadly force is necessary to prevent the escape, (2) the officer has probable cause to believe that the person has committed a felony, and (3) is dangerous to human life if not apprehended.

This is a close case. Could the officer have run after the fleeing suspect and used nondeadly force to prevent her escape, or was deadly force necessary? Does the officer have probable cause to believe the suspect poses a danger to human life if not apprehended? True, Ruth used deadly force in an attempt to commit a felony, and the officer saw this with his own eyes. But the suspect could barely lift the weapon and use it effectively. Moreover, the rifle was knocked from her arms; thus, she was no longer armed. Would a reasonable police officer believe the suspect is dangerous if not apprehended immediately?

2. Julio will claim that the common law allows him to use deadly force to prevent the commission of *any* felony. Julio will argue that Hector, by entering Julio's dwelling without permission, was

committing the felony of first-degree criminal trespass and that Julio was justified in killing Hector. The prosecution will counter that the felony was complete and that Julio was no longer justified in using deadly force to *prevent* the felony. Julio will respond that he shot Hector as Hector was committing the felony by entering his apartment without permission. Interesting issue!

In those jurisdictions that have adopted the broad common law rule governing the use of deadly force to prevent the commission of *any* felony, Julio will probably prevail unless the jury concludes the felony was already over when Julio shot Hector.

Ironically, this common law rule governing the use of deadly force to prevent felonies provides broader authority than does the law of self-defense. It is unlikely that Julio would be able to succeed with a claim of self-defense because he did not reasonably fear imminent death or serious bodily harm. To take a human life merely to prevent such a minor felony seems uncivilized in modern times. Because so many felonies were capital offenses at early common law, the rule did not seem so harsh then.

If, however, the jurisdiction limits the use of deadly force to prevent the commission only of felonies that are dangerous to human life, Julio may not be privileged to use deadly force to prevent the commission of felonious trespass. Under the majority view today, Julio would not be privileged to use deadly force to prevent this nondangerous felony.

Under the MPC, Julio would not be authorized to use deadly force because he did not believe he was preventing the commission of a felony that posed serious risk to human life.

3. Under the common law, police officers may use nondeadly force when they reasonably believe it necessary to make a lawful arrest for any crime. Under the MPC and under *Tennessee v. Garner,* police may use nondeadly force to apprehend someone they reasonably suspect of committing a crime after giving a warning (if feasible).

   Here Officer Smith's tackling Juan was lawful because Smith had reason to believe that Juan had committed a crime and Juan would not surrender even after being warned to stop and surrender. Officer Wesson's beating of Juan, however, is not lawful. Juan was

already in police custody when Wesson arrived on the scene. Wesson's use of the police baton to beat Juan was probably intended as retaliation for fleeing and causing risk of death or injury during the police chase.

Officer Wesson is in deep trouble, especially if a local TV news helicopter catches the whole incident on tape and broadcasts it.

4. On one hand, River could argue that he reasonably believed that a felony was being committed by the man and thus he was justified in his use of force. Under common law, a private citizen may use up to deadly force to prevent a felony, so long as the belief that a felony is taking place is reasonable. River could argue that because the man appeared homeless — giving rise to a reasonable (but incorrect) inference that he could not own such an expensive car — and was trying to pick the lock, River's belief that he was attempting to carjack the Lamborghini was reasonable.

   However, River will be out of luck if he is in a jurisdiction that either applies strict liability or only shields citizens who attempt to prevent felonies that will cause serious bodily harm or death. In a jurisdiction that applies strict liability, even a reasonable mistake as to whether a felony is taking place is not sufficient.

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1. Elliott, Necessity, Duress and Self-Defense, [1989] Crim. L. Rev. 611; Colvin, Exculpatory Defenses in Criminal Law, 10 Ox. J. Legal Stud. 381 (1990). Arguing strongly that it is the "crisis" aspect of these defenses that distinguishes them from other claims, see William Wilson, The Filtering Role of Crisis in the Constitution of Criminal Excuses, 17 Can. J.L. & Juris. 387 (2004). Consider, also, the analog to provocation, discussed in Chapter 8.

2. One therefore might explain the opinion in *Dudley and Stephens*, infra, as arguing that taking the life of an innocent is never justified because it is never actually necessary. As Justice Cardozo put it, "Who shall know when the masts and sails of rescue may emerge out of the fog?" B. Cardozo, Law and Literature 113 (1931). Indeed, one could argue in *Dudley* itself that the four should have waited until one of them died. This argument would then turn on whether the men believed that, if they had waited, the remaining three (whoever they were) would have been so weakened as to make nourishment unavailing. If this were then the case, one could analyze it as a mistake as to a justification, discussed in the text below.

3. On the other hand, Sir James Stephen, a prominent utilitarian, argued that it is exactly when human nature is most vulnerable to the almost irresistible threat of death that the law should be least forgiving. It is precisely in such situations, he argued, that a counterbalancing motivation for not committing a crime is most needed.

4. Aristotle says that actions performed under duress are ones "under pressure which overstrains human nature and which no one could withstand." Aristotle, Nicomachean Ethics, in The Collected Works of Aristotle, §1110(A)(25) (Jonathan Barnes ed., 1984). Spanish law characterizes duress as a defense of "insurmountable fear." Daniel Varona Gómez, Duress and the

Antcolony's Ethic: Reflections on the Foundations of the Defense and Its Limits, 11 New Crim. L. Rev. 615 (2008).

5. See, e.g, *United States v. Vasquez-Landaver*, 527 F.3d 798 (9th Cir. 2008); *United States v. Ibarra-Pino*, 657 F.3d 1000 (9th Cir. 2011).

6. The English House of Lords, in two cases in the 1970s, appeared to reconsider the rule, distinguishing between those who (under threat of death) actually killed the victim and those who merely aided in the killing. See *Director of Public Prosecutions v. Lynch*, [1975] 2 W.L.R. 641 and *Abbott v. Queen*, [1977] 3 W.L.R. 462. The House ultimately concluded that this distinction was illogical, and inconsistent with history, and reinstated the old common law rule barring the use of duress to anyone involved in a killing. In 2003, the Law Commission, A New Homicide Act for England and Wales, urged that duress be allowed as a defense to murder.

7. See Westen & Mangiafico, The Criminal Defense of Duress: A Justification, Not an Excuse — and Why It Matters, 6 Buff. Crim. L. Rev. 833 (2003). But see Huigens, Duress Is Not a Justification, 2 Ohio St. J. Crim. L. 303 (2004). And see Kahan & Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269, 333-334 (1996) (duress is neither wholly a justification nor wholly an excuse).

8. Only eight states allow duress as a full exculpation in homicide cases; a few others allow the claim to mitigate the killing to manslaughter. Cara Cookson, Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont, 34 Vt. L. Rev. 415, 444 (2009).

9. Paul H. Robinson, Shima Baradaran Baughman, & Michael T Cahill, Criminal Law: Case Studies and Controversies 546 (New York: Wolters Kluwer, 4th ed., 2017).

10. It is unclear how many states recognize a necessity claim. Compare Michael H. Hoffheimer, Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability, 82 Tul. L. Rev. 1291 (2007), asserting that less than a majority of states have statutorily enacted a necessity defense, and only two of those have followed the precise wording of the Model Penal Code with Elizabeth O'Connor Tomlinson, Proof of Necessity Defense in a Criminal Case, 115 Am. Jr. Proof of Facts 3d 309 (listing at least 24 states that have codified a necessity of choice-of-evils defense, many modeled on the MPC). Other states may have judicially adopted the concept.

11. Paul H. Robinson, Shima Baradaran Baughman, & Michael T Cahill, Criminal Law: Case Studies and Controversies 547 (New York: Wolters Kluwer, 4th ed., 2017).

12. See Gardner, The Defense of Necessity and the Right to Escape from Prison: A Step Towards Incarceration Free from Sexual Assault, 49 S. Cal. L. Rev. 110 (1975).

13. In dictum, Lord Coleridge, in *Dudley*, rejected the suggestion that casting lots would change the verdict. The casting of lots is at least as old as Jonah and as "modern" as Walt Whitman, who wrote, "I observe sailors casting lots who shall be killed to preserve the lives of the rest. . . . See, hear and am silent." Whitman, I Sit and Look Out. Mark Twain wrote a short story in which a group of politicians, stranded on a snowbound train, vie for the "honor" of being voted best orator, and therefore the first to be sacrificed by their peers.

14. Re A, [2001] WLR 480, [2001] 4 All ER 961. See Bohlander, Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes — Taking Human Life and the Defense of Necessity, 2006 J. Crim. L. 147.

15. B. Cardozo, Law and Literature 113 (1931).

16. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 549 (New York: Wolters Kluwer, 4th ed., 2017).

17. See Marshall, Life or Death on a Plank — Ripstein and Kant, 2 Ohio St. J. Crim. L. 435 (2005).

18. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 550 (New York: Wolters Kluwer, 4th ed., 2017).

19. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 550 (New York: Wolters Kluwer, 4th ed., 2017).
20. *Perka v. The Queen*, 13 D.L.R. (4th) 1 (1984).
21. German Penal Code §§34 & 35 (1975); Swedish Penal Code ch. 24, §§4 & 5 (1963).
22. Extraordinarily, W.S. Gilbert (Sullivan's cohort) wrote a poem in which a mariner discloses to a listener that he is the captain and the mate and the cook and the bo'sun, and indeed, the entire crew of the *Nancy Bell*, a distressed ship, having serially committed cannibalism on each of those members. The poem was considered so upsetting that the magazine PUNCH refused to publish it, for being "too cannibalistic."
23. Of course, as every torts student knows, Trump may still have to pay the dock owner damages for the loss. See *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456 (1910).
24. Tex. Penal Code §9.22.
25. As of 2018, a total of 29 states, the District of Columbia, Guam and Puerto Rico now allow for comprehensive public medical marijuana usage. See http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. But in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court (6-3, with Stevens writing for the majority) held that even seriously ill patients who use locally grown marijuana, under a doctor's order and pursuant to state law, may nevertheless be prosecuted for violating federal law. However, the Rohrabacher-Farr amendment (also referred to as the Rohrabacher-Blumenauer amendment) is legislation that passed the house in 2014 prohibiting the Justice Department from spending federal funds to interfere with the implementation of state medical marijuana laws. See https://www.congress.gov/amendment/113th-congress/house-amendment/748. The amendment does not change the legal status of cannabis however, and must be renewed each fiscal year in order to remain in effect. It also passed in 2015, 2016 and 2017.
26. As of 2007, all states had programs for such needle exchanges or allowed individual local governments to establish such programs.
27. Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. 1527 (2005).
28. MPC §3.02.
29. MPC §3.02(2). See DeGirolami, Culpability in Creating the Choice of Evils, 60 Ala. L. Rev. 597 (2009); Robinson, Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 Va. L. Rev. 1 (1985).
30. See §2.09(4).
31. *United States v. Oakland Cannabis Buyers' Cop.*, 532 U.S. 483 (2001) See Stephen Schwartz, Is There a Common Law Necessity Defense in Federal Criminal Law? 75 U. Chi. L. Rev. 1259 (2009).
32. E.g., N.J. Stat. Ann. 2C:2-9.
33. *Comm. v. Leno*, 616 N.E.2d 453 (Mass. 1993).
34. Another possible way to confront the issues in Example 5 is to avoid them, to argue that in all cases of civil disobedience the only proper "claim" that a defendant has is to accept the consequences of his intentional conduct. He must suffer the criminal penalties in order to demonstrate the immorality of the regime or the law to which he objects. Thus, those who sit in to protest civil rights infringements, or abortions, or the proliferation of nuclear power plants could be denied the claim of necessity/justification solely as a definitional matter.
35. See Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949).
36. See Stephanie J. Hamrick, Is Looting Ever Justified?: An Analysis of Looting Laws and the Applicability of the Necessity Defense During Natural Disasters and States of Emergency, 7 Nev. L.J. 182 (2006).
37. The defendant must use proportionate force. Thus, if *A* threatens to slap *B*, *B* may not kill *A*, even if that is the only way to avoid the slap. In general, the rules regarding the use of nondeadly force parallel those for the use of deadly force. The text focuses on the use of deadly force.
38. This is most clearly the case when *A* assaults *B* with deadly force, then attempts to retreat, but

B (not seeing *A*'s attempted retreat) uses deadly force, after which *A* kills *B*. See generally Paul Robinson, Causing the Conditions of One's Own Defense, 71 Va. L. Rev. 1 (1985).

39. *Carico v. Commonwealth*, 70 Ky. 124 (1870). For careful looks at the issue of preemption, both in self-defense law and in other contexts, see A. Dershowitz, Preemption: A Knife That Cuts Both Ways (2006); Ferzan, Defending Imminence: From Battered Women to Iraq, 46 Ariz. L. Rev. 213 (2004); Wallace, Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense, 71 U. Chi. L. Rev. 1749 (2004) (listing as factors (a) probability, (b) availability of alternative recourses, and (c) magnitude of harm); Kaufman, Self-Defense, Imminence, and the Battered Woman, 10 New Crim. L. Rev. 342 (2007).

40. As one judge noted nearly six hundred years ago, "I am not bound to wait while the other fellow lands blow for perchance it will be too late." Y.B. Mich. 2 Hen. 6, f. 8, pl. 40 (1414) (Cokeyn, J.).

41. *State v. Bonano*, 284 A.2d 345 (N.J. 1971).

42. See Suk, The True Woman: Scenes from the Law of Self Defense, 31 Harv. J.L. & Gender, 237, 252-259 (2008).

43. Fla. Stat. Ann. §§776.012; 776.013; 776.031

44. See Zachary L. Weaver, Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification, 63 U. Miami L. Rev. 395, 397 (2008). See also States that Have Stand Your Ground Laws, available at http://criminal.findlaw.com/criminal-law-basics/states-that-have-stand-your-ground-laws.html (last visited December 8, 2017).

45. Denise M. Drake, The Castle Doctrine: An Expanding Right to Stand Your Ground, 39 St. Mary's L.J. 573 (2008) (Texas statute). On the other hand, Georgia's statute merely codified its common law "no retreat" rule." Daniel Merrett, Defenses to Criminal Prosecutions: Provide That Person Who Is Attacked Has No Duty to Retreat; Provide Immunity from Prosecution, 23 Ga. St. U. L. Rev. 227 (2006).

46. Elizabeth B. Meagle, Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder," 34 Am. J. Trial Advoc. 105 (2010). See *People v. Heckman*, 993 So. 2d 12004 (Fla. App. 2007): Note, Florida Legislation: The Controversy over Florida's New "Stand Your Ground" Law: Fla. Stat. §776.013 (2005), 33 Fla. St. U. L. Rev. 351, 354 (Fall 2005). The creation of §776.013 eliminated the burden of proving that the defender had a reasonable belief that deadly force was necessary by providing a conclusive presumption of such. Fla. S. Comm. on Judiciary, CS for SB 436 (2005) Staff Analysis 5-6 (Feb. 25, 2005). See also Note 43 Florida's Protection of Perons Bill, 43 Harv. J. On Legis. 199, 201 (2006), citing Florida Senate Committee Report. Accord, Weaver, supra, n. 22 at 403-404. The Texas law's presumption appears to be rebuttable. See Denise Dennis Drake, The Castle Doctrine: An Expanding Right to Stand Your Ground, 39 St. Mary's L.J. 573, 590 (2008). There is no case law on either question as of this writing.

47. This, of course, should be contrasted with the usual process when there is a motion to dismiss, which should be denied if the judge determines that there are issues of fact to be determined by the jury. Some Florida trial courts had applied that concept, but the *Dennis* decision overruled them.

48. *Dennis v. State*, 51 So. 3d 456 (Fla. 2010).

49. As one writer has put it, "[L]aw enforcement must not only establish probable cause that a crime has occurred, but also seek to rule out an affirmative defense (self-defense) to determine entitlement to immunity. . . . It goes beyond figuring out whether a crime occurred; the statute requires police to make the defendant's case and then disprove it beyond a reasonable doubt." Elizabeth B. Megale, Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder," 34 Am. J. Trial Advoc. 105, 120, n. 92 (2010).

50. See Weaver, supra n. 22 at 420. "If police rely solely on the user of force's claim and do not

perform a more thorough investigation into whether there is other evidence that the force used was unreasonable, then there is too great an opportunity for injustice."

51. Lizette Alvarez and Cara Buckley, *Zimmerman Is Acquitted In Trayvon Martin Killing*, N.Y. Times (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html.

52. Lizette Alvarez and Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. Times (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html.

53. States that Allow Concealed Carry, https://americanconcealed.com/articles/second-amendment/states-that-allow-concealed-carry (last visited January 26, 2018).

54. Note, Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute, 74 N.C. L. Rev. 214 (1996).

55. *Wanrow* is difficult to interpret. The trial court had precluded evidence that the defendant's Native American culture also militated against the use of deadly force. The Washington Supreme Court said only that it could not hold that this was an abuse of discretion. This certainly implies that it would have been within the discretion of the judge to admit such evidence. If so, then the implication is that *any* source that led the defendant (even a male) generically to abandon the use of intermediate force would be relevant and admissible.

56. *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986). One writer has warned about the "already porous, progressively more subjective" standards now being suggested. Stacy Caplow, The Gaelic Goetz: A Case of Self Defense in Ireland, 17 Cardozo J. Int'l & Comp. L. 1 (2009).

57. *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983).

58. Finkelstein, Self-Defense as a Rational Excuse, 57 U. Pitt. L. Rev. 621 (2006).

59. See, e.g., *Commonwealth v. Adjutant*, 433 Mass. 649, N.E.2d (2005).

60. See Singer, The Resurgence of Mens Rea II: Honest but Unreasonable Mistake of Fact in Self-Defense, 28 B.C. L. Rev. 459 (1987). Cf. Giles, Self-Defense and Mistake: A Way Forward, 53 Mod. L. Rev. 187 (1990); Richard Anthony Simester, Mistakes in Defence, 12 Ox. J. Leg. Stud. 295 (1991). See Annot., Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self Defense Claim, That Physical Force Is Necessary, 73 A.L.R.4th 993.

61. Be careful! Some states, such as North Carolina, use this same term differently, thereby adding confusion to any generalized discussion of this (and other topics). See, e.g., *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). A substantial number of states allow manslaughter verdicts in imperfect self-defense cases. See *People v. Mejia-Lenares*, 135 Cal. App. 4th 1437 (2006) (collecting cases). England has a fully subjective view: so long as *D* honestly believed he was under attack, he is fully exculpated so long as he did not use force that would be excessive given the force he believed (mistakenly) he was facing. UK St. 2008 c. 4, Pt. 5, sec. 76 Self defence; *R. v. Williams* (Gladstone) 3 All E.R. 411 (1984). See Caplow, The Gaelic Goetz: A Case of Self-Defense in Ireland, 17 Cardozo J. Int'l & Comp. L.1 (2009).

62. Of course here, as in tort, this can be rephrased to require the "ordinary" care used by a person with "extraordinary" skills. The point is the same, however worded.

63. Stephen Garvey, Self-Defense and the Mistaken Racist, 11 New Crim. L. Rev. 119 (2008).

64. Ariz. Rev. Stat., §13-404(B) does not allow a self-defense claim when "verbal provocation alone" triggered the violent response. But in most instances, it is not words "alone" that are involved.

65. This term will be used generically here. It includes battered women who are *not* married to the batterer at the time of the killing (although many were married to him at an earlier time) *and* battered children. It also includes battered husbands and battered partners in same-sex relationships.

66. Most cases involving battered wives involve actual confrontation and are thus governed by

“normal” self-defense rules. Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. Pa. L. Rev. 379 (1991).

67. See *State v. Norman*, 324 N.C. 253 (1989); *State v. Stewart*, 763 P.2d 572 (Kan. 1988).

68. In addition, the issue of whether the wife has to retreat has hung in the background because, unlike the aggressor who pursues the defendant to her home, *both* parties in this case have a claim not to retreat. Although as a matter of logic this should be irrelevant (since the husband has no right to use illegal force against his wife, even in the home), it appears to have bothered some courts. Moriarty, “While Dangers Gather”: The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense, 30 N.Y.U. Rev. L. & Soc. Change 1 (2005).

69. See, e.g., Cal. Evid. Code §1107 (Deering 2008). See generally, Annot., 57 A.L.R.5th 315; Annot., 58 A.L.R.5th 749.

70. The term “police” here is used generically to characterize all governmental response. For example, battered women often argue that there are few governmental shelters to which they can retreat, and that their spouses have often ignored, without penalty, court orders forbidding further contact. The statistics on these matters, while in dispute in any given jurisdiction, certainly have borne out the complaints that at least in the past, governmental response to fears, and even beatings, of wives has been slow and sporadic at best. Thus, among other changes, most governments now fund safe houses for battered wives (and their children), provide for protective orders against battering spouses, have created special units in police departments, and may require arrest and/or prosecution of the spouse even if the wife/victim refuses to testify. Moreover, it is now a federal crime for a person to cross state lines with an intent to batter another and/or to possess a firearm if he has been convicted of a battering offense, or made subject to a state restraining order. While governmental authorities now seem to be much more sensitive to such concerns, there is still good reason to believe that the system has much left to do. See Tracy Chapman’s song, “Behind the Wall.”

71. Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763 (1999). C. Gillespie, Justifiable Homicide: Battered Women, Self-Defense, and the Law (1989); Kinports, Defending Battered Women’s Self-Defense Claims, 67 Or. L. Rev. 393 (1988).

72. See E. Gondolf and E. Fisher, Battered Women as Survivors: An Alternative to Treating Learned Helplessness (1988).

73. Joshua Dressler, Battered Women and Sleeping Abusers: Some Reflections, 3 Ohio St. J. Crim. L. 1 (2006) (noting that the duress provision does not require imminence, or even a nonimminent threat).

74. F. Spinagle, The Catechism Explained 388 (1961).

75. Virtually all states place on the prosecution the burden of proof in self-defense. In *Martin v. Ohio*, 480 U.S. 228 (1987), however, the Supreme Court held that placing the burden of proof on the defendant did not violate the United States Constitution. The Court’s opinion did not consider the question of whether self-defense is “usually” a justification, as many academic analysts have suggested. Nor did the Court refer to, much less discuss, the historic difference between excused and justified self-defense. Colorado has distinguished between charges of intentional or knowing homicide (where the state must disprove self-defense) and reckless or criminally negligent homicides (where the burden may be placed on the defendant). *State v. Pickering*, 2011 WL 4014400 (Colo.)

76. See Pilsbury, The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility, 67 Ind. L.J. 719 (1992).

77. The word “complete” is important — in *State v. Anderson*, 227 Conn. 518, 631 A.2d 1149 (1993), the trial court’s omission of the word “complete” required reversal of a conviction.

78. Onder Bakirgioglu, The Right to Self-Defence in National and International Law: The Role of the Imminence Requirements, 19 Ind. Int’l & Comp. L. Rev. 1 (2009).

79. But see Garvey, Self-Defense and the Mistaken Racist, 11 New Crim. L. Rev. 199 (2008)

(arguing, provocatively, that even a defendant's racism should be admissible, and allowed as excuse, because he is, at best, guilty of being a racist (which is not a crime), or of having failed to rid himself of racism (which, thus far, is also not a crime)).

80. See *State v. James*, 867 So.2d 414 (Fla. App. 2003).

81. The literature is voluminous. See Marcia Baron, The Provocation Defense and the Nature of Justification, 43 U. Mich. J.L. Rev. 117 (2009); Vera Bergelson, Justification or Excuse? Exploring the Meaning of Provocation, 42 Tex. Tech. L. Rev. 307 (2009); Reid Griffith Fontaine, Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification, 43 U. Mich. J.L. Reform 27 (2009); Mitchell N. Berman, Ian P. Farrell, Provocation Manslaughter as Partial Justification and Partial Excuse, 52 Wm. & Mary L. Rev. 1027 (2011). See also Gabriel J. Chin, Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction, 43 U. Mich. J.L. Reform 79 (2009)

82. E.g. Susan D. Rozelle, Controlling Passion: Adultery and the Provocation Defense, 37 Rutgers L.J. 197 (2005)

83. E.g. Baron, supra, n. 48.

84. Florida, for example, presumes that a person has a reasonable fear of imminent death or great bodily injury if she "had reason to believe that an unlawful and forcible entry . . . was occurring or had occurred." Fla. Stat. Ann. §776.013 (West 2012).

85. 15 States Expand Victims' Rights on Self-Defense, N.Y. Times, Aug. 7, 2006, at A1.

86. *Tennessee v. Garner*, 471 U.S. 1 (1985).

CHAPTER 17

Defenses Based on Individual Characteristics

OVERVIEW

The criminal law generally assumes that most people have mental and psychological capabilities sufficient to hold them responsible for the crimes they commit. But the criminal law does provide limited opportunities for a defendant to avoid or lessen his responsibility by demonstrating that one or more of his important human capacities was significantly impaired when he committed the criminal act.

Defenses such as insanity, infancy, intoxication, and diminished capacity are among the more important of these opportunities. These doctrines permit a defendant to claim that it would be unjust to punish him at all or as severely as a normal person because of his unusual limitations. They are fundamentally different from defenses like self-defense or necessity, which claim the defendant did the “right thing” in the situation. The defenses discussed in this chapter acknowledge that the defendant did not do the “right thing” but that, nonetheless, other policy considerations require that he be treated differently. For this reason, many courts and scholars describe these defenses as “excuses” rather than “justifications.” Included among these excuses is the defense of entrapment.

Entrapment differs from the other excuses detailed in this chapter. The defense of entrapment is somewhat unusual. It claims that the defendant did not “really” act with the same bad attitude as a criminal. In large part, the defense of entrapment is distinguishable because its purpose is different. It is aimed at making sure the police do not “manufacture” crime by inducing the defendant to act.

INSANITY

As we saw earlier, the criminal law assumes people know the law and have free will.[1] Their abilities to know and to choose (or, put in psychological terms, their cognitive and volitional capacities) are bedrock premises of criminal responsibility and underlie all philosophical theories of punishment.[2] Utilitarians expect the threat of punishment to influence behavior because people know they will be punished for breaking the law and will decide not to in order to avoid that punishment. Retributivists punish because defendants have chosen to commit a criminal act and have thereby earned their just deserts.[3]

Consequently, the criminal law generally does not ask whether a defendant knows if his conduct violates the law or finds it difficult to obey the law. Criminal law doctrine condones cognitive or volitional failure as an excuse in only a very few and well-defined instances.

For example, mistake of law is one situation in which the law may excuse the defendant if her belief about an act's legality was incorrect. However, that is a very narrow exception and difficult to establish. The common law did not permit the defense at all, and the MPC permits it only under stringent conditions. Likewise, duress is an example of when an individual will be excused because he does not make a free choice to commit a crime. But, again, the elements for a successful duress defense are quite demanding (see Chapter 16).

Legal insanity is an excuse that also permits inquiry into a defendant's capacity to know the law or to exercise free will. It focuses on the individual's personal characteristics rather than the situation in which she acts. There are two primary insanity defenses used by various jurisdictions in the United States: the *M'Naghten* test[4] and the Model Penal Code test.[5] Depending on the applicable legal test, a person is legally insane and not responsible for a crime if, as a result of mental illness, her cognitive or volitional capacity was seriously impaired when she committed the offense.

The rationale of the insanity defense is complex. Most supporters argue that it is vital to maintaining the moral foundation of criminal law.[6] Punishing a seriously disturbed person, who through no fault of her own, is simply unable to comprehend the immorality of her conduct

or to obey the law, is pointless and cruel. These individuals can be sent to a secure mental health facility to be treated. When they are no longer mentally ill or dangerous, they will be released.

The insanity test rests on three crucial assumptions. First, mental illness (sometimes called “mental disorder”) exists and is beyond the control of the afflicted person. Second, this illness interferes with important psychological functions. Third, this impaired functioning significantly impairs an individual’s ability to understand and direct her behavior. In sum, the insanity defense assumes there is a causal connection between the existence of mental illness and the individual’s criminal conduct.

Though the insanity defense has been recognized since the early 1500s,[7] today it is extremely controversial. As we shall see, high-profile cases involving the insanity defense receive broad media coverage. Insanity acquittals often provoke public outrage and evoke powerful agitation for the reform or abolition of the defense and for changing the manner in which the insanity test is litigated.[8] Legal insanity sharply focuses the tension in the criminal law between ensuring community safety and doing justice to the individual.

The Relevance of Mental Illness in the Criminal Justice System

The mental illness of a defendant is relevant for different purposes in the criminal justice system. Before considering the insanity defense in depth, it is important to note the relevance of mental illness in several other situations.

Competency to Stand Trial

Our adversarial system of criminal justice assumes a contest between two parties: a prosecutor seeking to obtain a conviction and a self-interested defendant seeking to obtain an acquittal. Because the defendant is often the primary source of useful information for his own defense and because he has a constitutional right to make many

significant decisions in the criminal justice system, including whether to plead guilty, to conduct his own defense, or to assert an insanity defense, he must be capable of meaningful participation in his own defense. Competency to stand trial ensures that a defendant can perform these vital roles and that the system will work as intended.

Both the common law and the Constitution require that a criminal defendant be competent to stand trial.[9] The Supreme Court has stated the test of competency to stand trial as follows: "[T]he test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him."[10]

The MPC also requires that a defendant is competent before he can be tried. Section 4.04 states: "No person who as a result of mental disease or defect lacks the capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures."

In assessing the competency of a criminal defendant to stand trial, the relevant time frame is his *current* mental status at the time of trial. Mental health professionals must evaluate the defendant and determine if he suffers from a mental illness that prevents him from understanding the significance of a criminal trial, including the role of the prosecutor, judge, jury, and defense counsel, and from being helpful in his own defense.

Burden of Proof

The common law assumed a criminal defendant was competent to stand trial unless some evidence indicated he was not. Historical analysis of British and American common law does not firmly establish whether the prosecution or the defendant carried the burden of persuasion on the defendant's competency to stand trial.[11] The Supreme Court has held that it is constitutional to impose this burden of proof on a defendant by a preponderance of the evidence,[12] but not by clear and convincing evidence.[13]

Disposition of an Incompetent Defendant

If a defendant is so mentally ill that he does not understand what a criminal trial is and cannot assist in his own defense, he may not be tried. Instead, the government may release him if he is charged with a minor offense or commit him to a mental health facility where he may be treated to restore his competency to stand trial. Different states have enacted statutes specifying how long a person may be committed before he must be released if not brought to trial. However, the Constitution requires that if it becomes clear the defendant will *never* become competent to stand trial, he must be civilly committed under other commitment laws or be released.[14]

Transfer from Prison to a Psychiatric Hospital

Some convicted defendants may become mentally ill while serving their prison terms. The state may transfer them to a mental health facility for appropriate treatment, but the inmate must be provided adequate procedural due process to determine if he is presently mentally ill.[15]

Release from Confinement

A person found not guilty by reason of insanity (NGRI) may be committed to a secure mental health facility indefinitely, even beyond the maximum term for which she could have been sentenced if found guilty.[16] The rationale behind this is that, though innocent, dangerous and insane defendants present a danger and the government has a legitimate interest in protecting the public from them.[17] The government may use commitment standards and procedures that are somewhat different from those used to civilly commit mentally ill individuals. A defendant initially found NGRI must be released if she is no longer mentally ill or dangerous.[18]

Execution Pursuant to a Sentence of Death

Both the common law and the Constitution prohibit the execution of an

individual sentenced to death if, at the time the death sentence is to be carried out, he is mentally ill and does not comprehend why he will be executed. This ensures that the individual understands the retributive purpose of his execution and will not view his death as pointless and cruel. It also ensures that he can assist in any appellate proceedings.[19]

The Insanity Defense

The defense of insanity is litigated at the criminal trial. The relevant time frame for the inquiry is the defendant's mental status at the time of the alleged offense. Thus, the assessment is retrospective.

In preparing for the trial, a mental health expert representing the government and one representing the defense may evaluate the defendant. Based on a wide variety of information, such as the defendant's mental health history, his account of the crime, the facts and circumstances surrounding the crime, and psychological and medical testing, these experts will form an opinion as to the defendant's mental status at the time of the crime and whether it satisfies the elements of the insanity test used in their jurisdiction.

The *M'Naghten* Test

First announced by the House of Lords in 1843, the *M'Naghten* test excuses a defendant from criminal responsibility if, at the time of the crime, he was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[20] In modern times, the test has been slightly modified; it no longer requires a "defect of reason."[21] Under the *M'Naghten* test, a criminal defendant cannot be convicted if, as a result of mental illness at the time of the crime, he did not know what he was doing or that it was wrong.

In sum, mental illness must have virtually nullified the actor's cognitive capacity so that he was unable to exercise the moral understanding of normal persons. Without a rational ability to recognize

and evaluate the moral issues raised by his behavior, the criminal law could not influence him.

In 2006, the Supreme Court concluded that due process does not require a state to use *both* prongs of the *M'Naghten* defense.[22] Ten states, including Arizona, limit their *M'Naghten* test to people who did not know their criminal act was wrong. The Court noted that four states do not even provide an insanity defense; thus, states that do afford it have broad authority on how to define the test. One way a defendant could show he did not know his conduct was wrong under the Arizona law was to prove that he did not know what he was doing when he acted. Thus, no evidence relevant to criminal responsibility was excluded at trial.

This case shows the continuing reluctance of the Supreme Court to constitutionalize and federalize the substantive criminal law, especially when defenses are at issue. States can decide if they want to provide the defense of insanity at all, and if they do provide it, they can define it however they choose.

The Meaning of Mental Illness

Most mental health professionals have interpreted the *M'Naghten* test as requiring the defendant to be out of touch with reality and not accurately perceiving the world around him.[23] For example, he may be hearing voices that command him to commit harmful acts. Or he may be acting under a delusional belief system, such as a belief that secret agents are out to kill him or that he is a significant historical person like Christ. These impairments can make it very difficult for the defendant to comprehend reality accurately and to evaluate the appropriateness of his conduct. Consequently, individuals with these impairments may engage in inappropriate and even criminal behavior.

The Meaning of "Wrong"

A major controversy surrounding the *M'Naghten* test is whether the term "wrong" refers to awareness of an act's criminality or immortality. And, if it means "morally wrong," should the defendant's personal moral beliefs or society's morality control? A mentally ill person may

know that an act is against the law and even that society considers the act wrong. However, should he be punished for committing an act that, according to his own delusional sense of morality, is not wrong? Arguably, this person is not deserving of punishment because he did not choose to do wrong as he saw things. Nor could he be deterred if he thought he was doing the right thing.

American courts are split on this question. Some will hold a mentally ill defendant responsible if he knew his actions were against the law. This approach is consistent with the general rule that ignorance of the law is no excuse. However, it may ignore the serious and pronounced difficulty the defendant has in rationally taking that knowledge into account in deciding whether to act. Some states will excuse a defendant if, because of serious mental illness, he believed he had received a direct command from God to commit the harmful act.[24]

The Irresistible Impulse Test

A few jurisdictions added to the *M'Naghten* test by also permitting legal insanity to apply to cases in which mental illness produced an "irresistible impulse" to act. The irresistible impulse test complements the insanity defense, which addresses a defendant's cognitive ability to perceive his or her actions meaningfully (both in terms of reality and morality) by focusing on the defendant's ability to choose.[25] The irresistible impulse test is appropriate where a defendant's ability to choose is inhibited by mental illness.[26] Under this test, the defendant could achieve an insanity defense if:

> (1) by reason of the duress of such mental disease, she had so far lost the power to choose between the right and wrong, and to avoid doing the action question, as that her free agency was at the times destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.[27]

This component, which adds severe volitional impairment to the insanity test, is generally satisfied if the defendant persuades a judge or jury that she would have committed the crime even if a policeman were at her side at the time.[28] Needless to say, it is a difficult test to satisfy. Roughly 30 percent of jurisdictions have adopted the "irresistible impulse" test.[29]

The Model Penal Code Test

During the 1950s, the *M'Naghten* test was severely criticized by psychiatrists, judges, and legal scholars because it excused only those individuals who lacked cognitive ability. These experts argued that legal insanity should also excuse those who could not control their behavior. In addition, the *M'Naghten* test required *total* impairment. Finally, it did not take into account new psychiatric knowledge about human behavior.[30]

Influenced by these criticisms and the emergence of rehabilitation as the primary goal of the criminal justice system, the American Law Institute proposed a new insanity test in the Model Penal Code, sometimes called the "Substantial Capacity Test." It provides in part that

> (1) [a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.[31]

The MPC test expands the test of legal insanity significantly. First, it expands the kinds of psychological impairments that can excuse a defendant; now, *volitional* (as well as *cognitive)* disability qualifies. Second, the MPC test does not require *total* impairment; instead, if a person "lacks *substantial* capacity," he may be excused. Third, it expands the scope of relevant testimony by mental health professionals. Some psychiatrists had criticized the *M'Naghten* test because it required them to commit professional "perjury" in the courtroom in order to present evidence they considered relevant to criminal responsibility.[32]

This test is considered "modern" in that it is more in keeping with supposedly new knowledge about human behavior. Unlike *M'Naghten,* it accepts that some mentally ill individuals may understand that their conduct is wrong but cannot control their behavior. Thus, they cannot be deterred nor have they chosen to do wrong.

The Meaning of Mental Disease or Defect

The MPC does not define "mental disease or defect" other than to provide that these terms "do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." This caveat was

added to ensure that someone could not claim he was mentally ill just because he had an extensive criminal history. Therefore, it excludes psychopathic or sociopathic personalities as such disorders were generally known when the MPC was adopted.[33]

At trial, it is not for medical experts to decide whether the defendant has a mental disease or defect.[34] Rather, the term is a "legal concept," and the jury is vested with responsibility to find a mental disease or defect; however, the jury may consider a witness's medical expertise in making this decision.[35]

Expanding the Meaning of Mental Illness

Many mental health professionals have applied the MPC terms more broadly to include recently recognized diagnoses of mental disorder, particularly those that identify volitional impairment. Thus, as new mental disorders are recognized as appropriate for treatment, the MPC test permits them to be used to establish legal insanity.

The Meaning of "Appreciate"

The MPC test's use of "appreciate" rather than "know" suggests that a mere statement that the defendant has knowledge that an act is wrong will not suffice to find a defendant legally sane. Rather, the defendant must have a deeper understanding of its wrongfulness. The MPC and Commentaries said: "The use of 'appreciate' rather than 'know' conveys a broader sense of understanding than simple cognition."[36] Unfortunately, the Commentaries do not suggest just what that "broader sense" means.

The Meaning of "Substantial"

The MPC test does not require complete inability to know or to choose. Instead, a person may be legally insane if his impairment is "substantial." This determination may require the fact finder to make a value judgment in light of the evidence.

Criticisms

There are two primary objections to the MPC test. First, it may provide too much room for experts to recognize new kinds of mental illness that can excuse individuals from criminal responsibility. Second, many critics claim that mental health experts cannot determine with reasonable accuracy an individual's capacity for self-control or measure the extent of that impairment. As the American Psychiatric Association noted in recommending the adoption of a more restrictive version of the *M'Naghten* test for legal insanity, "the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."[37]

The Federal Insanity Test

Before John Hinckley tried to assassinate President Reagan in 1981, all but one federal court of appeal used the MPC test for legal insanity. In 1984, after Hinckley's subsequent acquittal by reason of insanity, Congress enacted a new insanity test that must be used in all federal prosecutions. In part 18 U.S.C. provides:

> **Section 17. Insanity Defense**
>
> (a) Affirmative Defense. It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[38]

This new insanity test is arguably tougher than even the *M'Naghten* test adopted more than a century ago. The defendant must now suffer from a "severe" mental disease or defect. The federal test also does away with the "irresistible impulse" component of the insanity defense.[39]

Reform of the Insanity Defense

Substantive Changes

Before John Hinckley's acquittal by reason of insanity, every jurisdiction in the United States provided the defense of legal insanity. All but one federal court used the MPC test of insanity, as did more than half the states.[40] However, four states — Idaho, Montana, Utah, and Kansas — have abolished the insanity defense entirely.[41] Eight other states have abandoned the MPC test and gone back to *M'Naghten* or a tougher version. Currently, a significant majority of states with an insanity defense use some form of the *M'Naghten* test rather than the MPC test.[42]

Insanity Defense Myths and Facts

The insanity defense has been under heavy attack recently. The public becomes upset when individuals who intentionally engaged in harmful conduct are acquitted by reason of insanity. There are also common misconceptions about the use and consequences of this defense.

The insanity defense is not used very often. Criminal defendants use the insanity defense in less than 1 or 2 percent of all American criminal cases. When pleaded, the defense is usually not successful; only about one-third of insanity pleas succeed. Moreover, the defense is not used only by those charged with serious crimes such as murder. Defendants found NGRI have been charged with a wide variety of crimes, including felonies and misdemeanors. Minor property crimes are common among those found NGRI. Successful NGRIs are no more dangerous than criminals; they have re-arrest rates comparable to convicted felons.[43]

There is also risk in pleading insanity. NGRI defendants who successfully plead the insanity defense often spend significantly longer time in confinement for serious offenses than defendants convicted of similar offenses.[44]

The Guilty But Mentally Ill Defense

Historical Origin

In 1975, Michigan enacted a guilty but mentally ill defense (GBMI). At least 14 states have enacted the defense since then.[45]

Jury Options

The GBMI defense permits a jury to find a defendant who raises the insanity defense “guilty but mentally ill” rather than NGRI. In a few states that have abolished the insanity defense, the defendant may still raise a GBMI defense.[46] A GBMI verdict determines that the defendant is responsible for committing the crime but also recognizes that she was mentally ill at the time.

Dispositional Consequences

The dispositional consequences of a GBMI verdict vary. Usually, a GBMI defendant may be sentenced to prison for up to the maximum authorized term. This keeps her under the control of the criminal justice system and ensures her confinement for a definite period of time. In some states, a verdict of GBMI requires a mental health evaluation of the defendant to determine if she needs treatment.

In a few states, a defendant found GBMI cannot be sentenced to imprisonment unless the trial judge specifically finds that the defendant was not suffering from a mental disease that rendered her unable to appreciate the criminality of her conduct or to conform her conduct to the requirements of law.[47] This approach effectively moves the issues raised by the insanity defense from the jury’s consideration at the guilt phase to the judge’s determination at sentencing. In other states, a GBMI verdict does not have any legal consequences for the defendant.[48] A defendant found GBMI may be sentenced to death.[49]

Arguments Pro and Con

Supporters argue that the defense enhances public safety by permitting dangerous mentally ill individuals to be confined in prison rather than prematurely released from mental health facilities. Critics claim that the GBMI defense requires the jury to consider an issue that is not relevant

to guilt, sentencing, or release. Critics also claim that the GBMI defense confuses the jury and invites compromised verdicts, thereby allowing juries to avoid the difficult question of whether a mentally ill offender should be held criminally responsible.

The Empirical Consequences of the GBMI Defense

The GBMI defense was enacted to encourage juries not to find defendants NGRI. However, the impact of the GBMI defense on the insanity defense is mixed. It has not made much difference in the frequency of NGRI verdicts in Michigan. The number of NGRI verdicts actually increased in Illinois following enactment of the GBMI defense but declined in Georgia. On balance, the GBMI defense does not seem to have achieved its goal of decreasing the number of successful insanity defenses.[50]

On the other hand, research indicates that GBMI offenders are more likely to go to prison, to receive life sentences, and to receive longer sentences for the same crime than neurotypical offenders.[51] Thus, defendants found GBMI may be treated as both "bad" and "mad."

Examples

1. Jason, who lives with his father and stepmother, is 22 years old and has suffered from schizophrenia for several years. Jason comes in and out of touch with reality. Often he does not recognize where he is, what day it is, or who is around him. In addition, he is deeply religious and reads the Bible often. He has been committed to the state psychiatric hospital on several occasions because of his irrational, delusional, and frightening behavior, though he has never actually harmed anyone.
    a. One day, he is sure he sees the Devil come into his bedroom to take away his soul. In fact, his stepmother has come into his bedroom and simply asked him to go to the store for her. Jason, fearing for his salvation, grabs the Devil by the throat and strangles him until he no longer moves. A few hours later, his father comes home and discovers his wife dead on the floor and Jason praying. Jason looks up and says, "I have just slain the

Devil." He returns to his prayers.

Presently, Jason is in touch with reality after taking psychotropic drugs. He is horrified by what he did because he loved his stepmother very much. He understands in general terms what a trial is, the role of the various participants, and what he is charged with. When asked about this event, however, Jason only remembers attacking the Devil, who was trying to take away his soul.

b. One day, Jason hears the voice of God commanding him to slay his stepmother because she is in league with the Devil and must be destroyed as evil incarnate. Even though he knows that killing a human being is against the law, Jason obeys the divine command and strangles his stepmother to death, exclaiming, "Hallelujah, Lord!" throughout the episode.

c. One day, Jason decides, based on his reading of the Bible, that his stepmother is a religious heretic who, according to his reading of scripture, must die for her sins. Jason strangles his stepmother to death.

Is the insanity defense available in any of these examples?

2. Peter Salli is 22 years old and has suffered from paranoid schizophrenia for several years. He is an extremely devout Catholic. Having believed for the past five years in a worldwide conspiracy to destroy the Catholic Church, Peter feels he is God's chosen defender of Catholicism from these conspiratorial forces. Acting more strangely than ever, Peter buys an automatic weapon and a large amount of ammunition. He also locates the addresses of several abortion clinics in his area.

   Shortly thereafter, Peter enters two separate abortion clinics, screaming, "Abortion is wrong! You should pray the rosary and stop this killing!" Peter then kills two clinic staff members and wounds several others. He flees and is apprehended while trying to avoid detection.

3. Sybil is 22 and suffers from dissociative identity disorder (DID). Physically and sexually abused by her mother during childhood, she has developed several different identities to cope with this stress. Each of these identities is a well-integrated personality (with

its own pattern of perceiving, relating to, and thinking about the environment and one's self) within the primary or "host" personality. Each personality may at various times take full control of the individual's behavior.

One of Sybil's alter egos, Bridget, is particularly troubling to Sybil's psychiatrist because Bridget is a pyromaniac, always setting fires. In fact, the psychiatrist has forced Gilda, another personality or alter ego, to stop smoking. The doctor does not want to risk that Bridget will emerge and find matches on Sybil's person. Sybil, the host personality, does not smoke.

Much to her psychiatrist's dismay, Sybil is finally charged with arson for burning down a garage. Sybil, the host personality, doesn't recall the event at all. When the government psychiatrist talks to Bridget, she admits that she set the fire on purpose. "I knew it was against the law, but it looks cool!" Bridget is not remorseful about this act, and she understands that Sybil will go to prison.

As prosecutor, you must decide whom to charge and whether you can convict Sybil for what Bridget did.

4. Daniel roamed the streets of a major city with his wife, Jean, preaching to the homeless about the necessity of joining God's new tribe on earth for eternal salvation. Daniel, diagnosed with schizophrenia, paranoid type, believed that God spoke to him directly, commanding him to take young brides and create God's new tribe here on earth. Jean, who was devoutly religious but did not suffer from any mental disorder, sincerely believed that Daniel was God's chosen instrument for salvation here on earth. Together, they forcibly and secretly took 15-year-old Sarah from her family late one night and took her to their apartment to begin God's new tribe.

5. Lucky bets on the horses. Lucky bets on the dogs. Lucky bets on football games. Lucky bets on everything — and usually loses! Lucky is a compulsive gambler, unable to stop his excessive and destructive betting.

   In fact, he has been diagnosed with "pathological gambling disorder," a disorder of impulse control recognized in 1980 by the mental health professions in the Diagnostic and Statistical Manual

of Mental Disorders published by the American Psychiatric Association. These individuals have an overwhelming urge to gamble, and their compulsive gambling disrupts their family and work life. They always think the next bet is the "grand slam" that will finally put them ahead.

Lucky knows. He owes his bookie so much that he secretly embezzled money from his job to place the grand slam bet. When he lost again, he wore a mask and robbed a bank to get money for his next bet. Arrested shortly thereafter, Lucky is charged with gambling, embezzling, and armed robbery. Can he plead insanity?

6. Amber Bates home-schooled four children, ages 2 to 7. After the birth of each child, Amber became extremely depressed. Diagnosed with a major recurrent depressive disorder, she had to be civilly committed from time to time to prevent her from committing suicide or hurting her children. Nonetheless, Rob, her husband, after each birth pressured her to have another child. For the past several years, Amber has continued to suffer from bouts of serious depression and periodically has had to be hospitalized. Amber was released again from a psychiatric hospital ten days ago at her husband's request. Despairing of her own worth as a mother and convinced that her children would be better off in heaven than in her home, Amber drowned each of her children in the bathtub. She then called the police and said, "Come quickly. I have done something terrible. I have killed my children."

7. At a young age, Eugene was diagnosed with schizophrenia. The illness caused him to have delusions that his life was in danger. On multiple occasions, his illness caused him to believe members of his family were trying to kill him, to which he responded violently to protect himself. He was eventually placed on medication, which, combined with weekly counseling, permitted him to lead a relatively normal life for years. However, the medication made him feel less like himself and he always hated it. One day, Eugene decided to stop taking his medication. Soon afterwards, Eugene is at his desk when he is overcome with the belief that his coworker, Allen, is trying to kill him. When Allen approaches Eugene at the cafeteria, Eugene is under the delusion that Allen is finally going to

dispose of him. Afraid for his life, Eugene grabs a steak knife and attacks Allen, stabbing him repeatedly in the chest. Several people pull Eugene away, but amidst the chaos, Eugene stumbles backwards, falls, and hit his head on the corner of a table, causing serious injury to his head and brain.

Explanations

1a. Jason suffers from a serious mental disorder, schizophrenia, which causes significant distortions in perception and thinking. His medical history provides persuasive evidence of his long-standing illness.

Jason is competent to stand trial. He understands the nature of the charges and has a present ability to consult with his attorney with a reasonable degree of rational understanding. Though his factual recall is obviously incorrect in some important ways, he can recall what he thought he was doing and why he was doing it. A trial judge is likely to find Jason competent to stand trial on the murder charge.

This is a REALLY DIFFICULT case! It is not clear that the government can prove the mens rea of murder beyond a reasonable doubt. After all, Jason may not have intended to kill *another human being*. Rather, as a result of mental illness, he may honestly have believed he was killing “the Devil.” Thus, the prosecutor’s only alternative may be to seek involuntary civil commitment of Jason to a mental health facility where he will be confined and receive treatment until he is no longer mentally ill or dangerous.

If the jury does find the mens rea and actus reus of murder, then whether the state has an insanity defense becomes important. Under the *M’Naghten* test, Jason would be found not guilty by reason of insanity. As a result of his mental illness, Jason did not, at the time of the crime, understand the nature of his act, let alone that it was wrong. He actually perceived himself to be slaying the Devil. Because he did not realize he was killing a human being, there was no reason for him even to consider if what he was doing might be against the law or morally wrong. On the contrary, Jason undoubtedly thought he was doing the right thing. Punishing Jason

will not deter others like him nor has he earned punishment by choosing to do a wrongful act. Jason will be confined in a secure mental health facility until he is no longer mentally ill or dangerous.

Under the MPC test, Jason would also be found NGRI. As a result of mental disease or defect, Jason lacked substantial capacity either to appreciate that his conduct was wrong or to obey the law by not killing someone he thought was the Devil. Again, most purposes of punishment would not be served by convicting Jason.

In a GBMI state, the jury could simply find Jason "guilty but mentally ill" rather than insane. This verdict establishes that the defendant committed a voluntary act with the required mens rea or culpability. In most states, the verdict has no significance. The defendant may be sentenced to prison for the maximum term and even sentenced to death for a capital offense. In a few states he will automatically be evaluated to see if he needs treatment. If he does, he may be sent to a mental health facility for treatment, and minimum sentences may be waived under certain circumstances.

Because some of these outcomes may be possible in states that have adopted the GBMI defense in many of the following examples, we will not repeat them for the rest of this section of Examples and Explanations.

1b. Though suffering from a serious mental illness, Jason knows that he is killing his stepmother. He also knows that killing another human being is against the law. In a number of jurisdictions, Jason would be held responsible for his acts and found guilty if he knew that his conduct was against the law. Some utilitarians would support this result, arguing that, because he knew he would be punished, Jason (and those like him) are deterrable. Some retributivists might argue that Jason chose to break the law and thus deserves his punishment.

Other jurisdictions permit a divine command exception and will not punish a mentally ill person who commits a harmful act thinking he is obeying a command from God. Not only is such person's ability to know in a relevant way disturbed; they may even be acting under duress. After all, one does not disobey a command from God lightly!

Some utilitarians would agree that many disturbed individuals would do what they thought God told them to do, regardless of the criminal law. Thus, it is very difficult to change their behavior even by a threat of incarceration. Some retributivists would also agree, concluding that these unfortunate individuals simply do not have the necessary ability to make a rational moral choice and, therefore, do not deserve punishment.

In the few states that have abolished the insanity defense, the only issues to be litigated at trial are the defendant's actus reus and mens rea. The defendant's mental illness might be relevant to his mens rea at the time of the crime. It will not be admitted to establish a claim of legal insanity.

1c. This is a more difficult case. In many ways, Jason is very much as he was in Examples 1a and 1b. However, in this example, his acts are based on a delusional religious belief system; he does not act because of a divine command. Some jurisdictions would permit conviction in this case, even though it is not clear whether Jason is deterrable or has made a meaningful choice to do wrong.

2. The defense will claim that, at the time of the killings, Peter suffered from a pronounced mental illness that made him perceive the world in a very distorted way. His perception of persecution may have put him in a very defensive position toward the world in general and in a state of constant vigilance.

Peter's perception of persecution, though grossly incorrect, may also have led him to believe he was acting in justifiable self-defense. This is an interesting question. Even if Peter's view of the threat was correct, he would not be justified in using deadly force because there is no threat of death or serious bodily injury. In this case, there is a good argument that Peter's response to his perception was inappropriate, even conceding his distorted view of the world. The insanity defense, however, does not require that the defendant's action be lawful if the facts were as the defendant thought them to be. His inability to gauge reality may also impair his ability to morally evaluate possible courses of action.

In a *M'Naghten* jurisdiction, the defense will assert that Peter's delusional sense of persecution, both of his church and of himself,

left him unable to know that his act was wrong. This will be a close case, but if Peter knew that his conduct was against the law, he might be convicted. A jury may conclude that he is just like a conscientious objector who chooses to place his value system above society's and to disregard the criminal law. Or it may find Peter NGRI, concluding that Peter does not possess sufficient rationality to make a meaningful moral choice.

The result would not necessarily be any clearer in a jurisdiction that used the MPC test. This test lets the defense argue that, as a result of mental disease or defect, Peter lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The word "appreciate" may require a better understanding than simply "knowing" his conduct was wrong. It may also include some genuine emotional grasp that his conduct was wrong.

The prosecutor will retort that Peter may have been mentally ill, but he knew his act was against the law. She will claim that there is no evidence of compulsion in this case: no divine command, no delusional religious beliefs that killing, even in the defense of one's church, is appropriate. Moreover, there is abundant evidence of planning, preparation, and attempt to avoid detection and apprehension. Thus, she will argue that Peter should be convicted.

3. Now this is an interesting case! If one of the personalities within an individual suffering from DID knows what she is doing and appreciates that the conduct is criminal, can the "host" or "dominant" personality be held accountable for the actions of this other "alter" personality?

One federal district court said no. The host personality must appreciate the wrongfulness of the conduct that is under the control of the alter personality. The court held that the insanity defense must be presented to the jury, even though the "acting" personality was *not* insane at the time of the offense.[52] Thus, Sybil cannot be found guilty of the crime committed by Bridget because Sybil did not know what Bridget was doing or that it was wrong. The fact that Bridget, an alter ego, did know what she was doing and that it was wrong will not impose criminal responsibility on Sybil. Criminal responsibility depends on the mental status of the host

personality.

Note, however, that some jurisdictions take a contrary approach and assess responsibility on the personality that is in control at that time[53] or refuse to recognize the defense altogether.[54] In jurisdictions that focus on the personality in control, the defense might prevail with an insanity defense if it uses the ALI test. Pyromania is a recognized impulse control disorder that substantially interferes with an individual's capacity to obey the law. Thus, "Bridget" may be successful pleading insanity.

4. In states that allow the defense of insanity, Daniel might be found not guilty by reason of insanity. At the time of the crime, he suffered from a serious mental disorder characterized by delusional beliefs and auditory hallucinations. He may honestly have believed that God had commanded him to take Sarah as his wife by whatever means necessary.

   Under the *M'Naghten* test, Daniel, as a result of his mental disorder, may not have known the nature of his act (he thought that he was simply taking a new wife) or that it was wrong (God does not command someone to do anything that is a crime or morally wrong). Under the ALI test, Daniel could also argue that he had no choice but to follow God's orders; thus, as a result of a mental disorder, he suffered from a significant volitional impairment.

   However, in states that have abolished the insanity defense, Daniel would not be allowed to raise this defense. Evidence of his mental illness would be relevant only to actus reus and mens rea. His lawyer would argue that Daniel understood his conduct to be taking a new wife. The prosecutor would disagree, pointing out that Daniel surely knew and intended to take a young girl from her family and bring her to his home without consent. That is why he did it secretly and used force. Thus, Daniel should be convicted of kidnapping.

   Jean's devout religious beliefs do not amount to a mental disorder. Thus, her "motive" for aiding and abetting Daniel would not be relevant to guilt or innocence but would be considered at sentencing.

5. In a *M'Naghten* jurisdiction, Lucky is out of luck. There is no

evidence that he did not know what he was doing when he embezzled from his employer or robbed the bank, or that he did not know that these actions were wrong. To avoid apprehension, he tried to keep these crimes secret or his identity unknown. Thus, he would not succeed with a *M'Naghten* insanity defense.

In a jurisdiction that used the MPC test, Lucky just might get lucky. He suffers from "pathological gambling disorder." This impulse-control disorder substantially interferes with Lucky's capacity to "conform his conduct to the requirements of the law." Thus, he might be successful in using the MPC insanity defense to all charges, including not only the gambling charge, which is a "symptom" of his disorder, but also the other two charges involving crimes against property and persons committed to support his compulsive conduct.[55]

Defendants with a diagnosis of compulsive gambling have successfully used the MPC insanity defense to a charge of writing bad checks[56] and to a charge of first-degree larceny.[57] Other defendants have used the defense to charges like forgery, embezzlement, and armed bank robbery.[58] Some were successful; others were not.

6. Amber suffers from a serious mental disorder manifested by recurrent episodes of severe depression. At the time of her crime, she experienced an overwhelming sense of sadness and despair. Nonetheless, in a *M'Naghten* jurisdiction, Amber would probably be convicted of four counts of murder. Though she suffered from a serious mental disorder that clearly affected her mood, she knew what she was doing (killing her children) and that it was against the law and against society's morality. (She called the police and told them that she had done "something terrible" and they should come right away.) Her attorney could argue that "know" must include an emotional appreciation of the wrongfulness of her conduct, but most courts would not agree. Thus, she would probably be convicted in *M'Naghten* states. (In 2002, a Texas jury using the *M'Naghten* test convicted Andrea Yates under very similar facts. In a retrial after a successful appeal, another jury acquitted her in 2006. Close case.)

Amber has a better chance of succeeding in an MPC jurisdiction. The defense would argue that as a result of her severe depression, clearly a mental disease or defect, Amber's capacity to *appreciate* the criminality of her conduct was *substantially impaired*. She might prevail if the jury concluded that "appreciate" included an ability to truly grasp the legal and moral significance of her conduct. On the other hand, since Amber called the police and literally confessed on the telephone, the jury may conclude that Amber understood that killing her children was against the law and social morality and that this basic comprehension is sufficient for criminal responsibility. Amber's ability to control her conduct did not appear impaired. She had to plan how to kill her children and deliberately repeat the homicidal act four times. This seems like a very deliberate choice to act. Despite the greater leeway provided by the MPC test, Amber would probably be convicted of murder.

Of course, in the four states that have abolished the insanity defense, Amber would almost certainly be convicted. Her mental disorder does not negate the voluntary act to drown each child or prevent her from acting with purpose.

Should Rob be considered an accomplice because he continually pressured her to have more children, knowing the impact that would have on Amber's mood and resulting dangerousness, and also requested Amber's discharge from the hospital? If Amber succeeded in using the insanity defense, should the criminal law hold Rob responsible as the last responsible human agent? Is it morally just to convict Amber?

7. Under the *M'Naghten* test, Eugene might argue that he did not know that his conduct was wrong. He certainly understood that he was engaging in violent, potentially lethal conduct. In fact, he meant to engage in such conduct, but he did not appreciate the wrongfulness of his conduct because he was under the delusion that his life was in danger. The criminal law has concluded that individuals are justified in defending themselves from harm. Eugene would argue that not only did not he know the wrongness of his conduct — he was convinced that he was doing the right and necessary thing, morally and legally. Thus, he would argue that he is not blameworthy for the killing because he did not know his

conduct was wrong.

Under the MPC, Eugene would likely qualify for the insanity defense. He would argue that because of his mental illness he lacked “substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct.” This argument may look very similar to Eugene’s argument under the *M’Naghten* test, but because the standard is lower under the MPC, he would likely qualify for the defense.

Do not be distracted by the fact that Eugene affirmatively chose not to take his medication. Remember, the insanity defense looks at the defendant’s state of mind at the time of the crime. At the time of the crime, Eugene’s ability to perceive the wrongness of his actions was reduced. Some prosecutors have attempted to assert that mentally ill defendants who purposely fail to take their medication should bear responsibility for any crime they commit in the meantime. The argument is that because the mentally ill defendant knows of his mental illness and how it can cause him to act criminally, he purposely puts himself in a position to commit crimes if he fails to take his medication, and, thus, he should be held accountable for his criminal conduct. While few courts have addressed this argument, it has largely been held to be unpersuasive.[59] After all, not taking medication is not illegal and the defendant is not responsible for his mental illness.

Lastly, there may be a question of whether Eugene can stand trial. During the scuffle, as people attempted to intervene and stop him from stabbing Allen, Eugene suffered brain damage. Depending on the seriousness of the damage, Eugene may not be able to stand trial because he cannot understand what is happening in the trial and the significance of a guilty verdict.

INFANCY

Young children can commit harmful acts ranging from simple mischief, like setting off a firecracker in a mailbox, to serious havoc, like killing another person. Should they be held criminally responsible for such

conduct?

The criminal law ordinarily requires more than harmful conduct before it will impose blame and punishment. In addition to requiring mens rea, the criminal law will not blame and punish individuals who are so very different from ordinary people that they are incapable of understanding the moral significance of their behavior.

Most young children do not have the intelligence, judgment, emotional maturity, and moral capacity to make the rational choices the criminal law requires. For this reason, the law does not hold very young children criminally responsible even for behavior designed to cause serious harm. This is accomplished by providing the defense of "infancy."

On the other hand, every "child" eventually becomes an "adult" and becomes responsible for his or her behavior. The criminal law has taken different approaches to determining when a child can no longer assert the infancy defense and may be held criminally accountable for his behavior.

The Common Law

At very early common law, infancy was seemingly not a defense to a criminal prosecution. Instead, a young offender usually was pardoned for his crime.[60]

Over time, the common law developed the defense of infancy, which could be used to excuse children for crimes they had committed. The common law used chronological age at the time of the crime to determine when a child could be held criminally responsible.

Under Age 7

By the early fourteenth century, a child under the age of 7 was considered not to have the capacity to commit a crime. He was considered incapable of forming the mens rea necessary to commit a crime and was also considered undeterred by the threat of punishment. The common law used a conclusive presumption — that anyone under

age 7 was incapable of committing a crime — to preclude criminal responsibility. The prosecutor could not in fact introduce evidence that a particular child under age 7 had the mental capacity and moral sensibility necessary for making rational choices sufficient to justify criminal blame and punishment.

Between Ages 7 and 14

Children between the ages of 7 and 14 were presumed incapable of committing a crime, but this presumption was not conclusive. It could be overcome by evidence establishing that the child understood what he was doing and that it was wrong. (Note the similarity of this test to the *M'Naghten* test for legal insanity. See pages 554-555, 558.) The prosecutor carried the burdens of production and persuasion, the latter probably beyond a reasonable doubt.

Over Age 14

Children over the age of 14 were considered capable of committing crimes and could be tried as adult offenders unless insane.

The Model Penal Code

The Model Penal Code takes a very different approach to the age when children can be held fully responsible under the criminal law for criminal conduct. Section 4.10 provides a defense of "immaturity." Simply put, no one under the age of 16 can be tried and convicted of a crime. Children who are age 16 or 17 at the time of the crime can be tried in the juvenile court or, if the juvenile court waives jurisdiction over the offender and consents, in an adult court. Interestingly, the MPC does not establish a juvenile court system. It simply assumes that this system exists.

Contemporary Law

Juvenile Court Jurisdiction

Where a defendant succeeds on a defense of immaturity, he or she is generally transferred to juvenile court; in most cases, it does not mean the defendant is released.[61] All states have established juvenile court systems. They handle most cases involving children who engage in conduct that would be a crime if committed by an adult. Such conduct is often defined by statute as "delinquency."[62]

Most juvenile court laws do not set a minimum age for jurisdiction over delinquency cases, though they usually set under 18 as the maximum age of their jurisdiction. Thus, unless the state follows the common law approach, children under age 7 can be adjudged delinquent.

Juvenile courts were initially concerned primarily with the welfare of the child. Rehabilitation was their primary goal. Young offenders were channeled out of the adult criminal justice system and placed in special juvenile facilities designed to change their antisocial behavior and to restore them as productive members of society. Consequently, inquiry into a child's capacity to commit a crime was not considered relevant in a juvenile court proceeding.

Currently, many state legislatures have concluded that rehabilitation is not effective and that society needs to be protected from violent juvenile offenders. They have revised their juvenile court laws to emphasize responsibility rather than rehabilitation.[63]

Juvenile court laws generally permit judges to waive or decline jurisdiction (often based on the offender's age and on the seriousness of the crime) if the best interests of the child or the public require. If the juvenile court declines to assert its jurisdiction, the defendant will be charged and tried as an adult offender in the regular criminal court system. If convicted, he will be sentenced to adult penal institutions and can serve the same sentences as adult offenders.

Criminal Responsibility

Many states follow some version of the common law. Their statutes set a minimum age of criminal responsibility, often 7 or 8 years old at the time of the crime. Children under the specified age are conclusively

presumed incapable of committing a crime.

Some states, however, do not set a minimum chronological age. Instead, they presume young children under a specified age, such as 14 in California,[64] are incapable of committing a crime unless the state can prove the child knew what she was doing and that it was wrong. This approach focuses on the "mental age" of the child rather than her physical age.

In most states, older children, often between 7 or 8 and 12, 13, or 14 (depending on the specific statute), are *presumed* incapable of committing a crime. However, the prosecutor may introduce evidence that a young defendant within this age group understood the nature of her conduct and that it was wrong. If the prosecution carries the burden of persuasion on these issues, the child is considered to have sufficient mental and moral capacity to make rational choices sufficient for criminal responsibility. Consequently, she can be tried as an adult offender, usually subject to the juvenile court's declining its jurisdiction. If convicted, she can be punished just as severely as an adult offender.

In response to the growing number of juvenile offenders committing "adult crimes" at younger ages, many legislatures have lowered or eliminated the minimum age at which a juvenile can be tried as an adult. The empirical research supports this perceived trend of more juveniles committing more violent offenses. In 1994, persons under the age of 18 accounted for 11 percent of the willful killings cleared by law enforcement authorities nationally.[65] In addition, in 1990, there was a 27 percent increase over 1980 figures for juveniles arrested for violent crimes, and three out of four juveniles used guns to commit those crimes.[66]

Determining Capacity

As noted above, a minor who is under a certain age is presumed incapable of committing a crime, unless the prosecutor admits "clear and convincing" evidence that shows otherwise.[67] The determination of whether a child had the capacity to understand the wrongness of his or her conduct is fact-specific.[68] A number of factors are generally considered in the determination:

> (1) the nature of the crime, (2) the child's age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told the victim (if any) not to tell, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could lead to detention.[69]

Particularly, the seriousness of the crime can determine whether the defendant is prosecuted as an adult. Courts are generally more likely to find that a juvenile should be tried as an adult where the crime is violent and harmful toward another person. [70]

Examples

1. Lem, aged 6, Ben, aged 7, and Jamal, aged 9, enter a neighbor's house to steal a tricycle while the parents are shopping. While in the house, Lem seeks out Matt, a 6-month-old baby, lying in a crib. He drags Matt out of the crib and drops him on the floor. He then kicks him repeatedly in the stomach and head, inflicting very serious injuries. He and the other two boys flee the house with the tricycle when they hear Gabriel, the 13-year-old babysitter, waking up from a nap in the bedroom. Gabriel sees Lem leaving Matt's bedroom.

   Matt is taken to the hospital where he is on life-support systems for several weeks. He eventually recovers but suffers serious long-term brain damage.

   The prosecutor has witnesses who will testify that Lem had threatened to kill Matt because he did not like "the way Matt's parents look at me." Gabriel will also testify that, shortly after the incident, Lem threatened to burn down Gabriel's house if she told the police about seeing Lem in Matt's house that day.

   Can the prosecutor charge Lem with aggravated assault and have him tried in an adult court? Or must Lem be tried in the juvenile justice system?

2. Haylee, who is 9 years old, breaks into an elementary school and steals food from the cafeteria. While in the school, someone sees Haylee and yells after her. Haylee immediately runs away. By the time she escapes the elementary school, the police have shown up and catch her fleeing. At first, when the police ask if she had

broken into the school, Haylee lies. When she finally admits that she did, the police ask her whether she knows what she did was wrong, to which Haylee responds with, “I guess.” Soon the police discover that the year before, Haylee had been transferred to juvenile court for breaking into someone’s home. Should Haylee be tried as an adult? What facts are most relevant?

Explanation

1. In most states Lem could not be held criminally responsible for his attack on Matt. Because he was 6 years old at the time of the crime, Lem would be conclusively presumed incapable of committing a crime. Lem could probably be tried as a juvenile offender; he could not be tried and convicted as an adult for a criminal offense.

   Some states, however, do not set any minimum age of responsibility. Instead, they permit the prosecutor to introduce evidence that the defendant knew what he was doing and that it was wrong. Here the prosecutor might be able to prove that Lem had a motive to commit the crime and that the attack on Matt was premeditated and intentional. Moreover, Gabriel’s testimony might also establish that Lem knew that his behavior was wrong. By threatening Gabriel, Lem was trying to avoid detection. This indicates that Lem knew that attacking Matt was wrong. Lem might be tried for attempted murder in the first degree, subject to the juvenile court’s jurisdiction in this state.

   Whether Ben and Jamal can be tried and convicted for burglary and theft of the tricycle will be decided by the same analysis. Because Ben was 7 and Jamal was 9 when they went into Matt’s house and stole the tricycle, it is more likely that the prosecutor would be able to try both as adults.

   If successful in persuading a court that any of these young children should be tried as adult offenders, the prosecutor would also have to persuade the court that the defendants are competent to stand trial.[71] She would have to show that they understand the charges against them and the nature of the proceedings and that they could assist their attorneys.

   Under the Model Penal Code, all of the defendants would have

a valid defense of "immaturity" because they were under 16 years old at the time of the crime. Thus, none of the defendants could be tried and convicted of any crime. Instead, they would be dealt with in the juvenile court system.

2. Depending on the state, Haylee will likely be presumed to be incapable of committing a crime; however, the prosecution may rebut the presumption by presenting evidence that she had the capacity to understand the criminality of her conduct. First, the prosecution may note that Haylee attempted to conceal her criminal conduct by fleeing and lying to the police about what she had done. At the same time, when asked about the wrongness of what she did, Haylee did not admit she understood it to be wrong. Rather, she responded with, "I guess," which may be an indicator that Haylee did not really appreciate that her conduct was wrong. Nevertheless, Haylee's past conduct of breaking into a home may show that she knew what she was doing was wrong because she had been punished for similar behavior in the past. Still, the crime at issue was not violent; she did not cause bodily harm to anyone, so the court may be more inclined to permit adjudication of the crime in juvenile court to focus on the Haylee's rehabilitation, particularly given Haylee's age. The court (or prosecutor) may also consider the reason for her theft and her family situation in determining whether there was a lack of food at home or other difficult circumstances and not bring a charge at all.

   Under the MPC, Haylee would have a defense of "immaturity" because she is under the age of 16. Her case would be handled in juvenile court.

INTOXICATION

From time immemorial most societies have enjoyed alcoholic beverages, but alcohol can change the way many people behave. It can loosen social and moral inhibitions, impair physical performance, and cloud judgment. Studies have consistently demonstrated a high correlation between alcohol consumption and crime.[72] Precisely because it may

increase the frequency of harmful behavior, alcohol consumption poses special problems for the criminal law.

Early common law treated the inebriated offender and the sober offender in the same way. Intoxication was not relevant to criminal responsibility. Late common law modified this approach, permitting evidence of intoxication to reduce criminal responsibility for some crimes.

Except for occasional experiments with prohibition, contemporary criminal law has generally recognized that alcohol is a widely used and, some might argue, socially useful beverage. Because alcohol can seriously impair mental and physical abilities, however, the criminal law must impose its behavioral expectations on those who use it. The criminal law has developed doctrines that take into account the fact of intoxication in assessing responsibility but do not completely excuse crimes committed by people simply because they were intoxicated.

The law distinguishes between “voluntary intoxication” and “involuntary intoxication.” *Voluntary intoxication* refers to individuals who know, or should know, that the substance they are consuming (e.g., alcohol, drugs, medication) is likely to produce intoxicating effects. *Involuntary intoxication* refers either to consuming such substances without realizing it or to an unanticipated and unforeseen response to these substances. This is treated differently from voluntary intoxication.

Frequently, the criminal law has struck an imperfect compromise. It holds voluntarily intoxicated offenders responsible but often allows them to be convicted and punished less severely than sober offenders. Not everyone is satisfied with this approach. The impact alcohol consumption should have on criminal responsibility remains a controversial subject.

The advent of drug use has complicated matters even more. Drugs can have many of the same consequences on behavioral controls as alcohol. In addition, some drugs are hallucinogenic and can severely distort the user’s perceptions of reality.

In the common law tradition, courts generally analogized drug use to alcohol in deciding how the criminal law should respond to drugs. Because drug use is today much less socially accepted than drinking, the criminal law is less tolerant of those who commit crimes while under the influence of drugs. In our discussion here we include intoxication caused

by alcohol, drug use, or prescription medicine unless otherwise indicated.

Intoxication as an Element

Many criminal laws forbid the use of intoxicating substances under certain circumstances. Thus, laws criminalize certain activity while intoxicated, such as driving while under the influence of alcohol or drugs. In these cases proof of intoxication is an element of the crime.[73] Hence, the prosecutor is allowed to introduce such evidence to establish a necessary element of her case. These cases are governed by ordinary criminal law rules governing proof of crime. The defendant may deny using intoxicating substances or, in the alternative, concede their use but maintain they did not adversely affect his mental or physical capabilities.

The Relevance of Voluntary Intoxication to Mens Rea or Culpability

The Common Law

Early common law held the intoxicated defendant to the same standard of responsibility as the sober defendant. Hale wrote that the intoxicated defendant "shall have no privilege by this voluntarily contracted madness, but shall have the same judgement as if he were in his right senses."[74] Indeed, some commentators stated the law viewed intoxication "as an *aggravation* of the offense, rather than an excuse for any criminal misbehavior" (emphasis added).[75] This approach was also adopted in early American common law, and evidence of intoxication was not admitted in criminal trials.

During the nineteenth century, however, English courts modified this hard-line approach and permitted defendants to introduce evidence of voluntary intoxication in criminal trials. American courts followed suit, but judges did not want intoxicated offenders to avoid all criminal responsibility so they created "specific intent" crimes and admitted this

evidence only when those crimes were charged (see Chapter 4). Such evidence was not admitted in "general intent" crimes. By the end of the nineteenth century most American jurisdictions allowed evidence of intoxication to be considered in determining whether the defendant was capable of forming the specific intent to commit the charged offense.[76] Thus, an intoxicated defendant, charged with assault with intent to commit rape, could present evidence of his intoxication to show that, because he was drunk, he thought the victim had consented and consequently he did not intend to rape her. If, however, he simply intended to assault the victim, he could not introduce evidence of intoxication to negate the elements of assault because assault is a "general intent" crime.

A defendant might argue that he would not have committed either crime if he were sober. Thus, his moral claim is that he is really being punished for getting drunk.[77] This is a plausible claim. Many people do things when intoxicated that they would not dream of doing while sober. However, the common law concluded that the act of getting drunk was itself a culpable act. By drinking, the defendant was "reckless" as to the effect alcohol might have on him.[78] Moral blameworthiness could at least be attributed to his decision to drink despite realizing the impact alcohol can have.

Limiting evidence of voluntary intoxication to specific intent offenses is criticized as arbitrary and illogical. If alcohol consumption is logically relevant to the presence or absence of mens rea (or, as we called it earlier, to "element negation," see Chapter 4), then it should be admissible *whenever* it tends to show the defendant did not act with the culpability required for commission of the charged offense. Critics point out that excluding relevant and probative evidence of mens rea simply because a court has characterized the charged offense as one of "general intent" defies both logic and experience. Indeed, this doctrine creates pressure on courts to characterize a crime as one of "general intent" precisely so that evidence of intoxication will *not* be admissible to negate an element of the charged offense. See *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370 (1969). Policy concerns may override the logic of mens rea in such cases.

Supporters point out that the "specific intent only" approach ensures that the intoxicated defendant will usually be convicted of *some* crime

because most specific intent offenses have lesser included general intent crimes. To allow evidence of intoxication in *every* case might lead to not convicting the intoxicated defendant of *any* crime. This result would be intolerable to most people. Individuals might simply put themselves beyond the reach of the criminal law by drinking and then committing their crimes while drunk. Public safety could be seriously damaged.

Thus, the common law eventually compromised. In specific intent crimes, which were usually punished more severely than general intent crimes, the intoxicated individual would "get a break." By introducing evidence of voluntary intoxication, he might reduce the seriousness of the conviction. However, he would usually not walk out of the courtroom a free man simply because he was drunk. In most cases, there was a general intent crime that covered his harmful behavior. A defendant can be charged with the (commonly lesser) general intent crime based on the theory that she acted *recklessly* when she consumed alcohol and became intoxicated.[79] Even then, this approach is flawed because many specific intent offenses do not include a lesser, general intent version.[80]

Note that under the later common law, voluntary intoxication is not a defense. Rather, it is a doctrine that permits the defendant to introduce evidence to negate an element. Thus, the prosecution does not have the burden of proving the defendant was not intoxicated nor does the defendant have the burden of proving voluntary intoxication. (Of course, the prosecutor still must prove the required mens rea.) However, the defendant will have the burden of producing evidence of voluntary intoxication if the jury is to consider it.

In *Montana v. Egelhoff*, 518 U.S. 37 (1996), the Supreme Court held that a Montana statute that precludes the jury from considering evidence of voluntary intoxication in determining the existence of *any* mental state that is an element of the charged crime does not violate due process. The Court concluded that the respondent did not carry his burden of showing that the more recent common law allowing such evidence was "so deeply rooted at the time of the Fourteenth Amendment (or perhaps has become so deeply rooted since) as to be a fundamental principle which that Amendment enshrined."[81] Fourteen other states currently take the same basic approach as Montana.

About two-thirds of states allow evidence of intoxication on specific

intent issues, like purpose or knowledge, but do not allow it on general intent issues, like recklessness or negligence. There is also an emerging trend to require that the intoxication be pronounced and that it significantly impair the defendant's faculties. Some states are more restrictive and admit evidence of intoxication only in first-degree murder cases.[82]

The Model Penal Code

The Model Penal Code provides more precise definitions than the common law did. *Intoxication* means a "disturbance of mental or physical capabilities resulting from the introduction of substances into the body." MPC §2.08(5)(a). *Self-induced intoxication* means taking substances one knows, or should know, have a tendency to cause intoxication unless taken pursuant to medical advice or when one would otherwise have a valid defense to a charge of crime, such as duress. Although the MPC does not use the term *involuntary intoxication*, it recognizes intoxication that is "not self-induced." *Pathological intoxication* means intoxication that is grossly excessive given the amount of intoxicant the actor consumed and assuming that she did not know of her special susceptibility.

Section 2.08 allows the defendant to introduce evidence of self-induced intoxication whenever it "negatives an element of the offense." Evidence of intoxication is admissible but only if the crime requires proof of intention, purpose, or knowledge. Section 2.08(2) excludes such evidence if the offense requires recklessness, and the actor is unaware of a risk he would have been aware of had he been sober. People now know the impact alcohol and other intoxicating substances can have on human behavior. Drinking or taking drugs in the face of this knowledge is treated as the moral equivalent of being reckless (and negligent) about risk.

Thus, a defendant charged with "knowingly entering the house of another" could present evidence of voluntary intoxication to establish that he thought he was breaking into his own house. Such evidence would negate the element of "knowingly entering the house of *another*" (emphasis added). The MPC is intended to be more permissive than the common law because it does not exclude such evidence in "general

intent" crimes.[83] Instead, it allows it in whenever it is logically relevant to the presence or absence of an element, except for recklessness or negligence. The MPC approach may lead to an outright acquittal, depending on the crime charged and its lesser included offenses.

The Relevance of Voluntary Intoxication to Defenses

Many defenses require the actor to perceive his situation reasonably and to respond to it reasonably. What, if any, impact should voluntary intoxication have on defenses?

Voluntary intoxication is not a defense. In fact, it often makes it more difficult for the defendant to prevail when he does present a defense because most defenses require the defendant to act as a reasonable person would in the situation. Several examples will illustrate this point. In many jurisdictions, a defendant who claims self-defense must *reasonably* believe that he is in imminent danger of death or serious bodily injury (see Chapter 16). If voluntary intoxication causes him to perceive such a threat when a sober individual would not, then the defense will fail. Likewise, voluntary manslaughter requires that the defendant acted in the "heat of passion upon *reasonable* provocation" (see Chapter 8). As already noted, the act of becoming voluntarily intoxicated is itself considered a kind of recklessness and negligence. Finally, the mistake of fact defense usually requires the defendant's mistake to be reasonable. Voluntary intoxication usually precludes this. Thus, voluntary intoxication undercuts most defenses because, in most cases, the defendant is held to the standard of a reasonable *sober* person.

There may be some limited exceptions. In jurisdictions that consider "fighting words" to be legally sufficient provocation (see Chapter 8), voluntary intoxication may be relevant if the provoking words relate to the defendant's condition of being intoxicated. For example, using words that demean an alcoholic and his condition of voluntary intoxication might be considered legally adequate provocation in some jurisdictions. (Even here, however, the defendant may be held to the standard of the reasonable alcoholic.) Generally speaking, however, the

criminal law will hold an actor who is voluntarily intoxicated to the standard of the reasonably sober person when the actor asserts a defense.

Involuntary Intoxication

People can also become involuntarily intoxicated. Thus, someone may drink a beverage without having the slightest inkling that it contains alcohol or other inebriating substances. Or someone may have an extremely unusual reaction to prescription drugs. The common law permitted defendants to introduce such evidence as an affirmative defense, regardless of the crime charged, to establish the defense of involuntary intoxication.[84]

The defendant must prove that he unwittingly consumed an intoxicating substance (or that he took medication and had a highly unlikely and unforeseeable reaction) that produced the same symptoms as required by the *M'Naghten* test of legal insanity; that is, he did not know what he was doing or that it was wrong. (See pages 554-555, 558.) Since the defendant was not at fault in becoming intoxicated, fairness requires the defendant to have an opportunity to present this defense in *all* cases. Because involuntary intoxication can be used for all criminal charges, it is broader than voluntary intoxication, which is generally limited to specific intent offenses at common law or to negate intent, purpose, or knowledge under the MPC.

However, the involuntary intoxication defense requires the defendant to establish that the involuntary intoxication caused very severe impairment of his cognitive ability. This seems unfair considering that the defendant was not to blame for consuming the substance or for not appreciating the risk of such an unusual reaction.

The Relevance of Voluntary Intoxication to Actus Reus

Defendants have also sought to introduce evidence of intoxication to

show that they did not commit a voluntary act. The common law excluded this evidence because voluntary intoxication does not undermine the exercise of free will in human behavior.

It is possible, however, to argue that a defendant was so intoxicated that he could not have physically performed an act. Thus, if the defendant had passed out from drinking too much alcohol or using drugs, he could introduce this evidence to show that he could not have committed the voluntary act of the charged offense.

Alcoholism and Insanity

The Supreme Court has held that the constitutional prohibition on cruel and unusual punishment contained in the Eighth Amendment does not preclude punishing someone for appearing drunk in a public place even though the defendant claimed that, as an alcoholic, he could not control his drinking. *Powell v. Texas*, 392 U.S. 514 (1968). Though the Court has implicitly held that one cannot be punished for having the *status* of a chronic alcoholic, *Robinson v. California*, 370 U.S. 660 (1962), the Court concluded in *Powell* that a defendant may still be punished for *conduct* involving the use of alcohol if the behavior is not a symptom of the disease of alcoholism.

The Court noted that there was no medical consensus on whether alcoholism compelled a person to drink, thereby destroying an individual's free will. It therefore refused to strike down such laws as unconstitutional, preferring instead to permit states to experiment.

In some cases, heavy consumption of alcohol over an extended period can actually cause organic brain damage. A person suffering from this condition may actually raise the defense of legal insanity if his condition has become "settled" or "fixed" and results in the same cognitive or volitional impairments recognized by the insanity test used in the jurisdiction. Many such individuals suffer from delirium tremens, which can cause hallucinations. These individuals may raise the defense of insanity even if they were not intoxicated at the time of the crime.

It is not unusual to find that mental illness causally contributes to voluntary intoxication. Many people have the dual diagnosis of "mentally ill" and "substance abuser." The defenses of legal insanity and

voluntary intoxication are available to these individuals in appropriate cases.

The Model Penal Code permits a defendant to introduce evidence of intoxication that is "not self-induced" (e.g., someone spiked the nonalcoholic punch) or "pathological" (e.g., someone has a very unusual reaction to prescribed medication for the first time) to negate recklessness. MPC §2.08(2).

It also permits the defendant to introduce this evidence to establish the special affirmative defense provided in §2.08(4). The defendant must prove by a preponderance of the evidence that, as a result of either involuntary or pathological intoxication, she lacked substantial capacity either to appreciate the criminality of her act or to conform her conduct to the requirements of law. (This is almost the same as the MPC's insanity defense but here is caused by intoxication that is "pathological" or is not "self-induced" rather than by a mental disease or defect. See pages 560-562. It is not an insanity defense because §2.08(3) states that "intoxication does not, in itself, constitute mental disease within the meaning of §4.01.") If established, this affirmative defense will excuse the defendant from criminal responsibility even if the prosecutor has proven all the elements of the charged offense.

Examples

1. Bo is drinking heavily in a bar. He meets Amanda, who also is drinking, and they dance and drink for several hours. Bo asks her if she would like to come to his apartment. Amanda readily agrees. At his apartment, they have several more drinks. Then . . .
   a. Bo undresses Amanda and is about to have intercourse with her when she begins screaming. An off-duty police officer, hearing her cry, bursts through the door and arrests Bo for assault with intent to rape Amanda.
   b. Same facts except the police officer does not hear Amanda's scream until after Bo has sexual intercourse with Amanda. He bursts through the door and arrests Bo for rape.
   c. Bo starts to undress Amanda, intending to have sex with her. Sometime later, he is awakened by an off-duty police officer who bursts through the door and arrests him for attempting to

rape Amanda. Bo denies he ever initiated sexual intercourse, claiming he had passed out.

Can Bo introduce evidence of his voluntary intoxication?

2a. Paul is at a party. Melissa offers him a Cuban cigar, which was illegally imported into this country. Unknown to Paul, it contains marijuana. After smoking the cigar, Paul becomes giddy and hyperactive. He goes to the adjacent house and opens the door without knocking. He then goes inside and invites “everyone to come join the party.” The neighbors, an elderly couple, are not amused. They have Paul arrested and charged with criminal trespass.

2b. Paul is at a party. Melissa offers him a marijuana cigarette, which, unknown to Paul, contains “angel dust,” a hallucinogenic drug. Paul smokes the cigarette and has a psychotic-like reaction. Believing Melissa to be Satan, he savagely beats her. He is arrested and charged with aggravated assault. Can he introduce evidence that he smoked a marijuana cigarette or that it was laced with “angel dust”?

3. Brent and Teresa had been dating for over a year, but had recently broken up. Extremely upset, Brent followed Teresa in his car after seeing her at a club. Brent had been drinking and was driving aggressively. Afraid, Teresa returned to the club to get help. She told the doorman about Brent. He came outside and asked Brent to leave. Brent drove straight into Teresa’s car. He was charged with DUI and with the intentional destruction of another’s property. Brent argues that he was unable to control his vehicle because of his intoxication and that his collision with Teresa’s car was an accident. Does it matter if this state does not allow evidence of voluntary intoxication to negate a mens rea element?

4. Tubby drank incessantly. He was always being arrested for being drunk in public and other nuisance crimes. Finally, Tubby drank so much, he suffered organic brain damage. He began to hallucinate and to imagine terrible creatures were attacking him while he slept. One evening, a police officer tried to wake him after he had fallen asleep on a park bench; Tubby attacked the police officer,

mistaking him for a giant spider. Can Tubby introduce this evidence in his trial on third-degree assault for attacking a police officer while in the performance of his duties?

5. Serena is a regular drinker. Recently, she was prescribed medication for a minor ailment. Her doctor informs her that on very rare occasions the medication can react badly with alcohol and that she needs to be careful. Serena is not worried, however, and when she gets home from work one day, she takes her medication and then makes herself a cocktail and kicks back like she always does at the end of the work day. After two drinks, Serena becomes extremely intoxicated — much more than usual after two drinks. She ventures out, so inebriated that she forgets to put on her shoes, and proceeds to run amok: She batters a man on the street, vandalizes both public and private property, and sets a residence on fire. In the morning, she wakes up in jail with no recollection of what she did or how she got there. It turns out that the medication and the alcohol reacted badly, causing her to become far more intoxicated than usual. Serena is charged with arson (specific intent), criminal battery (general intent), and criminal mischief (specific intent). Does she have a defense to any of the charges?

Explanations

1a. Because assault with intent to rape is a "specific intent" crime, later common law would allow Bo to introduce evidence of his drinking throughout the evening to prove that he thought Amanda had consented to have sexual intercourse with him. If believed by the jury, Bo would not be convicted of "assault with intent to rape" because his voluntary intoxication prevented him from acting with the "specific intent" of raping Amanda. He did *not intend* to have sexual intercourse with a female *without her consent.* He might be charged with a lesser included offense like assault, however, if it is one of "general intent."

The MPC would also allow Bo to present evidence of his voluntary intoxication that is logically relevant to negating any element of the charged offense. Thus, if the statute required that he "*knowingly* have intercourse without consent," evidence of his

voluntary intoxication may negate "knowingly." If, however, a rape statute in this jurisdiction made *recklessness* with regard to consent an element of the crime, the MPC would not permit Bo to use this evidence to negate such recklessness. By drinking so much, Bo decreased his ability to evaluate the risk that Amanda did not consent. The act of drinking is sufficiently blameworthy to satisfy the requirement of recklessness in the rape statute.

1b. In many jurisdictions, rape is considered a "general intent" offense. Thus, the common law would not allow Bo to introduce evidence of voluntary intoxication to negate the mens rea of rape. This may seem unfair to the defendant (though not to the victim who has been subjected to unwanted intercourse). After all, Bo's mental state was the same in both Examples 1a and 1b. Though influenced by the alcohol, Bo thought Amanda had consented to sexual intercourse in both cases. Yet, simply because a court has decided rape is a "general intent" crime, he will not be allowed to introduce evidence of voluntary intoxication in Example 1b.

Under the MPC, however, the analysis is essentially the same as in Example 1a. Bo could introduce this evidence if it tended to negate any element of the charged crime. If the rape statute requires the defendant to have acted intentionally, purposefully, or knowingly with respect to any element, then this evidence is admissible.

1c. Bo could introduce this evidence under both the common law and the MPC. The common law would let him argue that the evidence established he could not physically have performed the act of intercourse because he was unconscious. Likewise, the MPC would let him introduce the evidence because it is relevant to an "element" of the charged offense. He would argue that he could not, and therefore did not, engage in the voluntary act of sexual intercourse.

2a. Though Paul probably knew that the cigar was illegally imported, he had no idea it contained a prohibited substance or drug that could cause intoxication. If this were a case of *voluntary* intoxication, under the common law, Paul could use this evidence if he was charged with a specific intent crime. Criminal trespass,

however, is probably not a specific intent offense. Thus, he probably cannot use this evidence to negate the element of "knowingly" entering another's house without permission. The MPC would allow Paul to use evidence of self-induced intoxication to negate any element of a charged offense. Paul would argue that this evidence negates that he "knowingly" (a) entered another person's house (b) without permission.

Unfortunately, this is more likely a case of *involuntary* intoxication. Paul had no idea he was consuming a substance that would, or was likely, to cause intoxication. To succeed under common law, he would have to prove that the marijuana made him unable to know what he was doing or that it was wrong. Paul probably did know that he was going into someone else's house and that he did not have permission. Thus, he would probably be convicted. Only if he was "really out of it" would he be acquitted. This is unjust. Ironically, Paul is probably in a better position under *voluntary* intoxication than he is under *involuntary* intoxication.

2b. This is a complicated case because it is, arguably, a case of both voluntary and involuntary intoxication. Paul knew that he was committing a crime — that is, smoking marijuana, an intoxicating substance. However, he did not know, or have reason to know, that he was consuming a far more powerful mind- and mood-altering drug. (See Chapter 6 for a review of the "greater crime" doctrine.)

Under common law, Paul can use evidence of *voluntary* intoxication to negate specific intent. If the aggravated assault statute proscribes an assault "with intent to inflict serious bodily injury" or other such language, it is probably a specific intent offense. If the court considered this a case of voluntary intoxication, Paul would be allowed to introduce this evidence to negate that specific intent. However, he could not use it in a general intent crime. Most likely, a general intent charge of assault is a lesser included offense, and the jury could not consider this evidence on that charge.

Under the MPC, however, Paul can use evidence of self-induced intoxication to negate any element of the charged crime except recklessness and negligence. Because a jury could consider this evidence on all charges, Paul has a better chance under the

MPC than under common law.

If the jury considers this a case of *involuntary* intoxication, then both under common law and the MPC Paul can introduce this evidence to show that he did not know what he was doing (he thought he was attacking the devil) or that it was wrong. Thus, he may be better using involuntary intoxication as a defense. The problem, of course, is that the judge may rule that this is a case of voluntary intoxication because Paul knew that he was taking an illegal substance; therefore, he consciously disregarded the risk that he might consume another illegal substance.

3. If the state follows the Montana approach and excludes evidence of voluntary intoxication in determining mens rea or a culpability element (unless intoxication is an element of the charged offense), it will be much easier for the prosecutor to persuade a jury that Brent did, in fact, *intend* to damage Teresa's car. The jury could likely infer "intent" based on his conduct leading up to the incident without being allowed to consider the effect of his alcohol consumption on his judgment, perception, and motor skills. If, however, the state allows evidence of voluntary intoxication on the issue of mens rea or culpability, then Brent could introduce evidence of his drinking just prior to the event to support his claim that his collision with Teresa's car was accidental rather than intentional.

   Ironically, even in a state that excludes evidence of voluntary intoxication on mens rea or culpability, the prosecutor could introduce evidence of Brent's drinking to prove that he was "driving under the influence" of alcohol because intoxication is an element of the charged offense. Thus, in some states, the prosecution could use this evidence to convict Brent of the DUI charge, while preventing Brent from using the same evidence to negate the mens rea of the intentional destruction of property charge. Is this consistent, logical, or fair?

4. Under the common law, Tubby could not introduce this evidence to negate mens rea because he is not charged with a specific intent offense. Because Tubby's extended drinking has actually caused organic brain damage with resulting impairment in his cognitive

abilities, he may now also have a defense of legal insanity. Depending on the jurisdiction, this might be a successful defense, though it may also lead to mandatory commitment in a mental health facility if the jury finds Tubby "not guilty by reason of insanity."

Under the MPC, Tubby could introduce this evidence if it negatives an element of the crime, including recklessness. Because Tubby was intoxicated and did not know that he was attacking a police officer while in the performance of his duties, this evidence should be admissible and Tubby may be acquitted.

However, the MPC would not allow Tubby to raise the special affirmative defense of intoxication because his intoxication was self-induced. He may still have a defense of legal insanity if experts conclude that organic brain damage caused by excessive alcohol consumption is properly characterized as a "mental disease or defect" as used in the MPC.

5. Many jurisdictions permit evidence of intoxication on specific intent crimes. If Serena is allowed to admit evidence of her intoxication, she may have a defense against the arson and criminal mischief charges because both crimes require intent. If she can plead the defense successfully, she may get the arson charge down-graded to "reckless burning" or some other lesser crime. Similarly, she may get her criminal mischief down-graded or dismissed. However, Serena will not be able to introduce evidence of her intoxication on her criminal battery charge. Battery, unlike the other two charges, is a general intent crime and most jurisdictions do not permit evidence of intoxication against general intent crimes.

   Under the MPC, Serena might argue that her response to the drugs was *pathological* — that she became excessively and unexpectedly intoxicated because of the reaction between the medication and the alcohol. She could argue that she generally did not become so intoxicated after two drinks, something she knew from years of regular drinking. The prosecution might argue that she cannot succeed on this defense because she was aware of her "special susceptibility" since her doctor had informed her that her medication and alcohol can react badly sometimes.

Under the MPC, Serena should be permitted to admit evidence of her intoxication to negate the mental state requirement for arson and criminal mischief because both crimes require intent. The MPC does not permit such evidence for crimes that require less than intent or knowledge to commit, so it is unlikely the evidence would be admitted on her charge of criminal battery.

Serena might even try to assert involuntary intoxication as an affirmative defense. While she was aware that the medication can react badly with alcohol, as her doctor informed her, such reactions are rare. She could argue that the rare reaction between the alcohol and the medication severely impaired her cognitive abilities. This may not work because the extreme intoxication was not a response she had to the medication alone, but one the medication and the alcohol caused together, a possibility Serena's doctor had raised.

DIMINISHED CAPACITY

The diminished capacity defense permits a more subjective inquiry into the blameworthiness of criminal defendants. The difference between the diminished capacity defense and the insanity defense is subtle at first, but can be readily distinguished by looking at the source of the disability.[85] The insanity defense is restricted to circumstances where the defendant's ability to perceive reality in a meaningful way or appreciate the wrongness of the criminal conduct is, depending on the test, totally or substantially reduced because of a mental disease or illness.[86] The diminished capacity defense, on the other hand, is not so restricted; it applies where the defendant's abilities are reduced by various conditions, such as immaturity, subnormality, duress, and more.[87]

The fact finder can take into account certain characteristics of the defendant, including mental illness and voluntary intoxication, in determining the degree of the defendant's culpability and the crime committed. Courts initially developed this doctrine to ameliorate the restrictiveness of the *M'Naghten* insanity test, to avoid imposing capital punishment on mentally disabled killers, and to individualize judgments

of criminal responsibility.[88] Today, the diminished capacity defense also includes voluntary intoxication in many jurisdictions. See pages 582-587.

Despite its relatively young history, the diminished capacity defense has proven confusing and troublesome to courts, scholars, and law students alike. There are several reasons for this chaos. First, there are several versions of the defense, each with a fundamentally different conceptual basis. Second, it is not really a “defense” at all. Third, it may permit a broad range of expert testimony to be introduced that, arguably, is not relevant in determining criminal responsibility under the law.

There have been three primary versions of this defense: (1) the “diminished responsibility” defense used in Great Britain, (2) the “diminished capacity” defense used in California, and (3) the “diminished capacity” defense that is still used in a number of jurisdictions today.

A Brief History

The best way to understand this confusing area is to look at each of these versions.

The British Version: Diminished Responsibility

The diminished responsibility defense was a creation of Scottish common law. See *HM Advocate v. Dingwall*, [1867] J.C. 466 (Scot). In 1957, Great Britain enacted the defense in statutory form when capital punishment was still used in premeditated murder cases.[89] Under the British statute, a defendant could introduce evidence showing that, though not legally insane, he was nevertheless mentally disturbed at the time of the offense. If the jury found that mental retardation or mental illness “substantially impaired the [defendant’s] mental responsibility” for the crime, it could find him guilty of manslaughter, even though the prosecution had actually proved all the elements of premeditated murder. Thus, mentally ill defendants who were not legally insane could avoid execution. In essence, the British doctrine of “diminished

responsibility" is really a form of mitigation in punishment.

The California Version

The California Supreme Court developed its version of the diminished capacity defense primarily to soften the perceived rigidity of the *M'Naghten* insanity defense. If a mentally ill offender was not found insane, he was held fully accountable under the criminal law. Initially, the California Court simply permitted mental health experts to testify that the defendant could not entertain the mens rea required for conviction of the charged offense. Thus, expert testimony could now be admitted not only on the insanity defense but also on the material element of mens rea or culpability. *People v. Wells*, 33 Cal. 2d 330 (1949).

In subsequent cases, however, the California Supreme Court began to use the diminished capacity defense to *redefine* the mens rea elements of homicide in California law. In *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959 (1964), the court reversed the first-degree murder conviction of a schizophrenic 15-year-old who had planned and deliberately carried out the killing of his mother so he could realize his sexual fantasies of murder and rape. The court agreed that the jury had properly rejected his insanity defense under the *M'Naghten* test because the defendant knew that his acts were against the law. Nonetheless, it held that the undisputed psychiatric evidence admitted at trial established that the defendant was mentally ill and, consequently, could not "maturely and meaningfully reflect upon the gravity" of his contemplated act. The court thereupon reduced his conviction to second-degree murder.[90]

Later, in *People v. Conley*, 64 Cal. 2d 310 (1964), the court decided that the defendant was entitled to introduce evidence of mental illness and voluntary intoxication to reduce a charge of first-degree murder to voluntary manslaughter. The court concluded that such evidence could establish that the defendant did not act with "malice aforethought" because he was "unable to comprehend his duty to govern his actions in accord with the duty imposed by law."[91]

Then, in 1974, the California court held in *People v. Poddar* that "[i]f it is established that an accused, because he suffered a diminished capacity, was . . . *unable to act in accordance with the law,*" he could

only be convicted of manslaughter.[92] Under California's ever-expanding diminished capacity defense, volitional as well as cognitive impairment caused by mental illness could negate the "malice aforethought" necessary for conviction of both first- and second-degree murder.

The California Supreme Court had used the diminished capacity defense to infuse new meaning into the statutory elements for homicide. In so doing, the court had effectively created a "mini-insanity" defense.[93] It had changed homicide's mens rea terms from simple descriptive terms describing planning, motive, and manner of killing into normative terms requiring both subjective awareness of wrongdoing and ability to obey the law.[94]

The California approach enhanced the law's ability to take into account an individual's characteristics in assessing criminal responsibility. On the other hand, it was virtually impossible to apply the doctrine consistently and with an even hand. Juries returned different verdicts in very similar cases.[95] Moreover, once psychiatric evidence was admitted to negate mens rea in homicide cases, it became virtually impossible to exclude it in cases involving other crimes, such as burglary.[96] If a defendant was successful in using the diminished capacity defense, he would be convicted of a lesser included offense or, if there was no such offense, he would simply be acquitted and released immediately. Initially, the California Supreme Court tried to limit the availability of the defense to "specific intent" offenses,[97] but the court eventually permitted the defense to introduce any evidence seemingly relevant to the presence or absence of statutory mens rea.[98]

In 1978 Dan White, a former member of the San Francisco Board of Supervisors, shot and killed Mayor George Moscone, the popular mayor of the city, and Harvey Milk, a member of the Board of Supervisors, in what appeared to be a well-planned and calculated murder motivated by revenge. He was charged with two counts of first-degree murder. The jury accepted White's diminished capacity defense that, because of mental problems aggravated by erratic junk food binges, he did not act with "malice aforethought." It convicted him of voluntary manslaughter. The public was outraged. The verdict in this high-profile case, in which the claim of diminished capacity was quickly dubbed the "Twinkie defense" by its critics, provided strong impetus for changing the law. In

1982, the defense of diminished capacity was abolished by public initiative.[99]

The Rule of Evidence Approach

The simplest version of the diminished capacity defense is best understood as a rule of evidence. If evidence logically tends to establish or negate a mental state of the charged offense, then either the defendant or the government may introduce such evidence for the jury's consideration on the issue of mens rea. If a defendant's mental illness prevented him from acting with "premeditation," "intent," or whatever mental state is required for conviction, he may introduce expert testimony to establish that he did not have the necessary mens rea.

The form in which expert testimony is permitted can vary. In most jurisdictions, the expert will simply express an opinion as to whether the defendant, because of his mental disability, did or did not have the mental state of the charged offense. In other jurisdictions, the expert will testify as to whether the defendant, because of his mental disability, had the "capacity" to form this mental state. Note that, regardless of the form or content of the experts' opinions, the prosecution still must prove beyond a reasonable doubt that the defendant had the mens rea required for conviction.

Thus, a person suffering from an emotional disorder such as bipolar disorder (manic depression) that causes him to become very exhilarated and excited might introduce psychiatric testimony that he did not have the mental state necessary for fraud or theft, though he paid for a large purchase of clothing with a worthless check. The expert might conclude that, because of his mental condition, the defendant believed he had the money in his account or could readily get it in time to cover the check.

The rule of evidence version of the diminished capacity defense is still widely used in many jurisdictions. There is a strong argument that a defendant has a constitutional right to use evidence of mental illness if it is relevant to the presence or absence of mens rea.[100] Most federal courts and about half the states permit the use of psychiatric evidence when it is relevant to the mens rea of a specific intent crime. Some jurisdictions permit its use whenever it is relevant to the mens rea of *any* crime,[101] while others limit it to first-degree murder.

Increasingly, however, jurisdictions are concluding that psychiatric evidence should not be admitted on mens rea at all either because it is not relevant to mens rea or because it is too confusing for juries.[102] In these jurisdictions, mental illness that does not satisfy legal insanity will not be considered in determining guilt or innocence.

In *Clark v. Arizona*,[103] the Supreme Court approved this limitation. In this case, the defendant sought to have a mental health expert testify that, in his opinion, Clark's paranoid schizophrenia rendered him unable to recognize that he was shooting a police officer rather than an alien disguised as a police officer. The Court determined that states can, without violating due process, exclude the testimony of mental health experts concluding that, as a result of a mental disorder, the defendant did not have a particular state of mind or the capacity to form mens rea. Thus, states are free to exclude opinion testimony of experts at trial on mens rea issues while admitting it on the defense of insanity, if they so choose.

The *Clark* case can be cogently criticized for denying the defendant the opportunity to present extremely relevant and reliable evidence (after all, it was admissible in the same case on the insanity defense) that could negate a material element of the charged crime. This evidentiary limitation effectively reduces the government's practical burden of proving that the defendant *knew* he was killing a police officer and, thus, intentionally killed a police officer acting in the line of duty.

The Model Penal Code

The Model Penal Code essentially adopts the rule of evidence approach and permits psychiatric evidence to be admitted whenever it is relevant to negate the mens rea of *any* crime: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." §4.02(1).

The MPC concluded that psychiatric evidence should be treated just like any other relevant evidence. It argued: "If states of mind are accorded legal significance, psychiatric evidence should be admissible whenever relevant to prove or disprove their existence to the same extent as any other relevant evidence." If a defendant successfully used

the diminished capacity defense to be acquitted of all charges, public safety could be adequately protected by involuntary civil commitment. See Model Penal Code and Commentaries, Comment to §4.02, at 219 (1985).

Summary

The diminished capacity defense today is best understood as a rule of evidence rather than a "defense." The doctrine simply permits courts to admit the opinions of mental health experts as evidence in a criminal trial if their testimony is relevant to the presence or absence of mens rea. Though such evidence has the potential for confusing juries and creating expert domination, it can, in appropriate cases, be relevant and useful to the jury's task of determining whether the defendant acted with the culpability required for conviction.

Examples

1. Hector suffers from paranoid schizophrenia. A uniformed officer in a patrol car with lights flashing responded to a neighbor's complaint about extremely loud music coming from Hector's house. As the officer approached his house, Hector opened the door, carefully looked at him, and shot him dead. The prosecutor has charged Hector with intentionally killing a police officer in the line of duty, and is seeking the death penalty.

   The defense seeks to introduce the evidence of a psychiatrist, who would testify that Hector suffers from a mental disorder known as "paranoid schizophrenia." He is extremely delusional, often hearing strange voices in his head threatening him with death, and believing that aliens (sometimes disguised as government agents) are trying to kill him. In the expert's opinion, Hector, as a result of this mental disorder, was psychotic or out of touch with reality at the time of the shooting, and believed that the victim was an alien disguised as a police officer who was about to kill him. The expert would also testify that paranoid schizophrenics often

believe erroneously that they are being persecuted and even threatened with death. People diagnosed with this illness can also suffer from auditory hallucinations (hearing voices when no one is present), and they often play music very loudly to drown out these disturbing voices.

The prosecutor argues that, based on a state statute, this testimony should be admitted only to establish legal insanity, and not to prove that, because of his illness, Hector did not intend to kill a police officer. He would, in turn, present a witness who heard Hector say that he wanted to kill police officers. The prosecutor intends to argue that Hector played his music loudly to lure a police officer to his home so he could kill him.

2a. Bertrand's wife, Lisu, recently divorced Bertrand, but he desperately wants to get back together. He has called her numerous times to no avail.

Bertrand suffers from a minimal brain dysfunction with an associated explosive personality disorder with paranoid features. Minimal brain dysfunction is a biochemical imbalance in the brain that prevents Bertrand from maintaining control over his emotional impulses, especially in stressful situations.

Finally, Bertrand visits Lisu at home, unannounced. She is very upset at Bertrand for his untimely visit and does not want to let him into the house, but finally does. She tries to explain that they cannot reconcile but he will not listen. When the discussion turns into a verbal fight, she tells him he is a "loser, incompetent, and sexually inadequate." Bertrand becomes extremely angry and upset. He grabs Lisu and indescribable violence ensues. Lisu ends up in the hospital in critical condition for her injuries. The prosecution charges Bertrand with attempted murder.

Bertrand seeks to present the testimony of a psychiatrist concerning his mental condition. The prosecution moves to exclude the evidence as irrelevant to legal insanity or to any other issue. Should the trial judge permit Bertrand to present the testimony of the psychiatrist, and, if so, on what issues?

2b. Same facts as above, except Bertrand's rage is caused by his drunkenness and not a minimal brain dysfunction. What about

evidence he was drunk?

3. Linky has been plagued with a “passive aggressive personality” and “passive dependent personality” all his life. His dominating and overbearing father has humiliated and embarrassed him since he was a young boy. Finally, at 18, Linky decides to strike back. He pays Frank $500 to steal his father’s pride and joy, a 1969 Ford Mustang. Linky calls Frank and meets with him to tell Frank dates and times when his father will be out of town. He also tells Frank to make sure he (Linky) isn’t connected to the theft.

   Linky, empowered and liberated by this assertive act, feels fantastic after paying Frank to steal his father’s car. He has finally “fought back.” Linky moves out of his father’s house, gets a job, and finds a girlfriend. Deciding that he no longer wants his father’s car stolen, he telephones Frank and calls it off. Unfortunately, Frank is an undercover police officer. Linky is arrested and charged with conspiracy to steal a car. (This jurisdiction has adopted the unilateral approach to conspiracy. See Chapter 14.)

   A defense psychiatrist testifies at trial that, at the conscious level, Linky wanted his father’s car to be stolen. But what Linky *really intended* at a subconscious level was to finally take control of his life by acting forcefully against the single overpowering person who had been controlling and dominating his life. The expert concludes that, in reality, Linky did not intend to commit a crime; he *intended* to obtain his psychological freedom by the act of hiring Frank to commit a crime. The fact that Linky called off the job after obtaining that psychological freedom is proof of what he “actually” intended.

4. Cedric is a veteran. While serving in the Marines, he was sent to Afghanistan where he witnessed combat. He has been out of the Corp. for five years but suffers from PTSD due to the experiences he had overseas. Cedric’s PTSD manifests in numerous symptoms, including insomnia, headaches, depression, and extreme irritability. Cedric sees Dr. Fenton, a therapist who specializes in treating veterans with PTSD, to help with his mental illness. Despite having no family or partner, Cedric has established a good support system in place. His best friend Rodger joined the Marines with him.

Cedric gave Rodger a key to his apartment. One night, Rodger has been drinking and instead of driving home, he goes to Cedric's apartment close by, as he has done on multiple occasions before, even though Cedric has asked him not to due to Cedric's sleeping troubles. Before he goes to sleep on Cedric's couch, Rodger goes through the bedroom where Cedric is sleeping to get to the bathroom. Unknown to Rodger, Cedric is awake after not sleeping for two days. Enraged and deliriously sleep-deprived, Cedric hurriedly reaches for the revolver in the drawer of the nightstand next to his bed and shoots Rodger twice in the head. Cedric is charged with first degree murder. Cedric's lawyer moves to have expert testimony admitted to show that Cedric suffered from a mental illness. Analyze the issues.

Explanations

1. This example is based on the *Clark* case. The defense will argue that this evidence is crucial to assessing the defendant's criminal responsibility. It proves that, at the time of the shooting, his client suffered from a serious mental disorder that rendered him unable to know what he was doing or that it was wrong. Thus, under either the *M'Naghten* or MPC insanity tests, Hector should be acquitted.

   Counsel would also contend that expert psychiatric testimony on the defendant's mental illness and its impact on how he perceived the world around him is crucial to determining whether Hector acted with the intent to kill a *police officer*. The expert would testify that Hector was playing loud music to drown out these terrifying "voices," not to lure a police officer to his death. His professional opinion is that Hector perceived the approaching figure to be an alien disguised as a public official who was out to get him; thus, he did not *know* he was killing a police officer. Rather, he believed he was defending his life against an extraterrestrial attacker. This evidence is logically relevant to the presence or absence of mens rea and, without it, an innocent man may be convicted and executed.

   The prosecutor would argue that, under state law, this evidence is admissible on the insanity defense, but the defendant should not

be allowed to use the "diminished capacity" defense. Otherwise, the defense will get "two bites at the apple"; that is, he will have two separate theories, legal insanity *and* lack of mens rea, available to avoid conviction and punishment for this very serious crime. The prosecutor will also claim that the opinion testimony of mental health experts can be very confusing to jurors and invite inappropriate sympathy for the defendant.

How should courts deal with this type of situation? Note that if a state does not have an insanity defense and does not allow the diminished capacity "rule of evidence" defense, expert evidence like this might be admissible only at sentencing. Even then, it might not have any impact.

2a. Although Bertrand suffers from a "minimal brain dysfunction," it probably does not prevent Bertrand from understanding the nature or quality of his act or that it was wrong to strike Lisu. Under the *M'Naghten* test, he is not legally insane.

If the jurisdiction used the MPC insanity test, Bertrand could introduce the testimony of a mental health expert to show that, at the time of the offense, he suffered from a mental disorder that substantially impaired his ability to conform his conduct to the requirements of the law. If the jury agreed, he might be found not guilty by reason of insanity.

But if the jury does not find Bertrand legally insane, it might still be able to consider the expert testimony in determining whether Bertrand intended to kill Lisu, if the jurisdiction permits the diminished capacity defense.

Because of the very serious injuries Lisu suffered, a jury might reasonably conclude that Bertrand intended to kill her rather than assault her. Thus, a jury might well convict him of attempted murder. Under the diminished capacity defense, Bertrand could introduce the expert's testimony on the mens rea. He would argue that his minimal brain dysfunction prevented him from forming the necessary mens rea for attempted murder; that is, he did not intend to cause Lisu's death. Rather, he was angry, stressed, and upset, and his brain dysfunction made him unable to control his impulses of rage. The testimony would help the jury understand that, though he may have intended seriously to hurt Lisu, Bertrand did not want

to kill her. Even if this defense is successful on the mens rea element of attempted murder, Bertrand will not be fully acquitted. Rather, he will probably be convicted of a less serious crime, such as assault.

This example also illustrates that evidence concerning the defendant's mental condition at the time of the crime may be admissible on *both* the defense of legal insanity (particularly if the MPC test is used) and on the presence of mens rea if a diminished capacity defense is allowed.

2b. Whether Bertrand might be convicted of assault rather than attempted murder depends on whether this jurisdiction permits voluntary intoxication to support a diminished capacity defense.

Many states permit the defendant to present evidence of voluntary intoxication to negate intent or knowledge. (Usually, evidence of voluntary intoxication is *not* permitted to negate recklessness because voluntarily becoming intoxicated is itself considered a reckless act.) In such a jurisdiction Bertrand might be convicted of assault rather than attempted murder if a jury decided that, because he was drunk, Bertrand did not intend to kill Lisu.

Other jurisdictions hold voluntarily intoxicated individuals to the same standard of criminal responsibility as sober actors and do not permit a defendant to introduce evidence that he was drunk at the time of the crime. These jurisdictions assume everyone knows that excessive use of alcohol impairs perception, judgment, and volitional faculties. Bertrand must also be aware that alcohol will affect his mental faculties. The criminal law attributes moral responsibility to the defendant because he voluntarily drank and became intoxicated. As one court noted: "The moral blameworthiness lies in the voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others."[104]

Therefore, some jurisdictions do not permit defendants under a diminished capacity defense to introduce evidence of voluntary intoxication to negate mens rea.

3. Although Linky suffers from diagnosed psychological disorders, he will not prevail on his insanity defense whether under the

M'Naghten or the MPC tests. He understood the nature of the act and that it was wrong. He also could control his behavior as evidenced by his first hiring and then firing Frank to do the job.

Linky would also argue "diminished capacity" if this jurisdiction permitted this defense. He would claim that his mental illness prevented him from forming the mental state required for conviction of conspiracy or solicitation. However, mens rea elements like "intent" and "knowledge" do not require awareness of the unconscious influences that may influence a person's decision to commit a crime. They only require awareness of the behavior that constitutes the crime. Put simply, these criminal mental states only require that a person is aware of *what* he is doing; they do not require awareness of *why* he may be doing it.

Linky has acted purposefully. He *intended* to come to an agreement with Frank and *intended* that Frank would commit a crime. Expert evidence on possible psychological reasons why Linky undertook this criminal enterprise will not be admitted under a diminished capacity defense because it is not relevant to the presence or absence of the mental states required for either conspiracy or solicitation. The defense may be able to use this evidence at sentencing.

4. Cedric's defense attorney will argue that expert testimony on Cedric's PTSD should be admitted because it relates to Cedric's state of mind. Specifically, the defense will argue that the expert testimony will show that Cedric did not act with premeditation due to his PTSD. The evidence will not likely show that Cedric is blameless — after all, Cedric knew that killing Rodger was wrong, but because of his PTSD and lack of sleep, he was not in a position to control his anger. The expert testimony will show the emotional distress Cedric was suffering and possibly demonstrate that he should be charged with a lesser homicide, one mitigated by "extreme emotional distress."

   If the jurisdiction uses the MPC for the insanity defense, the prosecution may make an argument similar to the one made in the Example 1.

ENTRAPMENT

Not all crimes are reported to the police, particularly so-called victimless crimes. These crimes usually involve willing participants engaged in activities that appear to involve no “real” victim. Prostitution, selling or purchasing drugs, and gambling are common examples of “victimless” crimes.

Because there is usually no incentive for the participants to notify the police when they commit these crimes, effective law enforcement often requires undercover police to engage in these criminal acts in order to detect and apprehend those who do. Thus, a police officer may buy crack cocaine to gather sufficient evidence to charge and convict drug dealers. (In many cases involving this defense, the police officer will also pretend to be an accomplice to the defendant’s crime.[105])

This active involvement by the police in what would otherwise clearly be criminal activity if there were no legal authority for them to do so raises difficult public policy questions. After all, the role of the police is to detect and solve crime, not to manufacture crimes or to induce law-abiding citizens to commit them.

Entrapment is a defense that attempts to strike the balance between proper police undercover investigation and detection of crime and inappropriate police instigation of crime. The defense focuses both on (1) what the police did and (2) the defendant’s predisposition to commit the crime. Because of this dual concern, the entrapment defense may be seen either as a rule of criminal procedure regulating police investigatory conduct or as a denial of true mens rea, claiming that the defendant did not really choose to commit a crime.

In some jurisdictions, entrapment is an affirmative defense. The defendant must produce evidence supporting the defense and must also establish it by a preponderance of the evidence. In other jurisdictions, the defendant has the burden of production, but the prosecution must establish that the defendant was predisposed to commit the offense. If successful, a claim of entrapment bars prosecution.

The History of the Entrapment Defense

American common law generally did not provide the defense of entrapment. As long as the defendant committed a crime, the police role in providing him with the opportunity to do so was simply not relevant to his guilt or innocence.

The primary impetus for recognizing this defense came from federal courts. In 1932, the Supreme Court held in *Sorrells v. United States*, 287 U.S. 435, that the defendant should have been allowed to use the entrapment defense to a charge of selling liquor to a government agent in violation of Prohibition laws. After refusing to sell liquor to the agent despite several requests, the defendant finally relented and sold him some. The Court defined the defense as follows: "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."

One argument offered to support the entrapment defense is that of presumed legislative intent. Simply put, the legislature did not intend that enforcement of a criminal law should ensnare otherwise innocent people caught by abusive government inducement. (Of course, the legislature was silent on this question. This is really a classic judicial stratagem for reaching a decision based primarily on public policy grounds.)

Another rationale supporting the defense is to deter improper police conduct. The government will not be allowed to obtain a conviction if police investigatory methods improperly fabricated criminal activity. Thus, the defense is available only if law enforcement officials or their agents, such as informants, *induce* — rather than merely enable — the defendant to commit the crime.

The defense to federal crimes announced in *Sorrells* is not required by the Constitution. Nonetheless, today all states have adopted this defense, though there are two different approaches.

The Defense Today

The Subjective Approach

This two-step approach, used by federal courts and a majority of state courts, focuses both on the *nature of the police conduct* and on the

defendant's predisposition to commit the offense.

The first requirement is that government conduct induce the commission of the crime. There is, as the *Sorrells* Court noted, a fine line between merely affording an opportunity to an "unwary criminal" to commit a crime and actually inducing an "unwary innocent" to commit a crime.[106]

The second requirement is that the defendant not be predisposed to commit the crime. This element shifts the analysis from what the government did to the character and criminal history of the defendant. It allows the government to argue that it was simply providing an opportunity for an "unwary criminal" to take the bait and commit a crime.

In *Jacobson v. United States*, 503 U.S. 540 (1992), the Supreme Court limited somewhat the targeting of criminal suspects. The defendant had subscribed to a magazine featuring nude pictures of boys under 18. After passage of a federal law criminalizing child pornography, the defendant stopped ordering the magazine. Government agents continually sent him material in the mail, including literature from a fake lobbying organization advocating repeal of the law and criticizing government censorship. The agents then sent him information for ordering magazines with titles indicating that they contained erotic pictures of young boys. Twenty-six months after receiving these various mailings, the defendant placed one order for two magazines that contained pornographic materials. After a controlled delivery to the defendant, he was arrested, charged, and convicted of possessing child pornography.

The majority held that the government had to establish that the defendant was predisposed to commit the crime and that *his predisposition was not the product of government conduct.* Because the defendant had never before ordered illegal material, the Court ruled as a matter of law that the government had not established this element.

Because the subjective approach allows the government to show that the defendant was predisposed to commit the crime, some critics believe this approach encourages the police to declare "open season" on individuals with a criminal history and to use any imaginable inducement to obtain their conviction. Using the defense is risky. A defendant's past criminal history usually becomes fair game, running the

substantial risk of prejudicing the jury. And, in some states, the defendant must admit committing the crime.

The Objective Approach

This approach, adopted in the MPC and a minority of states, looks primarily at what the government did and assesses what its impact would be on normally law-abiding people. It is less concerned with the criminal attitude or history of a particular offender than with controlling police conduct.

Under §2.13 of the MPC, the defense is established if a government agent, in order to gather evidence that a crime has been committed, "induces or encourages another person to engage [in an offense] either by (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." The defendant's predispositions are irrelevant.

Because the MPC defense is phrased in general terms, its application depends on the facts of each case. Frequent entreaties over time despite initial refusals, continuing appeals to sympathy, promises of excessive profit, or other persuasive stratagems that might induce law-abiding individuals to commit a crime will support the claim. However, the MPC does not permit the claim of entrapment when "causing or threatening bodily injury" to someone other than the individual inducing the crime is an element of the charged offense.

Because the objective approach to entrapment focuses on whether the police behavior was appropriate and not on the characteristics of the offender, this formulation can be seen as an attempt to oversee how the police do their job. By creating disincentives for inappropriate police conduct, this substantive criminal law defense serves the same general purpose as a rule of criminal procedure, much like the *Miranda* exclusionary rule.

Critics of the objective approach point out that it is good police work to target individuals with a known criminal history. And, they add, it may take special inducements to persuade an experienced and savvy criminal to commit a crime.

Due Process

So far the Supreme Court has not held that constitutional due process requires the defense of entrapment. Thus, both Congress and other jurisdictions are free to do away with the defense.

Nonetheless, several Supreme Court cases suggest that, at least in cases involving outrageous police conduct, the Constitution *may* require the availability of the defense.[107] In *Russell*, a government informer had supplied the defendant with an indispensable ingredient (which was extremely difficult to obtain) for manufacturing methamphetamine ("speed"). In *Hampton*, the defendant obtained heroin from a government informant and then sold it to a government agent. Though the Court upheld convictions in both cases, five Justices indicated that, in some cases of extremely outrageous government conduct, due process might require dismissal of the charges.[108]

Examples

1a. Linda, a prostitute, sees a man and asks if he needs a date. The man replies that Linda looks nice, but that he does not know if he can afford a date. Linda says that "a date" would only cost him $50, and they can have sex in her car parked just around the corner. The man then arrests Linda for soliciting prostitution.

1b. Linda occasionally engages in prostitution to raise extra money. One night she is walking home from a party, not intending to engage in prostitution. A man approaches Linda and asks her how much it would cost to have sex. Linda says she is not interested and keeps walking. The man follows her and says he will give her $1,000 to have sex with him in his car. Linda stops, thinks about it for a minute, and then agrees. The man, an undercover police officer, arrests her for prostitution.

Will the defense of entrapment succeed in either of these cases?

2. Lucy, a heroin addict, recently lost her job. Though she has saved some money, it is quickly running out. Unable to find her normal dealer, Lucy approaches someone else and asks to buy some

heroin. The man says he will give her twice the amount if she will have sex with him in his car. Knowing she is short of cash and needs a fix, Lucy agrees. He arrests her for prostitution. Entrapment?

3. Al, a local car dealer, has a reputation for selling cars at a good price but only if buyers pay in cash or cash equivalents. Maria tells Al that she is a commodities broker and wants to buy a Jeep Cherokee for cash. Al tells her she can pay $9,000 in cash and the rest in bank checks under $10,000 each. He says she must obtain cashier checks just under $10,000 from several banks for the rest of the purchase price because, under federal law, the bank must report any transaction involving $10,000 or more to the government. Maria agrees.

   A few days later she shows up to purchase the Cherokee with $9,000 cash and two bank checks for $9,900 each. Before signing the papers, Maria tells Al, “I really appreciate your telling me how to do this deal. In fact, I am a drug dealer and it’s been difficult for me to spend the money I earn from dealing drugs without tipping off the cops.” Al smiles and says, “Where there’s a will, there is a way.” After all the papers are signed, Maria arrests Al, who is subsequently charged with conducting a financial transaction involving property represented to be the proceeds of an illegal activity. Guilty or entrapped?

4a. An FBI agent poses as an Arab sheik and twice attempts to bribe a congressman. Both times the congressman rejects the bribes, telling the sheik, “This is neither the time nor the place. I need a place I am certain is secure so that I can’t be caught.” The “sheik” then arranges to meet the congressman in a hotel room. After the congressman hugs the sheik to make sure he is not “wired” with electronic recording devices, the congressman accepts the bribe. The event is recorded by secret cameras and microphones in the hotel room. Does the congressman have an entrapment claim?

4b. An FBI agent poses as an Arab sheik and twice attempts to bribe a congressman. Both times the congressman rejects the bribes, asserting they are unethical and illegal. On the third attempt the

sheik says, “I fully understand your reasons for not accepting money. Will you accept a new kidney from my country for your daughter who, I understand, will die soon unless she gets a new kidney?” The congressman, knowing this is true, reluctantly agrees. The “sheik” then arrests him for accepting a bribe.

5. Shawn occasionally sells small amounts of marijuana to his friends. Oprah, a recent acquaintance, approaches Shawn and asks to buy some marijuana to relieve the pain she feels from her cancer. Shawn sympathizes with her plight, but declines. A week later, Oprah pleads with Shawn, saying her pain is getting worse. Again, Shawn declines. Finally, Oprah calls him on the telephone and, pretending to scream in agony, says: “For the love of God, sell me some marijuana. You’re my only hope to ease my pain.” Shawn, feeling sorry for Oprah and her suffering, sells her some marijuana. The next day he is arrested. Any defense?

6. Rashwana, pretending to be a battered wife whose husband often beats her severely, approaches Msumo and describes a powerful but false history of the violence she has suffered. Rashwana begs Msumo to kill her husband and offers him $4,000 for the job. Msumo, feeling sorry for Rashwana, agrees. He is then arrested for conspiracy to commit murder. Entrapment?

7. José, who had converted to Islam and had been homeless for several months, downloaded instructions on how to make a pipe bomb from a jihadist website at the public library, and showed it to Alex, who was a paid undercover informant for the NYC Police Department. José said: “Making this would be a great idea.” Alex said: “Right and we could use it to bomb a police station or a police car.” He told José that he would find him an apartment where José could live and they could build the bomb together. José moved into an apartment Alex found for him. Alex then bought the necessary pipes, wires, and ignition device. José stole nails for shrapnel and dynamite from a construction site and started to build the bomb. José told Alex he did not have the drill bits necessary to drill the pipes and complete the bomb. Alex obtained them and together they completed the bomb. Alex then left. An hour later, the police arrested José in his apartment and charged him with plotting to

build and detonate a bomb in New York.

8. Pete's Trucking has suffered great losses from thefts of valuable cargoes carried on his trucks. Seeking to find out the culprit, Pete arranges to have some particularly valuable fur coats shipped on each of his drivers' trucks. José's truck is selected to be the first. The furs are not packed in secure boxes nor is there any of the usual paperwork. José has never stolen a dime in his life. In fact, another driver has actually done all the stealing. José, who earns the minimum wage and has a family of seven children to support, suddenly realizes the golden opportunity that has presented itself. He stops the truck en route and off-loads the furs into his house, intending to sell them and use the money to support his poor family. Pete, who has been following José's truck from a distance, sees this and calls the police immediately. José is arrested and charged with theft. The prosecution moves to bar the defense of entrapment. Why?

9. Brenna is under investigation by the FBI. Her recent behavior suggests that she may be a terrorist threat to the United States but she has never committed any terrorists acts in the past and her criminal history is minimal. Thornton, an undercover informant for the FBI, contacts Brenna and eventually establishes a friendship with her. One day, Brenna says to Thornton, "I want to do something to America." But when Thornton asks for details, Brenna refuses to elaborate. The following week, Thornton brings up what Brenna said, urging her to explain what she meant, but Brenna again declines. Thornton then suggests that Brenna meant she wanted to detonate a bomb downtown, to which Brenna smiles but does not confirm. Over the next couple of months, Agent Thornton attempts to get Brenna to speak about what she meant, making remarks about how he has had thoughts of setting off bombs or "shooting up" the local mall. Brenna eventually becomes more comfortable and actively engages in the conversation, imagining out loud how she would carry out mass violence against the United States.

    Finally, Thornton asks, "So why don't you do it?" Brenna responds that she cannot. She explains that she needs to focus on

getting money because she has been having financial difficulty lately. Thornton tells her that he could get her some money, as much as $100,000, if she can pull off the attack. Brenna agrees. Together, they start planning the attack. Thornton helps Brenna stake out a busy train terminal to target and provides her with fake bombs.

Over months of planning, Brenna develops a romantic affinity for Thornton, which Thornton uses against her. At one point, Brenna expresses doubt about carrying out the plan, but Thornton insists that it is the right thing to do. Brenna is unmoved by Agent Thornton at first, so he reminds her why she is doing this and how rewarding this will be. He tells her about the money and how they could use the money to "get away" together. Thornton then seduces Brenna, after which Brenna agrees to go through with the attack.

The day the attack is supposed to take place, Brenna loads up her car with the fake bombs and drives to Thornton's apartment where the FBI is waiting to arrest her. Brenna is charged with several counts of conspiracy and attempt to use weapons of mass destruction against the United States. Does she have an entrapment defense?

Explanations

1a. This is an easy case. The defendant approached the officer, initiated the discussion about sex for money, and provided a place for the crime. The government did no more than present an opportunity for an "unwary criminal" to commit a crime. In a jurisdiction adopting the subjective approach, the government could produce evidence of Linda's predisposition to commit prostitution, including any past convictions. Even under the objective approach, which focuses on the impact police conduct would have on a law-abiding citizen, Linda would not be successful. Ordinary citizens would not agree to commit an act of prostitution under these circumstances, so there is no risk of trapping the "unwary innocent."

1b. This case is more complicated. Under both the subjective and objective approaches the police instigated this criminal activity. The subjective approach looks not only at what the police did but

also at the defendant's predisposition. Linda's past prostitution supports the prosecution's claim that she was predisposed to criminal activity even before the police embarked on the undercover operation. Here, the police officer initiated the criminal venture by asking Linda if she would commit prostitution.

Yet, Linda initially declined the offer. Only when the undercover officer offered an extremely high payment did she agree. Even though the police conduct was extremely persuasive, a judge or jury could well find that Linda was predisposed to commit prostitution if the price was right, thereby defeating her claim of entrapment.

The objective approach looks at what the police did and determines whether a reasonable law-abiding person would commit the offense. Under this approach, Linda's past history of occasional prostitution would be irrelevant. Nonetheless, even an offer of $1,000 would probably not induce a law-abiding citizen to commit an act of prostitution. Linda might well be convicted even under the objective approach.

2. Poor Lucy. Of course, she initiated a drug purchase; there can be little doubt about her predisposition to commit that crime. However, it was the undercover police officer who instigated prostitution. Moreover, he took advantage of her addiction. He offered her heroin — something she needed more desperately than money.

   There is no evidence indicating that Lucy was predisposed to commit prostitution. More important, the undercover officer used her addiction as a powerful incentive to induce Lucy to agree to prostitution. Is this appropriate police conduct? Is it entrapment? You decide.

3. Al would argue that the government entrapped him by providing an indispensable element of the offense — the cash and the checks represented to be proceeds of illegal activity. He would also point out that the government agent went beyond mere investigation to gather evidence of ongoing crime. She actually created the crime for which Al was charged.

   The prosecution would argue that Al clearly was predisposed to

commit other crimes because he actually told the undercover agent how to avoid the $10,000 cash transaction-reporting law. All the police did was to provide Al an opportunity to commit a different crime; they offered no unusual incentives. In a similar case, the court concluded that the police conduct was not improper and dismissed the defense. See *United States v. Jensen*, 69 F.3d 906 (8th Cir. 1995).

4a. No. He rejected the bribe the first two times only because he was concerned about getting caught. When he thought he was in a secure place (even checking out the sheik for electronic surveillance), he readily accepted the bribe. Although the government did offer the bribe several times, this conduct did not reach a "level of outrageousness" sufficient to bar the prosecution. See *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983).

4b. Wow! The congressman has not previously indicated a predisposition to accept the bribe. In fact, he actually refused it on ethical grounds (though he did not inform law enforcement officials of the attempted bribe). But an offer to save the life of your child is a very powerful inducement to which even a law-abiding citizen might succumb. You are the judge. How are you going to rule, using either test?

5. Clearly, the government initiated this criminal act by having Oprah ask Shawn to sell her marijuana. And there appears to be some basis for targeting Shawn as someone who occasionally sells marijuana. However, Shawn consistently refused to sell marijuana to Oprah until she appeared to be in extremely severe pain. The jury might well conclude that such callous manipulation of human sympathy for another suffering human being is so outrageous that the charge should be dismissed.

6. The government initiated this criminal activity and there is no basis for thinking Msumo was predisposed to commit a crime. Moreover, any law-abiding citizen might be sympathetic to Rashwana's plight. Nonetheless, entrapment is not available if an element of the charge includes inflicting bodily injury on another. Thus, Msumo cannot use this defense.

7. The prosecutor would argue that the idea to commit a crime originated with José. He downloaded the instructions and told Alex that it would be a great idea to build a pipe bomb. The defense of entrapment should not prevail because José was the "first mover" in this case by obtaining the plan from a jihadist website. He also obtained some of the vital bomb parts himself, clearly indicating his criminal intentions. Thus, under the subjective view, José had a prior personal desire to build a pipe bomb, an object which has no lawful use, and he acted on that pre-existing disposition by downloading plans and telling Alex what a great idea building the bomb was. The police conduct here was perfectly proper. Alex merely wanted to determine if José was willing to implement his plan and commit a crime.

   Defense counsel would point out that José simply downloaded plans to build a bomb, but he took no steps to build one. In fact, his client was homeless and in no position to do so. Thus, José did not have a subjective predisposition to actually build and detonate a bomb nor is there anything in his record that indicates he did. Moreover, the paid police informant here clearly has the motivation to manufacture crime and he did. Alex found José an apartment, provided most of the essential materials to build it, including drill bits critical to its completion, and actually suggested the targets. In sum, the police conduct in this case was outrageous and should not be encouraged.

   Under the MPC's objective approach, the prosecutor would argue that the police conduct here would not have persuaded a law-abiding citizen to commit this crime. She would note that Alex did not suggest the idea to José, but simply followed up on José's criminal inclination to build a pipe bomb that has no lawful use. Alex did not tell José the venture was legal nor did he have to use *any* persuasion — let alone persuasion that might create a substantial risk of inducing an otherwise law-abiding citizen to commit this crime — to induce José to undertake this venture. Alex should be commended for preventing a terrible crime that could have killed and maimed many innocent people.

   Defense counsel would counter that a paid police agent turned a simple thought into action by doing everything necessary to

persuade and enable José to commit a crime. José had absolutely no intention — let alone capacity or competence — to commit this crime until Alex actually planted the idea in his head and then went to extraordinary lengths to start implementing it. Thus, Alex actually caused José, an otherwise unwilling criminal, to commit a crime and did almost everything necessary for him to do so.

It might be a tougher defense for José under the MPC. Though the MPC focuses primarily on the government conduct, José would have to persuade a jury that Alex lied to José about the legality of the proposed conduct or that Alex used unusually powerful methods of persuasion that might induce anyone to commit this crime.

Is the defense of entrapment useless as a defense in terrorism cases in this post 9-11 era? Should it be?

8. Entrapment is available only if the *government* is involved. Because Pete is a private citizen, José will not be able to raise this defense.

9. These facts are based on the Second Circuit case *United States v. Cromitie*, 727 F.3d 194 (2013). Under the subjective test, the conduct of law enforcement (or an informant) must have induced the defendant to commit the crime and the defendant must not have been predisposed to commit the crime. First, she would argue that Thornton induced her to conspire to attack the United States. She would point to his continuously engaging in her conversations about it, urging her to do it, and convincing her to do it even after she expressed doubt. Moreover, she would argue that Thornton offering her money to execute the attack is more evidence that she was induced to carry out the attack. Brenna might also argue that Thornton induced her to act by providing all the necessary resources. Second, Brenna might argue that she was not predisposed to execute an attack. When she said she wanted "to do something to America" she did not necessarily mean that she wanted to execute an attack against the United States. In fact, she was not the first to mention it; Thornton was the one to bring up an attack and she did not go along with the idea until he had continuously engaged in her conversations about it.

To Brenna's first argument, the government might argue it had "merely afforded" Brenna with the opportunity to conduct the attack by providing her with resources and information to do so. Second, the government might respond that even though she did not explain exactly what she meant by those words at the outset, the fact that she eventually participated in conversations about executing an attack after becoming more comfortable with Thornton shows that she was implying that she wanted to execute an attack, and therefore she was predisposed.

Under the MPC, an entrapment defense is viable if the police informant's conduct "induces or encourages another person to engage [in an offense] either by (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."

Brenna would argue that Thornton used methods of persuasion that created a substantial risk that even an ordinary law-abiding person would commit the offense. She would emphasize the fact that Thornton repeatedly brought up the subject of committing an attack despite her initial unwillingness to discuss it. Thornton also repeatedly overcame her doubts about the attack and offered her a substantial sum of money to do it.

The government would likely stress the seriousness of the offense and argue that, despite Thornton's aggressive persuasion methods, an ordinary law-abiding person would not be tempted to commit such an offense. It would argue that an ordinary law-abiding person would not entertain so many conversations about committing the offense and that even a large sum of money would not be enough to convince most people to act as Brenna did.

Lastly, Brenna might argue that she was denied due process because Thornton's conduct was "outrageous." Specifically, Brenna might argue that Thornton's conduct was outrageous because he engaged in a romantic, sexual relationship with her to induce her into acting. Courts have indicated that engaging in a sexual relationship may be enough to find a due process violation,

but it can be extremely difficult to prove.[109]

NEW EXCUSES: THE FUTURE IS UPON US

The law can treat claims of “new excuses” in at least three ways: (1) it can totally exclude them; (2) it can allow them as reductions of guilt, but not as full exculpations; (3) it can allow them in sentencing. For different claims, and at different historical moments, the path has been different, but it is not unusual to begin with the last approach and then move “up the chain” to a full defense. Consider, for example, duress. In the nineteenth century, duress was very narrowly restricted as a defensive claim; by the end of the twentieth century, the Model Penal Code had accepted it as a full defense even in homicide cases, and a number of courts or legislatures had recognized it as a mitigation to manslaughter in homicide cases.[110] Similarly, battered women who claimed self-defense prior to the 1970s framed their claims in “temporary insanity” or “heat of passion,” because the law did not recognize “battered spouse syndrome” as a scientific theory. Today, in contrast, every state allows evidence of battered spouse syndrome in such cases. Many who agree with the law of battered spouses nevertheless caution against receiving new excuse claims precipitously, pointing to the arguments relating to XYY chromosomes (discussed infra) and to premenstrual syndrome (also discussed infra) as illustrations of the validity of the law’s cautious pace.

To some, these new claims seem like nothing more than the last straw that an obviously guilty defendant will grasp. They characterize these claims as the “defense du jour” and talk about the “abuse excuse.” Almost twenty years ago, Professor Alan Dershowitz, highly critical of most of these claims, listed over 50 such claims that have allegedly been made by defendants in criminal cases; many more have been raised since.[111] Although many of the excuses listed by Dershowitz have been rejected both by courts as a matter of law and by juries on resolution of fact, the argument he makes cannot be dismissed offhandedly.

Opponents of liberalizing the law of defensive claims have more than just precedent on their side. They aver that many of these new

claims are based upon “junk science,” and that there is no compelling evidence (yet) that these new findings show that criminal behavior is “caused” by such excuses. Moreover, to the extent that there is *some* evidence that such behavior is “influenced,” opponents argue that it is the responsibility of an individual of good character to resist that influence, no matter how strong. Finally, some opponents argue eloquently that such claims will undermine the very premise of the criminal law, that of free will, and thus decimate the very concept of blameworthiness. *Even if* the claims are true, these persons argue, the criminal law must proceed *as if* they were not, for to admit them is to erode the very foundation of criminal liability.[112] As Lord Simon put it in *Lynch v. Director of Public Prosecutions*,[113] “Even the most devout predestinarian puts off his theology when he puts on legal robe.”

Proponents contend that the law *should* respond to such evidence and reject the “parade of horribles” argument. They maintain that judges and juries can filter the relevant claims from the frivolous. The essence of criminal responsibility, they argue, requires the law to examine *any* claim that a defendant’s power of control was undermined. As Professor Williams has declared:

> Once it is recognized that excuses are based on notions of justice, and show the law’s consideration for the defendant’s predicament in particular circumstances, it becomes obvious that the list of excuses need not be regarded as closed. [The Theory of Excuses, 1982 Crim. L. Rev. 732, 741-742.]

Usually, defendants will need, or certainly want, the testimony of an “expert” on the alleged excuse and its effects. Until very recently, most courts, following the lead of *Frye v. United States*, 293 F. 1013 (D. Cir. 1923), severely restricted the instances where expert testimony was allowed. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), however, the United States Supreme Court adopted a more generous rule for federal civil cases.[114] Many state courts seem to be adopting a *Daubert*-like standard as well. Whether this trend will be followed in criminal cases is uncertain.

We will not discuss the merits or demerits of any of the new claims. Instead, we will simply catalog a few of the more persistent claims. How these will be treated by the courts in the coming years is highly uncertain. The struggle between empirical claims and the criminal law’s

assumptions of free will will be fought in many of these battlegrounds.

It is always dangerous — even under the best of circumstances and with a great deal of information — to try to "categorize" anything. This is certainly true of the new claims. The lines suggested here are tentative. Thus, most "psychological" defense claims described below may later be treated as physiological in nature, if research increasingly indicates these conditions to be physiologically based.[115] Nevertheless, we shall make the attempt, in part because there may be similar issues surrounding one type of claim that do not surround others.

Physiologically (Biologically) Based Excuses for Criminality

At least since Ceaseare Lombroso[116] claimed to be able to determine a person's propensity for crime by feeling the bumps on his head,[117] both scientists and laymen have hoped that they could find a connection between biology and criminal behavior. After all, such persons might be "treatable," or if nontreatable, they could be incapacitated. In the early 1900s in this country and others, belief in such a biological connection led to a eugenics movement in which a number of state legislatures enacted statutes providing for the mandatory sterilization of criminals. Only after Hitler's "final solution" were these statutes repealed.[118]

Still, the search for a biological "cause" of crime continues, as controversial now as ever,[119] and again attacked on grounds that it supports racism.

Neuroscience and the Law — My Brain Made Me Do It

The most persistent[120] and daunting challenges to the theory of free will, and hence to the criminal law, are likely to come from neuroscience.[121] The advances made by this discipline in the past two decades are astounding — and growing exponentially. Neuroscientists now claim to know — more or less precisely — what parts of the brain control, or at least significantly affect, each part of our behavior.[122] For example, the

amygdala is said to affect decisions on “flight or fight,” while the prefrontal cortex has substantial impact on judgment. If there is physical damage to these areas of the brain, the function to which they are related is likely to be affected. Thus, persons with FLD (frontal lobe dysfunction) may lack the judgment that “normal” persons have, and may act more impulsively.[123] FLD defendants may then claim that their decision to act more “rashly” than others, particularly when confronted with what they (wrongly) perceive to be a threatening situation, should fully or partially exonerate them. Similarly, damage to the amygdala might result in a greater willingness to fight rather than retreat, even when there is a possibility of retreat.

As a general matter, these claims have not yet been accepted by courts, even those following the *Daubert* approach, as claims relevant to the defendant’s guilt.[124] But numerous court decisions have grappled with the contention that the failure by counsel to raise, or by a court to allow, such a claim during the sentencing phase of a capital proceeding[125] may suggest that defendant’s counsel was inadequate;[126] while many hold against the defendant, the issue will be continually raised.[127] While it is still several steps from those decisions to ones holding that these claims are relevant to guilt, these may be the first steps toward such holdings.[128]

On the other hand, the argument that this evidence is “scientific” is hardly resolved. Already a number of commentators are beginning to suggest that claims made — primarily by lawyers, not neuroscientists — that neuroscience will help “cure” violence are, like other claims made during the past two centuries,[129] significantly overblown and unsupportable. Specifically, the concerns are (1) that the current data do not support the notion of “locality” — that one portion of the brain is “responsible” for violence (or other misbehavior) — and (2) that the reliance on animal studies is too facile, ignoring or downplaying significant differences between the animals studied and humans.[130]

Genetics and Crime

Not far removed from the claim that brain disorders may affect behavior is the argument that genetic defects explain our (mis)behavior.

Again, the view that there are “born criminals”[131] has been present for centuries. In 1988, Professor Deborah Denno wrote that “social science research has not successfully demonstrated sufficiently strong links between biological factors and criminal behavior to warrant major consideration in determining criminal responsibility.”[132] But increasing evidence suggests that “significant genetic factors do appear to be influencing antisocial-behavior-related psychiatric disorder.”[133]

One of the most (in)famous claims of genetic disorder is that of the XYY chromosomes.[134] In the 1960s, researchers announced that they had discovered that a vastly disproportionate percentage of prison inmates had an “extra” Y chromosome. The suggestion was that, since the Y chromosome is what makes a person a male (every person has two sex chromosomes, at least one of which is an X; if the other is also an X, the fetus is a female), the “extra” Y chromosome must “add to” the “maleness” of the individual. Since crime — and particularly violent crime — is mostly a male activity, the argument was that this extra Y chromosome “caused” (or at least strongly influenced) violence, which was viewed as synonymous with “super maleness.” Since no individual can control his genetic makeup, it was argued that XYY men who committed crimes could not be blamed for those acts because they could not have done differently. Before the courts were confronted with potentially hundreds of such cases,[135] the methodology of the research was thrown into disrepute. However, the issue raised by the experience will not merely survive but will certainly be raised again as biology purports to find more physical links to specific kinds of behavior. The law will inevitably have to confront the question: What *should* the criminal law do if a genetic link, of some reasonable strength, is shown to “cause” specific conduct?[136]

A more recent version of this claim contends:[137]

> Evolutionary psychologists understand that the general structure of our human genotype has evolved largely in response to, and as a part of, conditions in a world that no longer exists: an era in which day-to-day survival was the basic rule and long-term planning was unfathomable. Our genes continue to interact with the environment in important ways everyday, and humans share hardwiring for “social-emotional responses [a phenotype] we’ve inherited from our primate ancestors (due, presumably, to some adaptive advantages they conferred).”

Premenstrual Syndrome (PMS)

Premenstrual syndrome[138] is another biological condition alleged to affect behavior. While many women experience cramps, nausea, and other (often severe) discomfort just before their menstruation, the term PMS was always restricted to the small percentage (about 2-3 percent) who suffer such agony and pain or mood swings that they sometimes become severely violent.

Women who have raised this claim have been forced to fit it into existing categories of defenses recognized by the common law — for example, insanity, provocation, diminished responsibility. Provocation is unavailable, however, because the victim may have done nothing provocative at all. The variations of insanity are usually not available because PMS is not considered to be a mental disease and because it is not permanent. In 1994, however, the American Psychiatric Association (APA) added premenstrual dysphoric disorder (PMDD), a severe form of premenstrual syndrome, to the list of depressive disorders in its Diagnostic and Statistical Manual (DSM-IV).[139] This might mean that (1) other women will be excluded from claiming PMS; (2) women who claim PMDD will be treated as suffering from a mental illness, with possible commitment after a successful defense.[140]

As with some of the other claims considered here, PMS raises other intriguing questions. For example, there are alleged "treatments" for PMDD. Could a woman who fails or refuses to undergo such treatment lose the claim on the basis of omission, much as did Decina (see Chapter 3)? How would such an argument take into consideration the fact that some of these treatments have potentially serious, long-run side effects? Is reasonableness the standard? And, if so, would that reasonableness be judged by the standard of (1) the reasonable woman; (2) the reasonable woman with PMDD; or (3) the reasonable woman with PMDD who feared such side effects (a) reasonably? (b) unreasonably? These questions may be precluded by the recognition of PMDD as a mental disorder, but perhaps not. After all, many women who do not fit the PMDD profile may still wish to argue that they were affected by PMS. There is no a priori reason why they should be prohibited from raising the facts just because the APA has declared some other women to be suffering from a mental illness.

Other Physiologically Based Claims

There is no end to the possible claims, but we list several more: hypoglycemia,[141] Alzheimer's disease,[142] neurotoxic damage,[143] and testosterone overload.[144]

Psychologically Based Excuses

Brainwashing

Many of the new claims of psychological causation and defense — diminished capacity, pathological behavior, post-traumatic stress disorder, temporary insanity, and the like — have already been considered in the section on insanity. At least one claim does not quite fit the usual psychiatric mode: brainwashing.[145] This phenomenon was first detected by studies of prisoners of war, but it became a criminal law issue in the bizarre case of Patty Hearst. As usual, truth is stranger than fiction.

Patty Hearst was an heiress to a fortune. By all accounts, she had little concern for political issues, much less for violent politics. Ms. Hearst was kidnapped in the 1970s by a militant group of terrorists in California, who demanded that her father take certain social measures (such as distributing free food to thousands of hungry poor people in several California cities). Months later, Ms. Hearst reappeared, dressed in black and carrying a machine gun, assisting the terrorists in robbing a California bank. She was arrested about a year later in San Francisco. When booked, she gave her name as Tanya, and her occupation as "revolutionary." (Not even Danielle Steele could concoct such a plot. But it all happened.)

At trial, Hearst (as she now called herself again) argued that it was not "she" but "Tanya" who had robbed the bank. During her captivity, she argued, she had been not merely tortured but indoctrinated. She had "become" another person, Tanya, and remained so until "deprogrammed" after her arrest.

The jury rejected Hearst's claim, but the judge allowed it to be presented. Clearly, it raises almost primordial questions. (1) When is a person "herself"? (2) Can that person "change" under psychological

pressure and then revert back when the pressure is removed?[146] (3) "Who" is punished — the previous "person" or that person's "mind" (which, by hypothesis, no longer exists)? (4) To what degree would an acceptance of the claim weaken the criminal law's moral stature? Some of these questions may also be raised in other contexts — for example, in dealing with "multiple personalities." But brainwashing raises all of them.

The brainwashing claim was more recently raised by Lee Malvo, a juvenile and one of the "Washington snipers" who, shortly after the 9/11 attacks, terrorized that city by randomly shooting victims. Malvo claimed that his cohort, much older than Malvo, had "created what (he) became just as surely as a potter molds clay." The jury convicted him, but refused to impose the death penalty.[147]

Mob Mentality

In a very famous (but not officially reported) incident, Damien Williams, a black resident of Los Angeles, joined a mob of rioters who were outraged by a jury verdict acquitting several white police officers charged with unlawfully beating a black man. The mob stopped a truck and its white driver, pulled him from the cab, and began beating him. Williams picked up a brick and hit the driver. Fortunately, the driver survived, but Williams was charged with attempted murder, aggravated assault, and several other offenses. At trial, Williams argued (among other things) that he had no intent to injure, much less kill, the driver, but that he was simply "swept up" in the emotions of the moment. The jury acquitted him of the most serious of these charges. Had the driver died, it is possible that Williams might have argued, at least under the Model Penal Code, that he was suffering from an "extreme emotional disturbance" that would lower his homicide from murder to manslaughter. However, the jury obviously sympathized with Williams' claim that he had been "caused" to act the way he did by influences beyond his power to control.

Cognitive Psychology, Law, and the Emotions

Scholars from a number of non-legal fields have suggested that the law

should consider and adopt recent sophisticated studies of the emotions.[148] Professors Kahan and Nussbaum, in a landmark article,[149] urged the reconsideration of emotions with regard to provocation. Professor Reid Fontaine has broadened the argument with a series of articles.[150] For example, he has pointed to "provocation interpretational bias," a condition that makes some persons more likely to react precipitously (and perhaps violently) to perceived insults. While some might respond that this is merely another way of saying the person is "short-fused,"[151] this may be an insufficient reaction if science demonstrates an inability, even over time, to control such a bias.[152] It may be too early for the law, particularly the criminal law, to absorb such findings, but it is clear that these arguments will be raised increasingly as the evidence for them becomes "harder."

Sociologically Based Claims

Many of the claims listed and criticized by Professor Dershowitz, while ultimately going to the defendant's blameworthiness, are currently cast in terms of "syndromes" caused by "abuses" of one sort or another (psychological, physical, sexual) that he suffered. Again, categorizing is both dangerous and simplistic. Nonetheless, one could distinguish between claims that these abuses led directly to criminality and those that argue that the abuse made the defendant more sensitive to indicia of imminent abuse.[153]

Criminogenic Causes: Rotten Social Background

Certainly one of the more controversial claims, still not raised in court,[154] has been the suggestion that persons raised in underserved environments become hardened to the pain that crime inflicts on its victims and are therefore less "blameworthy" when they inflict such injury.[155] Furthermore, the argument runs, deprivation itself "creates" a "propensity to commit crimes." This is *not* merely an argument that poor people, or those living in a low-income neighborhood, are more likely to steal than people who are not poor — everyone likes material goods. It

is, rather, an argument that constant deprivation affects the ability of the actor to assess the moral weight of his claim to goods (or bodily integrity) versus that of the "owner" of those goods.

Professor Erik Luna, tongue only slightly in cheek, has propagated the possibility of a "spoiled rotten social background" defense.[156] If this were a serious suggestion, it would be argued that a very wealthy child might simply not recognize that the "rules" applied to him.[157]

Urban Survival Syndrome and Black Rage

Although conceptually distinct, these two claims are suggested along with Rotten Social Background as fertile fields for defenses. The first argues that persons in tense urban settings are (much like battered women) more sensitive to, and therefore more able to comprehend than others, "signs" that suggest violence is imminent.[158] It has been rejected in the several cases that have raised it thus far. The second — possibly a variant of heat of passion — argues that minorities, especially black people, have so long been the victims of discrimination that their anger simply "erupts" against white people who are ostensibly unoffending, but who are seen as exemplars of the oppressing group.[159] This claim has been raised — and rejected — in several unreported cases.

Recap

It is easy to dismiss these claims as Dershowitz and many others do. But these claims touch directly the clash between the criminal law's assumption of free will and the scientific view that much human behavior is caused by physical or physiological factors we cannot control. How the criminal law responds to such claims, both specifically and generally, may become one measure of how evenhanded and fair it is. It is not necessarily an exaggeration to say that how the criminal law deals with such claims in the next century may well decide whether it continues to carry the moral weight it has always sought. As Professor Deborah Denno, a leading commentator on these questions, has said, "The criminal justice system still lacks a sound conceptual framework

for handling genetics research no matter what it decides to do with it."[160]

Examples

1. Nrin Sok emigrated from Cambodia in 1996. He began work in scrap yards, where metal items were often melted down. He seldom wore a mask. In 1997, he brought home to his wife a set of "magic" fertility belts of zinc, silver, and lead. The couple wore the belts almost continuously, hoping to conceive a child. One night a year later, in their small apartment, he burned the belts in a hot pan, and fumes emitted into the room. Almost immediately after this, he killed his wife. A series of tests revealed that, shortly after his arrest, the defendant had toxic levels of lead, cadmium, and manganese in his blood. He was also found to be in acute renal failure when arrested and was treated for kidney failure and liver and heart damage. By the time of his trial for first degree murder, he had fully recovered physically. Sent to a mental hospital after his arrest, he had made a full recovery by the time of his trial. Is Sok guilty of murder? Of any crime?

2. Frank is a landscape gardener and has been exposed to pesticides for 15 years. Charged with first-degree murder, he seeks to introduce evidence that his exposure affected his mens rea. What result?

3. Lyle and Erik walked into the living room of their parents' home one night and shot both parents, who were eating ice cream and filling out college application forms for their sons, with a barrage of weapons. They seek to introduce evidence that they were sexually abused by their father as children. Should the evidence be admitted?

4. Julius is charged with first-degree murder. He admits having shot the victim, but claims that it was upon "impulse" and that "the," or at least "a," cause of his impulse was a low level of serotonin in his brain at the time of the shooting. He seeks to introduce (a) evidence from friends and relatives that he has consistently been subject to impulses, many of them violent, over his life; and (b) expert

evidence from a neuropsychologist that low levels of serotonin "cause" "intermittent explosive disorder" and impair one's ability to resist impulses, violent and otherwise, and that Julius's brain shows such low levels of serotonin. Which of these types of evidence, if either, is admissible?

5. Jennifer's business had been going downhill for some time. On August 1, her financial officer, Elizabeth, refused to process the payroll. Jennifer went home, got her 9 mm Beretta semiautomatic pistol, returned to the plant, and shot Elizabeth four times. She wishes to introduce evidence that, beginning in January, friends noticed changes in her personality. In addition, she had not been able to sleep, she had lost weight, and on at least one occasion she had manifested suicidal intentions. She also wishes to show that these characteristics are related to "akathisia," a result of her taking Zoloft, a prescribed antidepressant medication. Is this evidence admissible?

6. Barry Stocks, a baseball player, strikes out, runs at the pitcher, and pummels him to death with the bat. Barry claims he was on anabolic steroids at the time, and that the homicidal act was a result of "'roid rage." What is the likely result?

7. Hume, 83, and Jessica, 79, have been married for 55 years. One day, Hume asks Jessica for a bagel. She brings him an onion roll. He "goes berserk" and axes Jessica to death. His attorney wants to argue to the jury that Hume's "old age" can account for his crime. To this end, he seeks to call several of Hume's friends and neighbors who will testify that over the past five to six years, Hume has seemed to "drift downhill" and become more easily irritated. He also wants to have a neurosurgeon show MRIs of Hume's brain, and testify that Hume's frontal lobe has deteriorated slightly, and that this may indicate he lacks full ability to control his impulses. The prosecutor seeks motion in limine to prevent either of these at trial. What should the trial court do?

8. College X and College Y have a longstanding rivalry. In the annual football game between the colleges' teams, College X destroys College Y after some questionable calls by the referee and wins the

game 33 points to 0. The fans of College Y are so appalled by the loss that they start a riot outside the stadium. In a frenzy, the crowd starts vandalizing parts of the stadium and vehicles in the parking lot. Melanie is not a fan of either team but happened to attend the event with her friend, a self-proclaimed "College Y football fanatic." As she attempts to leave, her friend convinces her to follow him toward the rioting crowd. Melanie becomes swept up the frenzy and participates in the destruction. She is later arrested and charged with criminal mischief. Does she have a defense? How does this square with the *Williams* case? If the judge ruled that evidence of a "mob mentality" defense could be admitted, do you think a jury would be as sympathetic toward Melanie?

Explanations

1. This instance of neurotoxicity from metal poisoning is detailed in Charell D. Arnold, At Nature's Mercy: the Uneasy Courtship of Criminal Defense and the Environment, 25 Tul. Envtl. L.J. 453 (2012). Any insanity claim that Sok might raise would confront the concern that mental illness is often permanent — while it may be treated, one is rarely "cured" of mental disease. (The misnomer "temporary insanity" is sometimes used by non-lawyers to refer to an "irresistible impulse" or to "heat of passion," but insanity is very rarely "temporary.")

   Nevertheless, in this instance, the prosecution agreed to recommend such a finding, and Sok was ultimately released. Did Sok create the condition of his own claim? Not knowingly. But see Chapter 16. For another example of neurotoxicity, see the case of Terrance Frank, who lived from childhood near a uranium mine and claimed organic brain damage caused him to kill two people. He was convicted of second (rather than first) degree murder.[161]
2. This too is a real case, *Commonwealth v. Garabedian*, 503 N.E.2d 1290 (Mass. 1987). The trial court admitted the evidence, but the jury rejected the claim. The defendant argued that his toxicological intoxication was *involuntary*, in the sense that he was unaware of the impact of the chemicals on his nervous (control) system. Many of these "toxicological damage" cases involve such a claim. Indeed,

a defendant who is asked why he did not seek treatment or refrain from further exposure is likely to argue that the earlier exposure diminished or removed his capacity for self-assessment. In this regard, the claim is akin to insanity.

3. This is the famous Menendez brothers trial. At the first trial, the evidence was admitted. Separate juries, deliberating the fate of each brother, were unable to reach verdicts. The evidence was argued as relevant for any of several points: (a) the past abuse created a rage against their father that suddenly "exploded" into a killing spree; (b) the past abuse made them sensitive to "little signs" that their father was displeased with them and might abuse them again; (c) the past abuse, combined with this sensitivity, made them able to discern through "little signs" that their father (abetted by the mother) was about to kill them to prevent them from revealing the past abuse, and therefore went to a self-defense claim. The court admitted the evidence for at least the third purpose. At retrial, this evidence was barred, and both brothers were convicted.

4. This question would require a very long answer on an exam. We will only skim the surface here. First, Julius is *not* raising an insanity defense, because he does not suffer from a recognized mental disorder. If he is in a jurisdiction that does not recognize diminished capacity as a relevant claim, it is difficult to see how his claim would be relevant. He is not claiming that he did not "premeditate," which is the central issue for first-degree murder; he is instead arguing that he lacked the capacity to prevent himself from acting upon his premeditated decision. The problem with this claim, even assuming that the jury believes it, is that the "lay" evidence (a), which may well be the predicate for the expert evidence (b), strongly suggests that Julius *knew* he was unable to control such "impulses" but took no steps to remedy his lack of control. The prosecution would then argue that his failure to take such steps (such as asking a doctor how to address the problem) should preclude any evidence as to the genesis of his lack of control. The issue might then become whether Julius had a "duty" to recognize that his lack of control was physical (rather than "mental") and to take steps to deal with it (see Chapter 7).

Furthermore, after *Clark v. Arizona*, discussed supra, pages 599-600, "complicated" expert evidence, and perhaps neuroscience in particular, might not be admissible because it could mislead the jury. Although *Clark* dealt with psychiatric evidence and the insanity claim, that decision could plausibly be applied to evidence of this kind as well. Although, hypothetically, this jurisdiction has not statutorily precluded neurological evidence, a trial court decision to do so might well be supported by *Clark*. Finally, there is the question of whether the evidence is sufficiently reliable or probative. In general neurology and cognitive behavioral science have become increasingly sophisticated, and there is increasing evidence that many neurological distinctions are genetically based.[162] Indeed, some courts have allowed evidence of low serotonin either at trial or at sentencing (in death cases).[163]

5. This is almost the direct reverse of Julius' situation in Example 4. Zoloft, Prozac, and Paxil, among others, are "selective serotonin reuptake inhibitors" (SSRIs), designed to increase the amount of serotonin in the brain (or, more accurately, to decrease the amount of serotonin not "absorbed" by brain cells, and therefore available for reducing depression). As in Julius' case, one issue will be whether there is sufficient agreement among physicians about the possible side effects of SSRIs.[164] Assuming Jennifer can surmount that obstacle, another issue here — in contrast, perhaps, to Julius' case — is that Jennifer may have an "involuntary intoxication" claim.[165] Some states have precluded claims of involuntary intoxication unless the intoxication was the result of "trick, artifice or force." That was obviously not the case here; there was no "trick" performed by Jennifer's doctors. But the side effects of Zoloft, and of Prozac, including depression, fatigue, and agitation, particularly at the initial stage of usage, were not clearly known — and certainly not known to Jennifer — when she followed the doctor's orders.[166] One source, however, says that of 80-plus cases raising the Prozac or Zoloft defense, only one has been successful.[167] A recent example where the claim failed involved a 12-year-old boy, convicted of killing both his grandparents and sentenced to 30 years in prison, who had been taking Zoloft for less

than a month before the killings.[168] The FDA now requires SSRIs generally to carry warnings of increased risk of suicidal behavior among young people. If, rather than seeking an "involuntary intoxication" claim, Jennifer raises a claim of "temporary insanity" created by the drugs, she may run afoul, as might Julius, of the implications of *Clark v. Arizona*.[169]

6. This case is obviously similar to Jennifer's, with one possible exception: The effects of anabolic steroids on behavior have been well documented for some time.[170] The fact that the effect of SSRIs was well known was one of the reasons the defendant in *Shuman* (supra, Explanation 5) raised in arguing that his counsel was ineffective. Indeed, failure to raise that issue has been suggested as constituting inadequate assistance of counsel.[171] If the court finds that these effects were known, it may be more difficult for Barry to successfully argue "involuntary" intoxication; it may be that he "should have known" of the risk posed by steroids, and if so, he would lose that claim.

7. This is a real event, recounted in Fred Cohen, Old Age as a Criminal Defense, 21 Crim. L. Bull. 5 (1985) (the prosecutor did not bring a charge). But the example raises both a "common sense" issue and a strict one of evidence. First, as to the "common sense," we have always recognized, simply as a matter of observation, that "young people" are less competent than adults. There has been no requirement that defendants "prove" this — it is simply understood, and now validated by our juvenile court system. Indeed, the United States Supreme Court, in holding, in *Atkins v. Virginia,* 536 U.S. 304 (2002), that persons under the age of 18 could not be criminally executed even if they had committed premeditated homicide, did not cite "scientific" evidence that persons under 18 are less morally culpable than those over that age — it simply concluded that, while some 17-year-olds might be more mature than some 18-year-olds, there was a need to draw an age line for the Constitution. So it would seem that Hume should be able to argue that he's "simply an old man." (On the other hand, don't we want older people to be more responsible, because they have learned over more years what "right" and "wrong" are?) But he

wants to buttress that claim with "scientific" evidence on brain function generally and on frontal lobe dysfunction particularly. It is "well established that the brain undergoes considerable alterations during senescence . . . (including) an increase in the number of senile plaques and in the amount of neurofibrillary degeneration."[172] Courts have been reluctant to allow this evidence in at trial, either because it is not yet fully proven (even under the *Daubert* test) or because it might be too confounding to the jury (the *Clark* approach). (There is additionally the concern that an actual brain scan may be "so" persuasive to jurors as to be prejudicial against the state; there is some anecdotal evidence that such a phenomenon exists.) It is unlikely that Hume will be able to have the "scientific" evidence admitted, but he almost surely would have the lay testimony admitted. Is that a good way to run a railroad?

8. Melanie could argue that her criminal conduct was the product of "mob mentality," and that she is not blameworthy, like the defendant in the *Williams* case. The jury may not be as sympathetic toward Melanie, however. The "mob" that Melanie was swept up in was, unlike the mob in the *Williams* case, simply upset fans. While some may take their football seriously, it is not as upsetting to lose a game as it is to witness apparent racial injustice in governmental institutions. Also, Melanie was not even a fan of the team that lost, so it is difficult to see why she would have been vulnerable to becoming swept away by the crowd of (presumably) true College Y fans.

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1. See *United State v. Barker*, 514 F.2d 208 (D.C. Cir. 1975) (Bazelon, J., dissenting).
2. J. Feinberg, What Is So Special About Mental Illness, in Doing and Deserving: Essays in the Theory of Responsibility (1970).
3. Hart, The Aims of the Criminal Law, 23 Law & Contemp. Problems 401 (1958).
4. *M'Naghten's Case*, 101 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).
5. See §401 (Mental Disease or Defect Excluding Responsibility).
6. Bonnie, The Moral Basis of the Insanity Defense, 69 A.B.A.J. 194 (1983).
7. N. Walker, Crime and Insanity in England 24-26 (1968).
8. See J. Q. La Fond & Mary L. Durham, Back to the Asylum: The Future of Mental Health Law and Policy in the United States (1992).
9. *Medina v. California*, 505 U.S. 437 (1992).
10. *Dusky v. United States*, 362 U.S. 402 (1960).
11. *Medina v. California*, 505 U.S. 437 (1992).

12. *Medina v. California*, 505 U.S. 437 (1992).
13. *Cooper v. Oklahoma*, 517 U.S. 348 (1996).
14. *Jackson v. Indiana,* 406 U.S. 715 (1972).
15. *Vitek v. Jones,* 445 U.S. 480 (1980).
16. *Jones v. United States,* 463 U.S. 354 (1983).
17. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 732 (New York: Wolters Kluwer, 4th ed., 2017).
18. *Foucha v. Louisiana,* 504 U.S. 71 (1992).
19. *Ford v. Wainwright*, 477 U.S. 399 (1986).
20. *M'Naghten's Case*, 101 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).
21. See H. Fingarette, The Meaning of Criminal Insanity (1972).
22. *Clark v. Arizona*, 548 U.S. 735 (2006).
23. Many mental health professionals would probably require an individual to suffer from an axis 1 diagnosis under the Diagnostic and Statistical Manual of Mental Disorders-IV-TR (4th ed. 2000).
24. *State v. Cameron,* 100 Wash. 2d 520, 674 P.2d 650 (1983).
25. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 726 (New York: Wolters Kluwer, 4th ed., 2017).
26. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 726 (New York: Wolters Kluwer, 4th ed., 2017).
27. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 726 (New York: Wolters Kluwer, 4th ed., 2017) (quoting *Parsons v. State*, 2 Sp. 854 (Ala. 1887).
28. See *United States v. Kunak,* 17 C.M.R. 346 (Ct. Mil. App. 1954).
29. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 729 (New York: Wolters Kluwer, 4th ed., 2017) (quoting *Parsons v. State*, 2 Sp. 854 (Ala. 1887).
30. For a thorough judicial critique of the *M'Naghten* test, see *United States v. Freeman,* 357 F.2d 606, 618-622 (1966).
31. MPC §4.01 (Mental Disease or Defect Excluding Responsibility).
32. Diamond, Criminal Responsibility of the Mentally Ill, 14 Stan. L. Rev. 59, 60-61 (1961).
33. Today this definition would probably exclude individuals with an "antisocial personality disorder," a diagnosis based primarily on an extensive history of getting into trouble with the law. Diagnostic and Statistical Manual of Mental Disorders-IV-TR 701-706 (2000).
34. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 725 (New York: Wolters Kluwer, 4th ed., 2017).
35. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 725 (New York: Wolters Kluwer, 4th ed., 2017).
36. Model Penal Code and Commentaries, vol. 2 at 169 (1985).
37. American Psychiatric Association Statement on the Insanity Defense 11 (Washington, D.C., 1982).
38. Comprehensive Crime Control Act of 1984 (Insanity Defense Reform Act), Pub. L. No. 98-473, ch. IV.
39. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 728 (New York: Wolters Kluwer, 4th ed., 2017).
40. La Fond & Durham, supra n. 8, at 36.
41. Nevada also abolished the insanity defense in 1995, but the Nevada supreme court held that due process required a limited opportunity to present the defense. *Finger v. Nevada*, 27 P.3d 66 (2001).
42. Corrado, Responsibility and Control, 34 Hofstra L. Rev. 59 (2005).

43. See La Fond & Durham, Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?, 39 Vill. L. Rev. 71 (1994).
44. Steadman, Empirical Research on the Insanity Defense, 477 Annals Am. Acad., Pol. & Soc. Sci. 58 (1985).
45. McGinley & Pasewark, National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas, 17 J. Psychiatry & L. 205 (1989); see also Current Application of the Insanity Defense http://criminal.findlaw.com/criminal-procedure/current-application-of-the-insanity-defense.html (last visited Dec. 9 2017).
46. Montana takes this approach. See *State v. Korell,* 690 P.2d 992 (1984).
47. Id.
48. *See* Slobogin, The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come, 53 Geo. Wash. L. Rev. 494 (1985).
49. *Harris v. State,* 499 N.E. 723 (Ind. 1986); *People v. Crews,* 122 Ill. 2d 266, 522 N.E. 1167 (1988).
50. La Fond & Durham, supra n. 8, at 138-139.
51. Callaghan et al., Measuring the Effects of the Guilty but Mentally Ill (GBMI) Verdict, 16 Law & Human Behavior 447, 452 (1992).
52. *United States v. Denny-Shaffer,* 2 F.3d 999 (10th Cir. 1993).
53. See, e.g., *State v. Grimsley,* 3 Ohio App. 3d 265, 444 N.E.2d 1071 (1982); *Kirkland v. State,* 166 Ga. App. 478, 304 S.E.2d 561 (1983).
54. *State v. Greene,* 984 P.2d 1024 (Wash. 1999).
55. See McGarry, Pathological Gambling: A New Insanity Defense, 11 Bull. Am. Acad. Psychiatry & L. 301 (1983).
56. *State v. Campanaro,* Nos. 632-679, 1309-1379, 514-580 & 707-789 (Superior Court of New Jersey Crim. Div., Union County, 1980).
57. *State v. Lafferty,* No. 44359 (Connecticut Superior Court, June 5, 1981). But see *United States v. Lyons,* 731 F.2d 243, 245 (5th Cir. 1982).
58. See McGarry, supra n. 48, and cases cited therein.
59. This argument is similar to the one asserted against defendants who voluntarily consume alcohol or drugs and commit crimes. (See below). However, courts have refused to accept this argument. *Com v. Shin*, 16 N.E.3d 381, 389 (Mass. App. 2014) (the court stated that "[i]t strains the analysis considerably to apply it to a defendant such as this, because his mental illness is not *caused* by his failure to take medication. . . . The appropriate analysis was simply whether, at the time of the incident, the defendant was criminally responsible."); see also *State v. Edgar*, 398 P.3d 756 (Hawai'i 2017) ("the failure to take medication may not be considered in determining the defense of lack of penal responsibility due to a mental disease, disorder, or defect.").
60. Kean, The History of the Criminal Liability of Children, 53 L.Q. Rev. 364 (1937).
61. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 774 (New York: Wolters Kluwer, 4th ed., 2017).
62. Juvenile courts also deal with other kinds of cases involving young people, including children in need of supervision and the termination of parental rights.
63. Walkover, The Infancy Defense in the New Juvenile Court, 31 UCLA L. Rev. 503 (1984); Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C. L. Rev. 1083 (1991).
64. Cal. Penal Code §26 (West 2009).
65. Federal Bureau of Investigations, U.S. Dept. of Justice, Uniform Crime Report 279 (1994).
66. Federal Bureau of Investigations, U.S. Dept. of Justice, Uniform Crime Report 410 (1992). However, the rate of juvenile violent crime fell slightly in 1995 for the first time in almost a decade, and in that same year the rate of homicide by juveniles decreased for the second year in a row, down by 15.2 percent. After a Decade, Juvenile Crime Begins to Drop, New York Times,

Aug. 9, 1996, at A1.
67. *State v. Ramer*, 86 P.3d 132, 114 (Wash. 2004).
68. *State v. Ramer*, 86 P.3d 132, 114 (Wash. 2004).
69. *State v. Ramer*, 86 P.3d 132, 114 (Wash. 2004); see also *Com v. Martz*, 118 A.3d 1175, 1183 (Penn. 2015). Some federal courts rely on a similar set of factors: "[1] the age and social background of the juvenile; [2] the nature of the alleged offense; [3] the extent and nature of the juvenile's prior delinquency record; [4] the juvenile's present intellectual development and psychological maturity; [5] the nature of past treatment efforts and the juvenile's response to such efforts; [and] [6] the availability of programs designed to treat the juvenile's behavioral problems." *United States v. Ramirez*, 297 *United States* F.3d 185, 193 (2d Cir. 2002).
70. *Ring v. State*, 894 S.W.2d 944, 947 (Ark. 1995) ("The serious and violent nature of an offense is a sufficient basis for trying a juvenile as an adult."); see also *United States v. Juvenile Male*, 754 F. Supp. 2d 569, 575 (E.D.N.Y. 2010) ("[t]he heinous nature of the crime of intentional murder . . . may be a factor entitled to special weight.") (quotations omitted)); but see *State v. Ramer*, 86 P.3d 132, 114 (Wash. 2004) (holding that for sex crimes, the State had a heavier burden of proving the minor's capacity).
71. See pages 555-557 for a discussion of competency to stand trial.
72. One study showed that 64 percent of 882 felons arrested in a two-year period in Cincinnati were intoxicated. Many studies find a close association between the alcohol consumption rate and the homicide rate. Robert N. Parker & Randi S. Cartmill, Alcohol and Homicide in the United States, 1934-1995, 88 J. Crim. L. & Criminology 1369, 1374-1377 (1998). A study by the Drug Use Forecasting System found that from 53 percent to 79 percent of men arrested in twelve major cities tested positive for illegal drug use. Even excluding those who tested positive for marijuana, the results still ranged from 25 percent to 74 percent. Crime Study Finds Recent Drug Use in Most Arrested, New York Times, Jan. 22, 1988, at A1, col. 6.
73. Many modern statutes criminalize drivers who operate a motor vehicle with a specified amount of alcohol in their blood. These statutes do not require any proof of intoxication.
74. 1 M. Hale, Pleas of the Crown *32-33.
75. 4 W. Blackstone, Commentaries *25-26.
76. Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045 (1944).
77. There is some evidence that courts would not permit the defendant to introduce evidence of voluntary intoxication if he had formed his criminal intent *before* drinking and had consumed alcohol solely to summon up courage to commit the offense. *Roberts v. Michigan*, 19 Mich. 401 (1870).
78. Of course, the legislature could enact a law that punished the act of getting drunk more severely precisely because of this risk. A defendant could then be charged with this offense rather than a crime involving recklessness or negligence. However, this approach has been rejected.
79. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 432 (New York: Wolters Kluwer, 4th ed., 2017).
80. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 432 (New York: Wolters Kluwer, 4th ed., 2017).
81. 518 U.S. at 37.
82. See Keiter, Just Say No Excuse: The Rise and Fall of the Intoxication Defense, 87 J. Crim. L & Criminology 482 (1997).
83. If, however, crimes requiring "purpose, intent, and knowledge" are considered to be the functional equivalent of the common law's "specific intent crimes," then the MPC produces virtually the same result as the common law.
84. Reported cases of involuntary intoxication are extremely rare.
85. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 764 (New York: Wolters Kluwer, 4th ed., 2017).

86. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 764 (New York: Wolters Kluwer, 4th ed., 2017).
87. Paul H. Robinson, Shima Baradaran Baughman, & Michael T. Cahill, Criminal Law: Case Studies and Controversies 764 (New York: Wolters Kluwer, 4th ed., 2017).
88. See Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827 (1977).
89. The Homicide Act of 1957, 5 & 6 Eliz. II, ch. II, §2(1).
90. 61 Cal. 2d 795, 821, 394 P.2d 959, 975, 40 Cal. Rptr. 271, 287 (1964).
91. 64 Cal. 2d 310, 322, 411 P.2d 911, 49 Cal. Rptr. 271 (1964).
92. 10 Cal. 3d 750, 758, 518 P.2d 342, 348 (1974) (emphasis added).
93. See Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1 (1984).
94. G. Fletcher, Rethinking Criminal Law 250-259 (1978).
95. Note, A Punishment Rationale for Diminished Capacity, 18 UCLA L. Rev. 561 (1971).
96. *People v. Wetmore,* 22 Cal. 3d 318, 583 P.2d 1308 (1978).
97. See *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370 (1969).
98. *People v. Wetmore,* 22 Cal. 3d 318, 583 P.2d 1308 (1978).
99. Cal. Penal Code §25(a) (West 2012).
100. See, e.g., *United States v. Pholot,* 827 F.2d 889 (3d Cir. 1987) (holding that the Federal Insanity Defense Reform Act of 1984 did not prevent defendants from using psychiatric evidence if relevant to the mens rea).
101. See, e.g., *United States v. Cameron*, 907 F.2d 1051 (10th Cir. 1990); *People v. Saille,* 54 Cal. 3d 1103, 820 P.2d 588 (1991).
102. See, e.g., *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982); *State v. Wilcox,* 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982).
103. 548 U.S. 735 (2006).
104. *Hendershott v. People,* 653 P.2d 385, 396 (Colo. 1982).
105. See Chapter 14.
106. As a matter of causation, the criminal law usually does not look beyond the last causal agent. Yet, the defense of entrapment effectively permits the defendant to argue that the government "caused" him to commit the crime.
107. *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Hampton,* 425 U.S. 484 (1976).
108. At least one lower federal appellate court has held that the Constitution requires reversal of a conviction when government conduct was so outrageous as to violate due process. *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978). This is a minority view.
109. *United States v. Rabinowitz*, 645 Fed. Appx. 63, 65 (2d Cir. 2016). In the Second Circuit, the defendant must show: "(1) that the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes upon learning that such a relationship existed; (2) that the government agent initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends; and (3) that the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein." *Id.* Even if the defendant can satisfy all three elements, she is only then entitled to a hearing to determine whether she was denied due process under the law. *Id.*
110. See also Kirchmeier, A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice, 83 Or. L. Rev. 631 (2004).
111. The Abuse Excuse (1994). See also J. Wilson, Moral Judgment (1997); Turk, Abuses and Syndromes: Excuses or Justifications?, 18 Whittier L. Rev. 901 (1997). But see Richard Singer, No Excuse for a Law Professor, 6 Crim. L. Forum 121 (1995).
112. E.g., Justice Weintraub, concurring in *State v. Sikora,* 44 N.J. 453 (1965).

113. [1975] 1 All E.R. 913.
114. *Daubert* provided that judges must look to various factors to determine whether expert scientific testimony should be admitted. Among those factors listed are the (1) the empirical testability of the scientific methodology used by the expert; (2) whether the scientific theory or technique has been peer reviewed; (3) the "potential rate of error" of the technique utilized; and (4) the acceptance of the technique in the scientific community. *Daubert*, 509 U.S. 579, 594.
115. For example, some geneticists now claim that there is good evidence that schizophrenia, a "psychologically based" claim already recognized under the common law "insanity" test, is really chromosomally and genetically influenced, if not determined.
116. See generally D. Denno, Biology and Violence (1990); D. Niehoff, The Biology of Violence (1999); Denno, Gender Issues and the Criminal Law: Gender, Crime and the Criminal Law Defenses, 85 J. Crim. L. & Criminality 80 (1994); Henry Fradella, What Role, if Any Should Biology Play in Criminal Cases, 45 Crim. L. Bull. (2009); Owen Jones and Timothy Goldsmith, Law and Behavioral Biology, 105 Colum. L. Rev. 405(2005).
117. C. Lombroso, Crime: Its Causes and Remedies (1911).
118. The United States Supreme Court considered the constitutionality of these statutes only once, in *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942). The Court found the statute unconstitutional on equal protection grounds: It did not sterilize *enough* criminals. Since, in *Buck v. Bell,* 274 U.S. 200 (1927), the Court had upheld a mandatory sterilization statute involving the mentally ill against an equal protection challenge, it is not clear what the Court might have done in the criminal context had the Oklahoma statute punished *all* thieves with sterilization.
119. In 1993, the National Institutes of Health funded a conference to assess the status of the investigation of the link between biology and crime, but withdrew the funds after public outcry. Two years later, however, the Institutes refunded the conference, which was held in late 1995.
120. Vanderbilt Law School has established an entire institute, funded by the MacArthur Foundation, on neuroscience and the law. See http://www.lawneuro.org. The work has grown exponentially. The fifth edition of this book cited an author who cited over two hundred articles written since 2000 on the subject of criminal law and neuroscience. Pustilnik, Violence on the Brain: A Critique of Neuroscience in Criminal Law, 44 Wake Forest L. Rev. 183, n.10 (2009). That information has now been broadened; for a general bibliography listing 565 articles on law and neuroscience, see Francis X. Shen, The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw 38 Int'l J. L. Legal Info, 352 (2010). For even more recent information, see Blog, Neuroethics & Law, http://kolber.typepad.com. See also Susan A. Bandes, The Promise and Pitfalls of Neuroscience for Criminal Law and Procedure: Conclusion, 8 Ohio St. J. Crim. L. 119 (2010).
121. See O'Hanlon, Towards a More Reasonable Approach to Free Will in Criminal Law, 7 Cardozo Pub. L. Pol'y & Ethics 395 (2009).
122. The view that different parts of the brain are "primarily" responsible for specific kinds of conduct may seem to echo the views of psychiatrists in the nineteenth century. Current thinking, however, is that while one or two areas may be primarily responsible for conduct, every action and thought is affected by multiple sites in the brain. The claim is not that "all" judgment is lost if the prefrontal lobe is damaged, but that "some" or "a great deal" of judgment is affected. On the other hand, "numerous studies have suggested that one area, the ventromedial prefrontal cortex (VMPC), is predominantly responsible for moral behavior in humans." Steven K. Erickson, Blaming the Brain, 11 Minn. J.L. Sci & Tech. 27, 48, citing Michael Koenigs et al., Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgments, 446 Nature 908, 908-910 (2007). See also Robert M. Sapolsky, The Frontal Cortex and the Criminal Justice System, 359 Phil. Trans. R. Soc. Lond. B 1787 (2004).
123. Redding, The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century, 56 Am. U. L. Rev. 51 (2006).

124. But see *State v. Anderson,* 79 S.W.3d 420 (Mo. 2002) (evidence allowed); see also *People v. Weinstein,* 591 N.Y.S.2d 715 (N.Y. Cty. 1992), (allowing PET scans of the defendant's frontal lobe even under the *Frye* test).
125. E.g., *State v. Mercer,* 381 S.C. 149 (2009) (clear, but not reversible, error not to allow doctor to testify at capital sentencing hearing about SPECT (brain scan) of defendant); *Hoskins v. State,* 735 So. 2d 202 (Fla. 1999) (ordering remand for purpose of having PET scan conducted on death penalty defendant). Laura Snodgrass and Brad Justice, "Death Is Different": Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries, 26 Dev. Mental Health L. 81, 98 (2007).
126. There is also the possibility that cases that raise this issue are resolved by plea bargain. That occurred in the *Weinstein* case, supra n.102; after the court allowed the evidence in, the prosecution agreed to a bargain. See Snead, Neuroimaging and "Complexity" of Capital Punishment, 82 N.Y.U. L. Rev. 1265 (2007).
127. See *Forrest v. State,* 290 S.W.3d 704 (Mo. 2009) (failure to obtain PET scan of defendant's brain was not ineffective assistance). Pustilnik, supra n. 98, at fn. 9 (citing cases). See also Adequacy of defense counsel's representation of criminal client — pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A.L.R.5th 109.
128. This may overstate the strength of those cases. As a general rule, the United States Supreme Court has held that defendants must be allowed to present ANY evidence in a capital sentencing proceeding. But that holding is a far cry from decisions suggesting that defense failure to raise brain trauma could be ineffective assistance of counsel.
129. E.g., phrenology, biological determinism, eugenics, psychosurgery, and others.
130. For particularly strong critiques, see Morse, Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note, 3 Ohio St. J. Crim. L. 397 (2006) and Pustilnik, supra n. 98. For critiques of the current efficacy of some of the neuroscientific methods, see Tancredi & Brodie, The Brain and Behavior: Limitations in the Legal Use of Functional Magnetic Resonance Imaging, 33 Am. J.L. & Med. 271 (2007); Dumit, Objective Brains, Prejudicial Images, 12 Sci. Context 173 (1999). See generally Meyer, Brain, Gender, Law: A Cautionary Tale, 53 N.Y.L. Sch. L. Rev. 995 (2008/2009); Feldman, Law's Misguided Love Affair with Science, 10 Minn. J.L. Sci. & Tech. 95 (2009) ("We are constantly seduced into believing that some new science will provide answers to law's dilemmas, and we are constantly disappointed.").
131. Cf. the movie *Natural Born Killers,* starring Woody Harrelson.
132. Deborah Denno, Human Biology and Criminal Responsibility: Free Will or Free Ride, 137 U. Pa. L. Rev. 615, 617 (1988).
133. Baker, Bezdjian & Raine, Behavioral Genetics: The Science of Antisocial Behavior, 69 Law & Contemp. Prob. 724 (2006). This article is one of several in a symposium, entitled The Impact of Behavior Genetics on the Criminal Law: Behavioral Genetics: The Science of Antisocial Behavior, in this issue of the journal. See also M. Ridley, Nature via Nurture: Genes, Experience, and What Makes Us Human 185 (2003). Professor Denno found at least 58 criminal cases between 1994-2007 that relied on behavioral genetics, but most were capital sentencing cases; Deborah W. Denno, Behavioral Genetics Evidence in Criminal Cases: 1994-2007, in The Impact of Behavioral Sciences on Criminal Law 317, 318-319 (ed. Nita A. Farahany 2009).
134. See Burke, The "XYY" Syndrome: Genetics, Behavior and the Law, 46 Denv. L.J. 161 (1969).
135. At least one American court rejected the XYY chromosome argument. *Millard v. State,* 8 Md. App. 419 (1970). Because then-existing (and probably current) criminal law had no niche for the claim, the defendant argued that he was "insane" under the *M'Naghten* rules.
136. See Dreyfuss & Nelkin, The Jurisprudence of Genetics, 45 Vand. L. Rev. 313 (1992). See also Coffey, The Genetic Defense: Excuse or Explanation?, 35 Wm. & Mary L. Rev. 353 (1993); Friedland, The Criminal Law Implications of the Human Genome Project: Reimagining a

Genetically Oriented Criminal Justice System, 86 Ky. L.J. 303 (1997-98).
137. Theodore Y. Blumoff, The Neuropsychology of Justifications and Excuses: Some Problematic Cases of Self-Defense, Duress and Provocation, 50 Jurimetrics J. 391 (2010).
138. Before the APA recognized PMDD, as discussed in the text, the literature was vast. See, for example, Lee Solomon, Premenstrual Syndrome: The Debate Surroundihng Criminal Defense, 54 Md. L. Rev. 571 (1995); Nicole R. Grosse, Premenstrual Dysphoric Disorder as a Mitigating Factor in Sentencing: Following the Lead of English Criminal Courts, 33 Val. U. L. Rev. 201 (1998).
139. The DSM expressly states that its classifications are not to be used in nonpsychiatric settings (e.g., in court), but lawyers have consistently relied on its authority in other types of cases in the past.
140. Connie Huang, It’s a Hormonal Thing: Premenstrual Syndrome and Postpartum Psychosis as Criminal Defenses, 11 S. Cal. Rev. L. & Women’s Stud. 345 (2002).
141. See *Regina v. Quick*, [1973] 3 W.L.R. 26 (Ct. of Crim. App.).
142. See Fred Cohen, Old Age as a Criminal Defense, 21 Crim. L. Bull. 5 (1985).
143. See Note, The Sevin Made Me Do It: Mental Non-Responsibility and the Neurotoxic Damage Defense, 14 Va. Envtl. L.J. 151 (1994).
144. Within the past few years, researchers have concluded that testosterone, a hormone found in much greater concentration in men than in women, does in fact affect “aggressive” behavior. See, e.g., Sullivan, the HE Hormone, New York Times Magazine, Apr. 2, 2000, p. 46. See also R. Sapolsky, The Trouble with Testosterone (1997); J. Dabbs, Heroes, Rogues and Lovers: Testosterone and Behavior (2000). While this may echo the “XYY” syndrome, the research seems much more methodologically sound. Whether the “influence” is sufficient to warrant consideration by courts is unclear.
145. See Delgado, Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (“Brainwashed”) Defendant, 63 Minn. L. Rev. 1 (1978); Dressler, Professor Delgado’s “Brainwashing” Defense: Courting a Deterministic Legal System, 63 Minn. L. Rev. 335 (1979). Note that even Dressler’s title poses the philosophical question — to what extent would recognition of such a claim “court” a deterministic view of human behavior (and how would the criminal law deal with such a view)?
146. Hearst had been out of the clutches of her captives for at least nine months before her arrest; police had destroyed the terrorist-robbers’ hideout and killed virtually everyone there. Hearst had already disappeared before that event. She explained that merely being “away from” the terrorists was insufficient to allow “regression” back to her “real self”; it required professional assistance that was available only after her arrest.
147. Nolan, the Indoctrination Defense: From the Korean War to Lee Boyd Malvo, 11 Va. J. Soc. Pol’y & L. 435 (2004).
148. Terry A. Maroney, Law and Emotion: A Proposed Taxonomy of an Emerging Field, 30 Law & Hum. Behav. 119 (2006).
149. Dan H Kahan and Martha Nussbaum, Two Conceptions of Emotion in Criminal law, 96 Colum. L. Rev. 269 (1996).
150. Reid Griffith Fontaine, On Passion’s Potential to Undermine Rationality: A Reply, 43 U. Mich. J. L. Reform 207 (2009) (Fontaine I); Adequate (Non) Provocation and Heat of Passion as Excuse Not Justification, 43 U. Mich. J.L. Reform 27 (2009) (Fontaine II); The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretation Bias, and Heat of Passion Homicide, 12 New Crim. L. Rev. 69 (2009) (Fontaine III); Reactive Cognition, Reactive Emotion: Toward a More Psychologically-Informed Understanding of Reactive Homicide, 14 Psychol. Pub. Pol’y & L. 243 (2008) (Fontaine IV).
151. Amir Pichhadze, Proposals for Reforming the Law of Self-Defence, 72 J. Crim. L. 409 (2008).

152. Theodore Y. Blumoff, The Neuropsychology of Justifications and Excuses: Some Problematic Cases of Self-Defense, Duress and Provocation, 50 Jurimetrics J. 391 (2010). See also Rebecca Hollander-Blumoff, Crime, Punishment and the Psychology of Self-Control, 61 Emory L.J. 501 (2012).
153. For a general discussion, see Falk, Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage, 74 N.C. L. Rev. 731 (1996).
154. The idea that someone's "rotten social background" could play a role in excusing or alleviating punishment for a crime was introduced in *United Status v. Alexander*, 471 F.2d 923 (D.C. Cir. 1972).
155. Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation? 3 Law & Inequality 9 (1985).
156. See 2 Ala. C.R. & C.L. L. Rev. 23 (2011).
157. Cf. Simon Baatz, For the Thrill of It: Leopold, Loeb, and the Murder That Shocked Chicago (2008).
158. See Liggins, Urban Survival Syndrome: Novel Concept or Recognized Defense?, 23 Am. J. Trial Advoc. 215 (1999).
159. See W. Grier & P. Cobbs, Black Rage (1968); Snierson, Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate, 143 U. Pa. L. Rev. 2251 (1995).
160. Revisiting the Legal Link Between Genetics and Crime, 69 Law and Contemp. Probs 209, 238 (2006).
161. See David B. Mcconnell, The Sevin Made Me Do It: Mental Non-Responsibility and the Neurotoxic Damage Defense, 14 Va. Envtl. L.J. 151 (1994). For a general discussion, see Deborah W. Denno, Considering Lead Poisoning as a Criminal Defense, 20 Fordham Urb. L.J. 377 (1993).
162. See S. Pinker, The Blank Slate (2003), it is not clear that this evidence has reached even the *Daubert* level of reliability. See *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004).
163. See, e.g., *State v. Payne*, 2002 WL 31624813 (Tenn. Crim. App.); *Contra People v. Uncapher*, 2004 WL 790329 (Mich. App), *review denied*, 471 Mich. 901, (2004) (evidence of serotonin levels properly excluded because defendant did not raise insanity defense).
164. See *Wood v. State*, 75 Ark. App. 22 (2001).
165. See, e.g., *People v. Hari*, 218 Ill. 2d 275, (2006).
166. Harris, Problems with Prozac: A Defective Product Responsible for Criminal Behavior? 10 J. Contemp. Legal Issues 359 (1999); *Commonwealth v. Shuman*, 445 Mass. 258 (2005).
167. Walker, Rx: Take Two of These and Sue Me in the Morning: The Emergence of Litigation Regarding Psychotropic Medication in the United States and Europe, 19 Ariz. J. Int'l & Comp. L. 775, n. 206 (2002).
168. New York Times, Feb. 16, 2005.
169. See *People v. Arteaga*, 2004 WL 811719 (Cal. Rules of Court, Rules 976, 977) (Cal. App. 4, 2004) (No. G031507).
170. See, e.g., Bidwill and Katz, Injecting New Life into an Old Defense: Anabolic Steroid — Induced Psychosis as a Paradigm of Involuntary Intoxication, 7 U. Miami Ent. & Sports L. Rev. 1 (1989).
171. See *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2004) ("evidence . . . regarding the potential of steroid use to cause severe personality changes . . . could have explained how (defendant) could have been transformed from an allegedly mild-mannered, law abiding individual into a person capable of committing the brutal murder"). But see *Pennington v. State*, 913 P.2d 156 (Okla. Crim. 1995) (insufficient evidence to establish that "'roid rage" is a valid scientific theory).
172. E. Busse & E. Pfeiffer, Behavior and Adaptation in Late Life 268 (1969).